REGULATORY GUIDE 45

Mortgage schemes: Improving disclosure for retail investors

May 2012

About this guide

This is a guide for responsible entities, compliance committees, compliance plan auditors, valuers, publishers and others involved with the issue or advertising of interests in mortgage schemes.

It sets out ASIC's benchmarks and disclosure principles for improved disclosure to retail investors to help them understand and assess unlisted mortgage schemes, while maintaining the flexibility of the public fundraising process.

It also sets out the standards we expect responsible entities and publishers to meet when advertising unlisted and listed mortgage schemes that are offered to retail investors.

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 in May 2012 and is based on legislation and regulations as at the date of issue.

Previous version:

- Superseded Regulatory Guide 45, issued 2 September 2008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.

Contents

A Overview

Key points

ASIC has developed eight benchmarks and eight disclosure principles for unlisted mortgage schemes that can help retail investors understand the risks, assess the rewards being offered and decide whether these investments are suitable for them.

Responsible entities of unlisted mortgage schemes in which retail investors invest should:

- disclose against the benchmarks on an 'if not, why not' basis (see Section C); and
- address the disclosure principles (see Section D).

We have also set standards for advertising of all mortgage schemes (whether listed or unlisted) to retail investors: see Section F.

Those involved with mortgage schemes (e.g. compliance committees, compliance plan auditors and valuers) should consider these disclosure and advertising obligations when carrying out their responsibilities: see Section G.

Improved disclosure for unlisted mortgage schemes

RG 45.1 Since mid-2007, Australia has experienced debt market turbulence flowing from the US sub-prime crisis, together with successive interest rate increases and a cyclical softening in property markets. Some mortgage schemes have experienced financial stress under these economic conditions, evidenced by a decrease in fund inflows and extensions of withdrawal periods or suspensions of withdrawals.

RG 45.2 In this context, we consider that the requirement to provide retail investors in unlisted mortgage schemes with the information they need to make an informed investment decision requires, at a minimum, disclosure against the benchmarks and the provision of the information in the disclosure principles.

RG 45.3 We have developed eight benchmarks and eight disclosure principles that apply to all unlisted mortgage schemes in which retail investors invest: see Table 1. We expect unlisted mortgage schemes to:

(a) disclose whether the benchmarks (as applicable) are met and, if not met, provide an explanation on an 'if not, why not' basis (see Section C and RG 45.15–RG 45.17);

(b) address the disclosure principles (see Section D and RG 45.18–RG 45.19); and

(c) ensure that any advertising supports the benchmarks and disclosure principles in the Product Disclosure Statement (PDS) (see Section F).

RG 45.4 Failing to meet one or more of the benchmarks does not mean that a particular mortgage scheme is necessarily a poor investment. However, additional disclosure to investors will be needed to address that benchmark on an 'if not, why not' basis so that investors can assess the impact of failure to meet that benchmark on their investment decision.

RG 45.5 Disclosure is not designed to stop retail investors from taking investment risks, but to help them understand the risks involved in any particular investment or type of investment. This enables them to make an informed decision about whether the potential reward (the return on their investment) is balanced against the level of risk involved, and whether they are prepared to take on that risk.

RG 45.6 We believe that our approach balances:

(a) the need to improve disclosure to allow investors to make better informed decisions; and

(b) the desirability of not unduly interfering with this market as a market for raising capital.

Note: The need to strike an appropriate balance between protecting investors' interests and allowing markets to operate freely is part of ASIC's mandate under the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

RG 45.7 This approach should also lead to more comparable disclosure for unlisted mortgage schemes, helping investors to compare investments in this sector.

Who this guide applies to

RG 45.8 For the purposes of this guide, a 'mortgage scheme' is a managed investment scheme that has, or that is likely to have, at least 50% of its non-cash assets invested in mortgage loans and/or unlisted mortgage schemes. Mortgage loans are loans secured by a mortgage over real property (including residential, commercial, industrial or retail property, or vacant land).

RG 45.9 We expect responsible entities of unlisted registered mortgage schemes in which retail investors invest directly or indirectly (e.g. through an investor directed portfolio service) to disclose against the benchmarks and address the disclosure principles as discussed in Sections C and D.

RG 45.10 We also expect responsible entities of both listed and unlisted registered mortgage schemes to follow the advertising standards in Section F.

RG 45.11 We expect other parties involved with issues of interests in unlisted registered mortgage schemes or advertisements for registered mortgage schemes generally to support the principles in this guide. This includes compliance committees, compliance plan auditors, valuers, publishers and media. For example, we expect compliance plans for mortgage schemes to set out adequate measures to ensure compliance with the disclosure and advertising standards in this guide: see Section G.

RG 45.12 We expect that a feeder fund would take into account information about the underlying fund(s) it plans to invest in when making a decision to invest in the fund(s). We consider it is important that feeder funds provide disclosure for the fund because the risks associated with investing in the feeder fund may differ from the underlying fund(s).

RG 45.13 Accordingly, the feeder fund should have information about the underlying fund(s) in which it has a material investment (or make reasonable endeavours to procure the information) and that is pertinent to the benchmarks and disclosure principles. If the information is not available, the responsible entity of the feeder fund should disclose this and explain why. We recognise that disclosure relating to loan portfolio and diversification, and valuation policies, may not be appropriate at the feeder fund level, in which case the feeder fund should provide disclosure on a 'look through' basis.

Benchmarks and disclosure principles for unlisted mortgage schemes

RG 45.14 Table 1 provides a summary of the eight benchmarks and eight disclosure principles that apply to all unlisted mortgage schemes in which retail investors invest.

Table 1: Benchmarks and disclosure principles for unlisted mortgage schemes in which retail investors invest

1. Liquidity	Benchmark 1 and Disclosure Principle 1 *apply only to pooled mortgage schemes* and address the scheme's ability to satisfy its expenses, liabilities and other cash flow needs, including the preparation of 12-month cash flow estimates that are approved by the directors.

2. Scheme borrowing	Benchmark 2 and Disclosure Principle 2 address the scheme's policy on borrowing, including the scheme's actual and intended borrowing, as well as the scheme's policy on borrowing.
3. Loan portfolio and diversification	Benchmark 3 and Disclosure Principle 3 *apply only to pooled mortgage schemes* and address the scheme's lending practices and portfolio risk, including concentration risk.
4. Related party transactions	Benchmark 4 and Disclosure Principle 4 address the risks associated with related party lending, investments and transactions, including details of any related party transactions.
5. Valuation policy	Benchmark 5 and Disclosure Principle 5 address the scheme's valuation practices, including when an independent valuation is required.
6. Lending principles—Loan-to-valuation ratios	Benchmark 6 and Disclosure Principle 6 address the scheme's lending practices, including the loan-to-valuation ratios.
7. Distribution practices	Benchmark 7 and Disclosure Principle 7 address the transparency of the scheme's distribution practices, including whether current distributions are paid from scheme borrowings, and disclosure of the source of distributions.
8. Withdrawal arrangements	Benchmark 8 and Disclosure Principle 8 address the transparency of the responsible entity's approach to withdrawals of investments when the scheme is liquid and when the scheme is non-liquid.

Disclosure against the benchmarks: 'If not, why not'

RG 45.15 Responsible entities of unlisted mortgage schemes in which retail investors invest should disclose against the benchmarks in Section C on an 'if not, why not' basis. This means providing a clear statement that the scheme either:

(a) meets the benchmark; or

(b) does not meet the benchmark *and* providing an explanation of how and why the responsible entity deals with the business factors or issues underlying the benchmark in another way.

RG 45.16 'Why not' means explaining how a responsible entity deals with the business factor or issue underlying the benchmark, including the alternative systems and controls the responsible entity has in place to deal with the issue underlying the benchmark.

RG 45.17 If a benchmark contains multiple requirements, all elements of the benchmark and the required disclosure should be addressed (i.e. it is not usually sufficient to explain in general terms why a benchmark has not been met or to address only some aspects of a benchmark). Additionally, disclosure should be made on the basis that a benchmark is either 'met' or 'not met'. If the benchmark is not fully met, the benchmark is regarded as 'not met' (rather than partially met) and there should be an explanation as to why it is not met.

Disclosure principles

RG 45.18 The purpose of the disclosure principles is to improve the consistency and quality of disclosure by responsible entities of unlisted mortgage schemes and to enhance investor confidence. The disclosure principles are explained further in Section D.

RG 45.19 The disclosure principles apply to information that retail investors reasonably need to know to make an informed investment decision and monitor whether their expectations are being met.

Transitional arrangements

RG 45.20 Until 1 January 2013, responsible entities should—at a minimum—continue to disclose against the benchmarks that were in place under superseded RG 45 issued in September 2008 to any PDS or ongoing disclosure provided to investors in unlisted mortgage schemes.

Note: We encourage responsible entities to disclose against the benchmarks and apply the disclosure principles to new PDSs and ongoing disclosure before 1 January 2013 if possible.

Advertising standards for all mortgage schemes

RG 45.21 Experience indicates that retail investors who are thinking about investing place particular emphasis on the information and impressions given in advertisements. Some of the advertisements we have observed for mortgage schemes have not given a realistic impression of the scheme, its features and risks.

Note: References to 'advertisements' in this guide should be read broadly. They include comment and promotion of mortgage schemes in media programs or publications (generally known as 'advertorials') and statements about mortgage 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 the PDS.

RG 45.22 To promote investor understanding of mortgage schemes and minimise the risk of mis-selling, we have set standards for responsible entities when advertising their mortgage schemes: see Table 2 and Section F. These standards apply to all mortgage schemes (whether listed or unlisted) that are offered to retail investors.

RG 45.23 While the primary responsibility for advertising material rests with the organisation placing the advertisement, under general law the publisher or other media conduit may also have some responsibility for its content. Therefore, we expect publishers and the media to support these standards when accepting advertisements for mortgage schemes.

RG 45.24 The standards we have set for responsible entities when advertising mortgage schemes seek to reduce the risk that advertisements will give retail investors messages about mortgage schemes that are inconsistent with disclosure in a complying PDS.

Table 2: Advertising standards for mortgage schemes (whether listed or unlisted) offered to retail investors

Area	Summary of standard
Repayment of principal investment	To avoid common misconceptions about the risk profile of mortgage schemes, advertisements should include a prominent statement to the effect that investors risk losing some or all of their money.
Returns on investment and investment ratings	Advertisements should only quote returns if the return is accompanied by prominent disclosure that there is a risk that the investment may achieve lower than expected returns. Advertisements should only quote investment ratings if the rating is properly explained and does not create a misleading impression about the scheme. The advertisement should state that investment ratings are only one factor that investors should consider when deciding whether to invest.
Comparisons with bank deposits and 'risk-free' suggestions	Advertisements should state that a mortgage scheme is not a bank deposit. They should *not* suggest that: • a mortgage scheme is, or compares favourably to, a bank deposit; or • there is little or no risk of the investor losing their principal or not being repaid.
Withdrawal periods, withdrawal rights and investment periods	Advertisements that refer to withdrawal periods, withdrawal rights or investment periods should include details of any restrictions on withdrawals that might apply.
Fees	Advertisements that state the amount of a fee (or that a type of fee is not payable) should include details of any circumstances in which a higher fee applies (or in which the fee is payable).
Suitability statements	Advertisements should not state or imply that the scheme is suitable for a particular class of investor.
Consistency with PDS disclosure	Statements in advertisements should be consistent with the corresponding disclosures on that subject matter in the PDS.
Telephone inquiries	Statements made in response to inquiries are subject to the same regulation about misleading and deceptive conduct as the advertisements.

B The unlisted mortgage scheme sector

Key points

Some features of unlisted mortgage schemes can create risks for investors.

Clear benchmarks and disclosure principles can help investors to make informed decisions about these products.

Business models of mortgage schemes

RG 45.25 A mortgage scheme operates on the basis that:

(a) the scheme raises funds by issuing interests to investors. These funds are either pooled and lent by the scheme to various borrowers (pooled schemes) or lent in relation to a specific property (contributory schemes). In both pooled and contributory schemes, loans are secured by mortgages over real property and security may be a first or subsequent mortgage. For pooled schemes, investors do not have an interest in a particular mortgage loan, but have an interest in scheme property as a whole;

(b) the return to investors is generally generated by interest payments made by the borrowers to the scheme;

(c) investments are either for a fixed term or can be withdrawn following a withdrawal request; and

(d) the value of an investor's investment may be subject to change depending on the asset position of the scheme.

RG 45.26 Some mortgage schemes may lend funds for construction or property development. For these schemes, the skills and experience of the responsible entity in assessing these activities and selecting appropriate loans are particularly important to the performance of the scheme.

RG 45.27 Some mortgage schemes promote that they can provide investors with a level of capital security by committing to pay investors back their initial investment at the end of their investment term. Other schemes promote fixed rates of return.

RG 45.28 Some mortgage schemes may lend funds to borrowers and 'capitalise' the expected interest payments. This means that the scheme may not be receiving actual cash payments from the borrower over the course of the loan and instead receive the capital and accumulated interest payments at the end of the loan term.

RG 45.29 Many mortgage schemes promote that withdrawal requests will generally be satisfied within a relatively short period.

Risks to investors

RG 45.30 Past experience and our analysis of the mortgage scheme market suggest that features of the operations of some mortgage schemes can hold particular risks for investors.

RG 45.31 The key features and risks are identified in Table 3. These features are not present in every unlisted mortgage scheme that is offered to retail investors. The investment risks described will vary from scheme to scheme and from business model to business model. However, disclosure about these features and risks, including to what extent they are present in a given offering, is relevant for a broad range of schemes.

RG 45.32 The benchmarks in Section C and the disclosure principles in Section D address these features and risks to help investors make informed decisions about whether an unlisted mortgage scheme is a suitable investment for them.

RG 45.33 We have excluded listed mortgage schemes for the purposes of the benchmarks and disclosure principles because:

(a) being listed means that there is a secondary market on which an investor can sell their investment;

(b) the market supervisor will assess and, if appropriate, admit the interests in the scheme to trading; and

(c) the market supervisor will supervise the scheme's ongoing compliance with any listing rules—in particular, a continuous disclosure regime.

Note: The advertising standards in Section F apply to all mortgage schemes, whether listed or unlisted.

Table 3: Risk features of unlisted mortgage schemes

Risk feature	Description	What this means
Liquidity	The liquidity of the scheme is key to its ability to meet its representations about whether investors can withdraw from the scheme and whether it can meet its other ongoing commitments.	Liquidity may be at risk because of a mismatch between when the responsible entity represents that it can meet withdrawal requests and cash flows from the underlying businesses or assets to which funds have been lent. Liquidity is frequently heavily dependent on continuing inflows from new investors, borrowings or 'rollovers' by existing investors because the underlying assets of the scheme may not be easily realised within a short period of time.

Risk feature	Description	What this means
Scheme borrowing	Some schemes borrow against the assets of the scheme to fund distributions, redemption requests or scheme operations generally.	If a scheme borrows against the assets of the scheme, investors' interests in the scheme's assets will generally rank behind the lender. Investors in schemes with high borrowings face the risk that distributions will not be made or withdrawals will be suspended so that loan payments can be met. Investors also face the risk that they may lose part or all of their investment if the scheme defaults on these loans.
Portfolio diversification	The criteria that responsible entities use to decide what loans to make are variable and prone to risk, especially where: • loan-to-valuation ratios are often much higher than for traditional lending; and • the loans made may be highly concentrated to particular types of commercial activities, locations or borrowers.	Lack of diversification in the scheme's loan book may mean that an adverse event affecting one borrower or one type of loan will simultaneously affect the majority of borrowers, and therefore put the overall portfolio at greater risk.
Related party transactions	Some schemes lend to, invest scheme funds in, and transact with, associated companies or businesses.	There is an increased risk that these transactions are less likely to be made on arm's length commercial terms and that the responsible entity will not monitor them as robustly as those involving unrelated parties.
Inconsistency in valuations	The valuations that schemes rely on are carried out on a variety of bases, with differing assumptions and instructions. These valuations are fundamental to determining how much the scheme may lend.	If valuations are not prepared properly or by appropriately qualified and experienced valuers, it is difficult to assess the risk exposure associated with a loan. It is also difficult to monitor loan-to-valuation ratios on a continuing basis.
Lending principles	Some schemes may take a more conservative approach than others when determining how much to lend to a borrower relative to the value of the underlying security property.	Schemes that lend at a higher loan-to-valuation ratio are more vulnerable to the risk of an adverse change in market conditions where the security obtained from borrowers becomes insufficient to cover the loan.
Distribution practices	Some schemes fund distributions out of sources other than income, such as borrowings.	Where distributions are not sourced solely from scheme income, there is a risk that these distribution practices may not be sustainable over the long term. This risk may be heightened where a scheme promotes a fixed return on investments.

Risk feature	Description	What this means
Withdrawal arrangements	Some schemes promote a short withdrawal period to attract investors, although the maximum period allowed in the scheme's constitution is much longer.	This practice creates the risk that investors do not fully appreciate that their right of withdrawal may be refused until a longer period of time has elapsed than the one represented.
Misleading advertising	Advertising used to promote some schemes helps create unrealistic expectations about investors' ability to withdraw their investment and the scheme's relative safety.	Even if the PDS highlights risk in an appropriate way, advertising that conveys messages not in line with the regulated disclosure document can undermine the effect of that disclosure.

C Benchmarks for unlisted mortgage schemes

Key points

All responsible entities of unlisted mortgage schemes should address general benchmarks on:

- liquidity—pooled mortgage schemes only (see RG 45.34–RG 45.41);
- scheme borrowing (see RG 45.42–RG 45.43);
- loan portfolio and diversification—pooled mortgage schemes only (see RG 45.44–RG 45.46);
- related party transactions (see RG 45.47–RG 45.49);
- valuation policy (see RG 45.50–RG 45.55);
- lending principles—loan-to-valuation ratios (see RG 45.56–RG 45.60);
- distribution practices (see RG 45.61–RG 45.63); and
- withdrawal arrangements (see RG 45.64–RG 45.71).

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

Benchmark 1: Liquidity

RG 45.34 For a pooled mortgage scheme, the responsible entity has cash flow estimates for the scheme that:

(a) demonstrate the scheme's capacity to meet its expenses, liabilities and other cash flow needs for the next 12 months;

(b) are updated at least every three months and reflect any material changes; and

(c) are approved by the directors of the responsible entity at least every three months.

Note 1: The cash flow estimates should be prepared on the basis of an estimate of zero inflows from new subscriptions for the relevant period. Withdrawals should be determined with reference to the period within which investors would reasonably expect withdrawal requests to be processed, rather than the maximum period within which the responsible entity is able to process withdrawal requests.

Note 2: 'Cash' and 'cash equivalents' have the same meaning as in Australian Accounting Standard AASB 107 *Statement of cash flows* (AASB 107). Paragraph 6 of AASB 107 defines 'cash' as 'cash on hand and demand deposits' and 'cash equivalents' as short-term, highly liquid investments that are readily convertible to known amounts of cash and which are subject to an insignificant risk of changes in value. However, for the purposes of the benchmark, a responsible entity cannot take into account undrawn amounts under bank overdraft or lending facilities.

Explanation

RG 45.35 For the purposes of this benchmark, 'liquidity' is the proportion of cash or cash equivalents in a scheme's assets. It is a powerful indicator of the ability of the scheme to meet its short-term commitments. For unlisted mortgage schemes, we are particularly concerned with relative liquidity (i.e. short-term assets relative to short-term liabilities).

Note: 'Liquidity' for the purposes of this benchmark is not the same as 'liquidity' for the purposes of Pt 5C.6 (which relates to satisfying a statutory test). It is important that any disclosure to investors does not confuse these two concepts.

RG 45.36 The global financial crisis has highlighted the significant challenges that can be faced by mortgage schemes in managing their liquidity. Liquidity management is important so that schemes can meet:

(a) investor expectations about the payment of distributions;

(b) loan commitments drawn in stages by borrowers;

(c) changes in the scheme's operational needs;

(d) unexpected expenses of the scheme; and

(e) interest on scheme borrowing.

RG 45.37 A cash flow estimate is a key tool to measure the ability of a responsible entity of a scheme to meet its short-term commitments. For unlisted mortgage schemes, we are particularly concerned with the alignment of investor expectations about liquidity and the capacity of the scheme's assets to be realised to meet those expectations.

RG 45.38 We expect responsible entities to take into account their historical experience on inflows and outflows in estimating their cash flows and to disclose material assumptions underlying their cash flows (e.g. historical inflow and outflow rate) when disclosing against this benchmark.

RG 45.39 The cash flow estimates are not required to be disclosed to investors, but we envisage that responsible entities would need to review their estimated cash flows on an ongoing basis, update the estimates and reflect any material changes at least every three months to determine whether they continue to satisfy this benchmark.

RG 45.40 We expect responsible entities to periodically 'stress test' their liquidity assumptions. For example, we expect responsible entities to consider:

(a) their current PDS and the possibility of an ASIC stop order disrupting their cash flows; and

(b) the possibility of a significant increase in the rate of investor withdrawal requests.

RG 45.41 We expect responsible entities to take into account the results of this stress testing in their liquidity planning. In some cases, this may mean they need to increase their cash position: see RG 45.34.

Benchmark 2: Scheme borrowing

RG 45.42 The responsible entity does not have current borrowings and does not intend to borrow on behalf of the scheme.

Explanation

RG 45.43 Some schemes borrow to finance distributions or the operation of the scheme. It is preferable that borrowings are not used as a source to fund distributions and to satisfy withdrawal requests. It is important that investors are made aware if this is the case and are provided with details of the borrowings and credit facilities entered into by the scheme. Borrowings that are due to mature within a relatively short timeframe can be a significant risk factor, especially in periods where credit is more difficult and expensive to obtain. It is important that investors understand that they will rank behind creditors of a scheme.

Benchmark 3: Loan portfolio and diversification

RG 45.44 For a pooled mortgage scheme:

(a) the scheme holds a portfolio of assets diversified by size, borrower, class of borrower activity and geographic region;

(b) the scheme has no single asset in the scheme portfolio that exceeds 5% of the total scheme assets;

(c) the scheme has no single borrower who exceeds 5% of the scheme assets; and

(d) all loans made by the scheme are secured by first mortgages over real property (including registered leasehold title).

Explanation

RG 45.45 The primary assets of a mortgage scheme are the loans it makes to others. The quality of these loans and its other investments, and the nature of security taken to support these loans and investments, is a key element in the financial position and performance of the scheme.

RG 45.46 The more diversified a loan portfolio is, the lower the risk generally that an adverse event affecting one borrower or one type of loan will simultaneously affect the majority of borrowers, and therefore put the overall portfolio at risk.

Benchmark 4: Related party transactions

RG 45.47 The responsible entity does not lend to related parties of the responsible entity or to the scheme's investment manager.

Explanation

RG 45.48 Related party transactions (including loans to, and investments in, related parties) are less likely to be monitored as robustly as those involving unrelated parties. This can affect valuations, loan-to-valuation ratios, due diligence and credit assessment processes.

RG 45.49 The benchmark focuses on lending transactions (as well as the responsible entity's policy and practices for lending to related parties) because these appear to be the most common type of related party transaction that affects unlisted mortgage schemes.

Benchmark 5: Valuation policy

RG 45.50 In relation to valuations for the scheme's mortgage assets and their security property, the board of the responsible entity requires:

(a) a valuer to be a member of an appropriate professional body in the jurisdiction in which the relevant property is located;

(b) a valuer to be independent;

(c) procedures to be followed for dealing with any conflict of interest;

(d) the rotation and diversity of valuers;

(e) in relation to security property for a loan, an independent valuation to be obtained:

- (i) before the issue of a loan and on renewal:
  - (A) for development property, on both an 'as is' and 'as if complete' basis; and
  - (B) for all other property, on an 'as is' basis; and
- (ii) within two months after the directors form a view that there is a likelihood that a decrease in the value of security property may have caused a material breach of a loan covenant.

Explanation

RG 45.51 Robust and objective valuations are needed to ensure that a scheme's financial position is correctly stated in the PDS and ongoing disclosure. This depends on responsible entities adopting rigorous policies as to when, how and by whom valuations are conducted.

RG 45.52 It is important for investor confidence that suitably qualified independent experts perform the valuations, and that the process is transparent.

RG 45.53 It is also in the interests of a responsible entity that the valuations it obtains and uses are robust and accurate. Responsible entities are responsible for the accuracy of the financial statements and other documents that rely on these valuations.

RG 45.54 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 assumptions.

RG 45.55 It is also important that up-to-date valuations are obtained for properties over which responsible entities are to take security. Existing properties and the scheme’s mortgage assets should also be subsequently valued at relevant times to ensure that the mortgages held in the scheme continue to be appropriately valued.

Benchmark 6: Lending principles—Loan-to-valuation ratios

RG 45.56 If the scheme directly holds mortgage assets:

(a) where the loan relates to property development—funds are provided to the borrower in stages based on independent evidence of the progress of the development;

(b) where the loan relates to property development—the scheme does not lend more than 70% on the basis of the latest ‘as if complete’ valuation of property over which security is provided; and

(c) in all other cases—the scheme does not lend more than 80% on the basis of the latest market valuation of property over which security is provided.

Explanation

RG 45.57 A scheme’s approach to loan-to-valuation ratios is one indicator of how conservative or aggressive its lending practices are. Some schemes are willing to lend funds equal to a higher proportion of a property’s value (sometimes up to or exceeding 100% of its value). Such ratios make a scheme more vulnerable to risk in that a change in market conditions (e.g. a downturn in the property market) may mean it is unable to fully recover the money it has lent to borrowers. It also increases the risk that the security obtained from borrowers will be insufficient to cover the loan.

RG 45.58 We have separated loans relating to property development from other property-related loans (e.g. residential mortgages). By property development, we mean loans whose main or primary purpose is for real estate developments or construction (e.g. home units, retail, commercial, subdivisions and industrial development). The benchmark loan-to-valuation ratio for property development loans is lower than for other loans because it is calculated on an 'as if complete' basis.

RG 45.59 If funds are lent for property development activities, a loan-to-valuation ratio may be agreed upfront, but it is generally not appropriate to advance all of the funds to the developer upfront. Rather, we expect responsible entities to put systems and controls in place to ensure funds are only provided to the developer where there is satisfactory progress of the development (based on reliable external evidence of that progress).

RG 45.60 We expect that, during the term of the loan, the loan-to-valuation ratios will change. The loan-to-valuation ratios in the benchmark refer to the most recent valuation obtained for the relevant property. For second-ranking mortgages, the valuation would be on the basis of the unencumbered value of the property.

Benchmark 7: Distribution practices

RG 45.61 The responsible entity will not pay current distributions from scheme borrowings.

Explanation

RG 45.62 Investors need to know how distributions are funded because this is an important indicator of the performance of a scheme. In some situations, distributions that are funded wholly, or in part, from sources other than net scheme income (e.g. from borrowings) for the relevant distribution period may indicate that the distribution practices are unsustainable over the long term or may be insufficient to meet advertised returns. Accordingly, it is important that responsible entities disclose where distributions are sourced from and, where these are not sourced from scheme income, explain why.

RG 45.63 We understand that, where scheme income is insufficient to meet advertised returns, schemes may fund distributions in a number of different ways (e.g. by reducing their fees, from scheme borrowings or from scheme capital) rather than paying a reduced return. Such practices have developed because competition in the mortgage scheme sector means that many schemes may prefer to meet advertised returns even if that means funding out of capital.

Benchmark 8: Withdrawal arrangements

Liquid schemes

RG 45.64 For liquid schemes:

(a) the maximum period allowed for in the constitution for the payment of withdrawal requests is 90 days or less;

(b) the responsible entity will pay withdrawal requests within the period allowed for in the constitution; and

(c) the responsible entity only permits members to withdraw at any time on request if at least 80% (by value) of the scheme property is:

(i) money in an account or on deposit with a bank and is available for withdrawal immediately, or otherwise on expiry of a fixed term not exceeding 90 days, during the normal business hours of the bank; or

(ii) assets that the responsible entity can reasonably expect to realise for market value within 10 business days.

Non-liquid schemes

RG 45.65 For non-liquid schemes, the responsible entity intends to make withdrawal offers to investors at least quarterly.

Note: If the scheme is a 'liquid scheme' responsible entities should indicate that the 'non-liquid scheme' section of this benchmark is not applicable (or vice versa) (see appendix).

Explanation

RG 45.66 Assets such as mortgage loans that are held by a mortgage scheme can be difficult to realise in poor market conditions. Despite this, under the statutory definition of 'liquid assets' in the *Corporations Act 2001* (Corporations Act), these assets could technically be 'liquid' if the responsible entity reasonably expects to be able to realise those assets for market value within the period specified in the constitution.

RG 45.67 Investors may have expectations that a scheme has sufficient assets to readily support withdrawal requests. The freezing of redemptions by most pooled mortgage schemes following a substantial increase in the number of redemption requests is an example where investor expectations of liquidity could not be supported by a scheme, even where the scheme is technically 'liquid'.

RG 45.68 The benchmark distinguishes between liquid and non-liquid schemes, and reflects the differences in withdrawal arrangements that would apply in each case.

RG 45.69 For liquid schemes, the benchmark includes a period within which the constitution allows the payment of withdrawal requests to be made and addresses the nature of the assets held in the scheme where the scheme permits investors to withdraw from the scheme on request. The purpose of the benchmark is to align the withdrawal arrangements of a scheme that is operating as a 'liquid scheme' in a statutory sense with investors' common understanding that a liquid scheme is one that has sufficient realisable assets to meet withdrawal requests on demand. We consider these elements of the benchmark allow investors to better assess the liquidity of a scheme (as promoted to investors) against the actual liquidity of the scheme's underlying asset base. Accordingly, a scheme that is 'liquid' under the Corporations Act will not necessarily meet the benchmark.

RG 45.70 For non-liquid schemes, the benchmark addresses the requirement for all investors to have the ability to withdraw from the scheme on a periodic basis. Once the scheme becomes non-liquid, there is no statutory limit on the period for which it may remain non-liquid. It is preferable that mortgage schemes provide investors with the ability to withdraw on a periodic basis and, if this is not possible, investors should be clearly informed of this.

RG 45.71 For contributory mortgage schemes, the benchmark would generally be inapplicable if operators have disclosed that investors have no ability to withdraw from the scheme until the loan to which the mortgage relates has been repaid.

D Disclosure principles for unlisted mortgage schemes

Key points

Responsible entities of unlisted mortgage schemes should apply the disclosure principles as part of their disclosure obligations under Pt 7.9 of the Corporations Act. The disclosure principles also reflect the information required for ongoing disclosure to investors: see RG 45.129–RG 45.130.

Disclosure Principle 1: Liquidity

RG 45.72 For pooled mortgage schemes, the responsible entity should disclose information about:

(a) the current and future prospects of liquidity of the scheme;

(b) any significant risk factors that may affect the liquidity of the scheme; and

(c) the policy of the scheme on balancing the maturity of its assets with the maturity of its liabilities.

Note: If the responsible entity has no reasonable grounds for commenting on the prospects of liquidity, then it should state this and explain why to investors: see s769C and Regulatory Guide 170 *Prospective financial information* (RG 170) at RG 170.20.

Explanation

RG 45.73 The responsible entity's policy on liquidity management is important. Adequate liquidity is a key feature in the ability of the responsible entities of some mortgage schemes to meet expenses, liabilities and other cash flow needs, including investors' expectations about their ability to withdraw from those schemes.

RG 45.74 The responsible entity should disclose whether it reasonably expects there to be any changes to the scheme's expenses, liabilities and other cash flow needs that will affect the current and future liquidity of the scheme. For example, we expect responsible entities to explain the impact of an expected large number of quarterly investor withdrawal requests, draw-down of loan commitments or other significant changes to the scheme's operational needs.

Disclosure Principle 2: Scheme borrowing

RG 45.75 If the scheme has borrowings, the responsible entity should disclose:

(a) for borrowings due in less than two years—the total debts due and their maturity profile, undrawn credit facility and whether refinancing or sale of assets is likely during this period;

Note: The responsible entity should make appropriate disclosure about the prospects of refinancing or possible alternative actions (e.g. sale of assets or equity fundraising). If the responsible entity has no reasonable grounds for commenting on the prospect of refinancing or possible alternative actions, then it should state this and explain why to investors: see RG 170.20.

(b) for borrowings due in between two and five years—the total debts due and their maturity profile for each 12-month period and undrawn credit facility;

(c) for borrowings due after five years—the total debts due;

(d) why the responsible entity has borrowed the money, including whether the borrowed funds will be used to fund distributions or withdrawal requests;

(e) any material loan covenant breaches;

Note: A responsible entity should disclose any information about breaches of loan covenants that is reasonably required by investors and update investors about the status of any breaches through ongoing disclosure. 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 been informed that the loan is likely to be terminated if the breach occurs).

(f) the fact that amounts owing to lenders and other creditors of the scheme rank before an investor's interests in the scheme; and

(g) the risks associated with the scheme's borrowing and credit facility maturity profile.

Note: A responsible entity should explain any risks associated with its borrowing and credit facility maturity profile, including whether borrowings have been hedged and, if so, to what extent.

RG 45.76 A responsible entity should also disclose:

(a) the existence and details of any current interest rate and foreign exchange hedging policies of the responsible entity; and

(b) whether the scheme's variable interest rate and/or foreign exchange exposure conforms with these policies.

Explanation

RG 45.77 It is important that investors understand the borrowing structure of a scheme and the risks associated with the structure, and be able to distinguish between schemes that borrow and those that do not.

RG 45.78 Responsible entities should also disclose whether borrowed funds will be used to fund distributions or withdrawal requests since this may indicate that the responsible entity's policy on distributions and withdrawals is not sustainable over the long term. Information about breaches of loan covenants reasonably required by investors is key risk information in upfront and ongoing disclosure.

RG 45.79 The returns of a scheme may be substantially affected by changes in the interest rate and/or foreign exchange rates. It is important for investors to understand the foreign exchange and hedging policies and any material variances between the actual position of the scheme and those policies.

Disclosure Principle 3: Loan portfolio and diversification

RG 45.80 For pooled mortgage schemes, the responsible entity should disclose the nature of the scheme's investment portfolio, including:

(a) by number and value:

(i) loans by class of activity (e.g. development or construction projects, industrial, commercial, retail, residential, specialised property, reverse mortgages);

(ii) loans by geographic region;

(iii) the proportion of loans that are in default or arrears for more than 30 days;

Note: A responsible entity should disclose, by number and value, the proportion of loans that are in both default and arrears if these terms have different meanings in the scheme's lending policy.

(iv) the nature of the security for loans made by the scheme (e.g. first or second ranking);

(v) loans that have been approved but have funds that have yet to be advanced and the funding arrangements in place for any of these undrawn loan commitments;

(vi) the maturity profile of all loans in increments of not more than 12 months;

(vii) loan-to-valuation ratios for loans, in percentage ranges;

(viii) interest rates on loans, in percentage ranges; and

Note: A responsible entity should also include disclosure about the scheme's hedging policy in relation to interest rates.

(ix) loans where interest has been capitalised;

(b) the proportion of the total loan money that has been lent to the largest borrower and the 10 largest borrowers;

Note: We acknowledge that, for reasons of privacy or commercial confidence, it may not be appropriate to name the largest borrowers. The total loan money lent to the 10 largest borrowers can be disclosed as an aggregate amount.

(c) the percentage of loans (by value) that are secured by second-ranking mortgages;

(d) the use of derivatives (if any);

(e) a clear description of the non-mortgage assets of the scheme, including the value of such assets; and

(f) the scheme's diversification policy and how the assets correlate with that policy.

RG 45.81 The responsible entity should disclose its policy on the above matters and on how the scheme will lend funds generally. For example, such disclosure should cover:

(a) the maximum loan amount for any one borrower;

(b) the method of assessing borrowers' capacity to service loans;

(c) the responsible entity's policy on revaluing security properties when a loan is rolled over or renewed; and

(d) the responsible entity's approach to taking security on lending by the scheme (e.g. the types of security it takes and in what circumstances, and whether the security must be income producing).

RG 45.82 If an unlisted pooled mortgage scheme invests in, or may invest in, other unlisted mortgage schemes (whether registered or unregistered), the responsible entity must disclose its policy on investing in those schemes, including the extent to which the responsible entity requires those schemes to meet the benchmarks and apply the disclosure principles in Sections C and D.

Explanation

RG 45.83 It is important that responsible entities disclose in their PDSs their approach to loan portfolio diversification and the degree of concentration of risk. Most responsible entities will have a firm policy on how and when the scheme will lend funds. This should be disclosed as clearly and prominently as possible to help investors monitor the financial position and performance of the scheme over time.

RG 45.84 Responsible entities should also disclose the nature of the security for loans made by the scheme (e.g. its ranking, the value of the assets supporting the security and the financial position of any guarantor).

Note: If any security rights (e.g. mortgages) held by the scheme have been assigned or transferred to third parties, this needs to be disclosed as well.

RG 45.85 Investors should know the proportion of loans that are in default or arrears and the scheme's approach to such loans. The responsible entity is or may be relying heavily on payment of interest and repayment of capital on the loans it has made to pay distributions and withdrawal proceeds to investors, and to maintain the financial position of the scheme. Therefore, investors have a strong interest in the proportion of loans in default or arrears and what the responsible entity is doing to address this.

RG 45.86 If a scheme lends to a number of related companies within a group of companies with common directors or ownership, the loans to those companies may be disclosed at an aggregate level on the basis that the borrower group is the borrower.

RG 45.87 Investors can also benefit from having useful additional information about the diversity and strength of the scheme's loan book. It will help investors to know details of ranges for:

(a) the maturity profiles of loans;

(b) loan-to-valuation ratios; and

(c) interest rates on loans.

Disclosure Principle 4: Related party transactions

RG 45.88 If the responsible entity enters into related party transactions, the responsible entity should disclose details of these transactions, including:

(a) the value of the financial benefit;

(b) the nature of the relationship (i.e. the identity of the related party, and the nature of the arrangements between the parties, in addition to how the parties are related for the purposes of the Corporations Act—for group structures, the nature of these relationships should be disclosed for all group entities);

(c) whether the arrangement is on arm's length terms, is reasonable remuneration, some other Ch 2E exception applies or ASIC has granted relief;

(d) whether member approval for the transaction has been sought and, if so, when;

(e) the risks associated with the related party arrangements; and

(f) the policies and procedures that the responsible entity has in place for entering into related party transactions, including how compliance with these policies and procedures is monitored.

Note: The term 'related party' is defined in s228 (as applied to the scheme by Pt 5C.7) and includes the responsible entity.

Explanation

RG 45.89 The additional disclosure is relevant to all types of related party transactions. Examples of services provided by related parties include investment management, mortgage and legal services.

RG 45.90 It is important that responsible entities disclose in the PDS their approach to related party lending, investments and other transactions, and how such transactions are assessed and monitored to consider whether the transaction is made with the same rigour and independence as transactions made on an arm's length commercial basis.

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

Disclosure Principle 5: Valuation policy

RG 45.91 The responsible entity should disclose:

(a) where investors may access the scheme's valuation policy—for example, by disclosing that the policy is available on a relevant website;

(b) the processes that the directors employ to form a view on the value of the security property;

(c) the frequency of valuations of security property; and

(d) any material inconsistencies between any current valuation over security property and the scheme's valuation policy.

RG 45.92 For a contributory mortgage scheme, the responsible entity only needs to provide an investor with information about the valuation of the property securing a loan in which the investor has, or is being offered, an interest.

Explanation

RG 45.93 The valuation policy adopted by responsible entities should be available so that investors may better assess the reliability of the valuations of a scheme's assets and any property over which security has been taken.

Disclosure Principle 6: Lending principles—Loan-to-valuation ratios

RG 45.94 If the scheme directly holds mortgage assets, the responsible entity should disclose:

(a) the maximum and weighted average loan-to-valuation ratios for the scheme as at the date of reporting; and

(b) where funds are lent for property development:

(i) the criteria against which the funds are drawn down;

(ii) the percentage (by value) of the completion of any property that is under development as at the date of reporting; and

(iii) the loan-to-cost ratio of each property development loan as at the date of reporting.

RG 45.95 The responsible entity should also disclose the percentage of the scheme's assets that are property development loans. If property development loans exceed 20% of the scheme's assets, the responsible entity should identify the scheme as one that invests a significant component of funds in property development loans. If the loan-to-cost ratio of any property development loan exceeds 75%, this should also be highlighted.

Explanation

RG 45.96 We consider it relevant that responsible entities disclose the scheme's overall loan-to-valuation ratios in order to understand the scheme's risk exposure to changes in market conditions (e.g. a change in the property market). The overall ratios should be based on the most recent valuations of the scheme's mortgage assets.

RG 45.97 The loan-to-cost ratio is the ratio of the loan amount to the total cost of the construction or development project (including the cost of the land). This ratio and the responsible entity's policy on how and when funds are provided to developers should also be disclosed.

RG 45.98 It is good practice that, if the scheme invests a significant percentage—20% or more (by value)—of funds in property development loans, the scheme has a name that investors can identify as one that significantly lends for property development (e.g. 'ABC Mortgage Developments Scheme').

Disclosure Principle 7: Distribution practices

RG 45.99 If a responsible entity is making, or forecasting, distributions to members, it should disclose:

(a) the source of the current and forecast distributions (e.g. from income earned in the relevant distribution period, operating cash flow, financing facility, capital, application money);

(b) if the distribution is not solely sourced from income received in the relevant distribution period, the reasons for making those distributions and the risks associated with such distributions;

(c) if the distribution is sourced other than from income, whether this is sustainable over the next 12 months; and

(d) when the responsible entity will pay distributions and the frequency of payment of distributions.

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 (from sources other than realised income) are sustainable, it should explain this to investors: see RG 170.20

RG 45.100 If the scheme promotes a particular return on investments, the responsible entity must clearly disclose details of the circumstances in which a lower return may be payable, together with details of how that lower return will be determined. For a contributory mortgage scheme, the responsible entity should, for a particular investor, disclose the above information to the investor for distributions or returns made, or forecasts to be made, to that investor.

RG 45.101 The responsible entity should include a table identifying up to five main factors that would have the most material impact on forecast distributions, the risks of changes to those factors on distributions and a sensitivity analysis based on changes to those factors. It must also explain how any excess returns actually earned by the scheme will be applied.

Explanation

RG 45.102 Some mortgage schemes seek to give investors an assurance about income stability by disclosing that a fixed return is generally payable. We consider that such disclosures will be misleading unless the responsible entity also makes prominent disclosure of:

(a) the mechanism by which it will seek to achieve a fixed return, together with any limitations of relying on that mechanism; and

(b) the circumstances in which investors may be paid a lower return and how that lower return will be determined.

RG 45.103 If distributions are funded (wholly or in part) from borrowings for the relevant distribution period, this may indicate that distribution practices are unsustainable over the long term or may be insufficient to meet advertised returns. Accordingly, detailed disclosure on the scheme’s distribution practices and policies is important so that investors may assess whether the scheme’s distribution policy is sustainable.

Disclosure Principle 8: Withdrawal arrangements

RG 45.104 The responsible entity should disclose:

(a) the scheme's withdrawal policy and any rights that the responsible entity has to change the policy;

(b) the ability of investors to withdraw from the scheme when it is liquid;

(c) the ability of investors to withdraw from the scheme when it is non-liquid;

(d) any significant risk factors or limitations that may affect the ability of investors to withdraw from the scheme;

(e) how investors can exercise their withdrawal rights, including any conditions on exercising these rights;

(f) the approach to rollovers and renewals, including whether the 'default' is that investments in the scheme are automatically rolled over or renewed;

(g) if the 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;

(h) the maximum withdrawal period that applies to the payment of withdrawal requests when the scheme is liquid;

(i) any rights the responsible entity has to refuse or suspend withdrawal requests; and

(j) the policy of the scheme on balancing the maturity of its assets with the maturity of its liabilities and the ability of its members to withdraw (e.g. if a scheme has a policy of ensuring that sufficient assets are held in readily realisable investments to meet future withdrawal requests, the responsible entity should state this in its PDS, provide details of the source of the realisable investment and report against this in its ongoing disclosure).

RG 45.105 If the responsible entity makes representations to investors that they can withdraw from the scheme, there should be disclosure on:

(a) the grounds (which must be verifiable) for the statement;

(b) the supporting assumptions (which must not be hypothetical only) for the statement;

(c) the basis for the statement (which must not be based only on an opinion of the directors of the responsible entity if there are no objective grounds to support that opinion); and

(d) any significant risk factors that mean that withdrawal requests might not be satisfied within the expected period.

RG 45.106 If the PDS contains a statement to the effect that, historically, withdrawal requests have been satisfied within a particular period, this may suggest a link between historical withdrawal periods and withdrawal periods that are likely to apply in the future. The responsible entity should ensure the statement clarifies that investors should not conclude that there is such a link between the historical availability of withdrawals and their future availability.

RG 45.107 If the scheme promotes a fixed redemption unit price for investments (e.g. $1 per unit), the responsible entity must clearly disclose details of the circumstances in which a lower amount may be payable, details of how that amount will be determined and the impact of a default under the scheme's mortgage assets on investors (e.g. on investor distributions and the unit price).

RG 45.108 A responsible entity of a contributory mortgage scheme should, for a particular investor, disclose the above information to the investor as it relates to the investor's ability to withdraw.

Explanation

RG 45.109 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 a scheme. If a scheme constitution provides for a long withdrawal period but the scheme is promoted on the basis that withdrawal requests are satisfied within a much shorter period, it is important for responsible entities to clearly disclose that:

(a) the responsible entity does not have an obligation to satisfy withdrawal requests within the shorter period;

(b) the constitution provides a longer withdrawal period for satisfying withdrawal requests (including details of the longer withdrawal period); and

(c) if the scheme does not satisfy the statutory liquidity requirements, members will only have a limited ability to withdraw (if any).

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

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

RG 45.110 Some mortgage schemes rely on investors keeping their funds invested beyond the end of the initial investment period. In some cases, the terms of issue allow this to occur automatically unless the investor makes a positive decision to withdraw their funds. In other cases, it is the investor who makes a positive decision to have their funds reinvested.

RG 45.111 It is important that investors fully understand the responsible entity's approach to rollovers and renewals through clear disclosure in the PDS, including details of:

(a) the default position on maturity;

(b) what investors need to do to withdraw or reinvest their funds (including details of the relevant timeframes); and

(c) any restrictions on the ability of members to withdraw at the end of the initial period.

RG 45.112 We consider that it is potentially misleading not to provide investors with updated information about their investment when they are considering whether to roll over their investment. Depending on the circumstances, the responsible entity may also need to provide investors with an updated PDS.

RG 45.113 Some mortgage schemes seek to give investors an assurance about capital stability by disclosing that investments are generally redeemable at a fixed unit price. We consider that such disclosure will be misleading unless the responsible entity also makes prominent disclosure of:

(a) the mechanism by which it will seek to achieve a fixed withdrawal price (e.g. by relying on a third party guarantee), together with any limitations of relying on that mechanism;

(b) any restrictions on the ability of investors to withdraw from the scheme;

(c) what will occur if the portion of the net assets of the scheme attributable to an interest in the scheme has a value that is less than the fixed withdrawal price; and

(d) the circumstances in which investors may be paid a lower withdrawal price and how that lower price will be determined.

RG 45.114 It is also typical for the constitution of a mortgage scheme to confer discretion on the responsible entity to suspend withdrawals. Responsible entities should explain the discretion and the consequences of the exercise of that discretion.

E Form and method of disclosure

Key points

Disclosure against the benchmarks and information addressing the disclosure principles should be included in any Product Disclosure Statements (PDSs) and ongoing disclosure for these schemes issued on or after 1 January 2013.

This information should also be included in the most effective way possible (e.g. on a website or in regular updates).

It is best practice for a PDS to contain a table within the first 15 pages summarising the entity's disclosure against the benchmarks, including explanations if it does not meet the benchmarks.

Method of disclosure

RG 45.115 Disclosure against the benchmarks and information addressing the disclosure principles should be:

(a) included in the PDS (see RG 45.118–RG 45.121); and

(b) updated in ongoing disclosure as material changes occur (see RG 45.129–RG 45.130). We also expect disclosure updates to be provided at least half-yearly (if not already provided under ongoing disclosure obligations).

RG 45.116 In some circumstances, disclosure may be made on a website (e.g. by relying on Class Order [CO 03/237] *Updated information in product disclosure statements*): see RG 45.129 and RG 45.131–RG 45.135.

RG 45.117 Provisions in the Corporations Act and the ASIC Act apply to disclosure made in advertising material. Advertising by responsible entities should support investor understanding of disclosure against the benchmarks and information addressing the disclosure principles, and be consistent with all corresponding disclosures on that subject matter in the PDS.

Disclosure in a PDS

RG 45.118 We prefer that, within the first 15 pages of a PDS, the responsible entity should address in a table whether or not the benchmarks are met: see the appendix for an example of the form of disclosure. We consider it useful if the table also identifies where further information (if any) on the benchmarks can be found, and that this further information is disclosed as early on as practicable in the PDS.

Information addressing the disclosure principles should also be disclosed as soon as practicable after the benchmark table.

RG 45.119 Our benchmarks and disclosure principles relate to matters that, in any event, must be disclosed under s1013D–1013E because issues relating to these matters 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.

Note: The benchmarks and disclosure principles do not attempt to specify all the information that is required to be included in a PDS by the Corporations Act.

RG 45.120 We expect a PDS for an unlisted mortgage scheme to explain in a clear, concise and effective way:

(a) the business model of the mortgage scheme and what it will actually do with the money;

(b) the track record and experience of senior management; and

(c) the nature of the investor's interest in the mortgage scheme (e.g. what withdrawal rights apply, if any).

RG 45.121 We believe that disclosure against the benchmarks and applying the disclosure principles in a PDS promote compliance with the requirement that PDSs should be worded in a clear, concise and effective manner by encouraging comparability and uniformity of financial measures, and highlighting issues that ASIC and industry experts consider crucial to making an investment decision.

Clear, concise and effective disclosure

RG 45.122 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 mortgage schemes, this *includes* the benchmark and disclosure principle information.

RG 45.123 The requirement for 'clear, concise and effective' disclosure should be read as a compound phrase so that each word qualifies the other. This means it is inappropriate to focus on one word in the phrase at the expense of others.

RG 45.124 We consider that a PDS will generally be clear, concise and effective if it:

(a) highlights key information (e.g. through an investment overview as explained below);

(b) uses plain language;

(c) is as short as possible;

(d) explains complex information, including any technical terms; and

(e) is logically ordered and easy to navigate.

RG 45.125 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 mortgage scheme sector.

Note: Responsible entities should refer to Regulatory Guide 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* (RG 168) and Regulatory Guide 228 *Prospectuses: Effective disclosure for retail investors* (RG 228) when considering ways to ensure that a PDS is worded in a clear, concise and effective manner.

Investment overview

RG 45.126 We consider there is a greater risk that a PDS will not be worded and presented in a clear, concise and effective manner if the PDS does not include an investment overview within the first few pages that highlights information that is key to a retail investor's investment decision.

RG 45.127 An investment overview is an introduction to the issuer and offer. It is not intended to replace the PDS and investors should read the whole document. The investment overview should:

(a) be the first substantive section of the PDS;

(b) highlight and provide a meaningful summary of information that is key to a retail investor's investment decision, including at least a summary of the benchmark and disclosure principle information; and

(c) provide balanced disclosure of the benefits and risks.

RG 45.128 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.

Ongoing disclosure

RG 45.129 Responsible entities may have obligations under the Corporations Act (e.g. under Chs 2M and 6CA and Pt 7.9) to provide ongoing disclosure to investors, including:

(a) issuing a supplementary PDS when there are certain material changes to information in a current PDS;

Note: PDSs commonly allow information to be updated on a website if the information is not materially adverse: see [CO 03/237]. We consider that if the omission of disclosure against the benchmarks and information addressing the disclosure principles 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 45.131–RG 45.135.

(b) providing periodic statements to investors in registered schemes under s1017D;

(c) for disclosing entities and registered schemes, disclosing material changes and significant events (e.g. under s675 and 1017B); and

(d) complying with annual reporting obligations (e.g. under Ch 2M).

RG 45.130 We expect responsible entities to provide disclosure updates at least half-yearly in addition to providing ongoing updates whenever there have been material changes to previously disclosed information. If there have been any material changes to a scheme's performance against the benchmarks, including against the scheme's alternative approach to meeting the benchmarks, or to the information provided under the disclosure principles, the responsible entity must explain these in ongoing disclosure. Responsible entities should also provide updates on the status of performance against the benchmarks and information provided under the disclosure principles, and any changes not covered under the ongoing disclosure.

Website disclosure

RG 45.131 We acknowledge that website disclosure allows an entity to provide material information to investors in a timely and efficient way. A responsible entity that makes website disclosure should have regard to Regulatory Guide 198 *Unlisted disclosing entities: Continuous disclosure obligations* (RG 198) in terms of how to disclose on its website.

RG 45.132 Disclosure against the benchmarks should be located in a single place on the website. The home page should contain a prominent link to this location so that investors can easily access it. If investors have to look for information in a number of places, there is a greater likelihood that they will not find all the information necessary to make an informed investment decision.

RG 45.133 However, we would discourage a responsible entity from publishing lengthy documents on its website in which the material information is 'buried' among information that is not material. If a responsible entity considers that an investor may have difficulty readily identifying material information, it should consider separately highlighting that information to investors.

RG 45.134 In addition to making material information available on its website, a responsible entity should consider whether direct disclosure of the information to investors is appropriate. This may occur, for example, where the entity is aware that a significant number of investors might not have ready access to the internet.

RG 45.135 A responsible entity that discloses material information on its website should consider giving investors the option of receiving an email alert when material information is updated. We strongly encourage this type of facility because it helps investors to become aware of relevant information as soon as possible after it is published.

Timing for implementing improved disclosure

RG 45.136 For all listed and unlisted mortgage schemes, responsible entities should comply with the advertising standards (which applied from 2 September 2008).

RG 45.137 Disclosing against the benchmarks and addressing the disclosure principles applies to both existing and new offers of interests in unlisted mortgage schemes.

RG 45.138 By 1 January 2013, the responsible entity of an existing unlisted mortgage scheme should address the benchmarks on an ‘if not, why not’ basis and apply the disclosure principles in updated disclosure that is brought to the attention of existing investors. This could be done by using the responsible entity’s normal investor communication channels (e.g. in a regular investor update, in a periodic statement under s1017D or by including the information on a website that is used to communicate with investors).

RG 45.139 The updated disclosure should also advise investors how the responsible entity intends to update them on the status of the benchmark and disclosure principle information and about material changes. This is particularly important if the responsible entity intends to use a website to communicate material changes to key information.

RG 45.140 By 1 January 2013, if an existing PDS is still in use, responsible entities should either:

(a) include the benchmark and additional disclosure principle information on a website referred to in the PDS (if the omission of information from the PDS is not materially adverse); or

(b) update the PDS by a new or supplementary PDS so that it includes the benchmark and additional disclosure principle information.

Note: We consider that, if the omission of the benchmark and additional 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.

RG 45.141 PDSs dated on or after 1 January 2013 should clearly and prominently disclose against the benchmarks on an 'if not, why not' basis and apply the disclosure principles. The PDS should also explain how the responsible entity intends to update investors for ongoing disclosure.

Note: Responsible entities of contributory mortgage schemes that provide an investor with a supplementary PDS for the investor's mortgage loan may deal with the benchmarks in the supplementary PDS.

RG 45.142 If there are any material changes to the scheme's performance against the benchmarks or to the disclosure principle information, the responsible entity should deal with this in ongoing disclosure. It is good practice to update investors on material changes to key information about an unlisted mortgage scheme as soon as practicable (e.g. by updating a website used for this purpose).

RG 45.143 It is good practice for responsible entities to update investors at least half-yearly on the status of their performance against the benchmarks and the disclosure principles, including whether the information has been updated for any material changes since the last investor report.

ASIC review of PDSs and ongoing disclosure

RG 45.144 From 1 January 2013, we will review PDSs in use and ongoing disclosure for unlisted mortgage schemes to check that the benchmark and disclosure principle information is adequately disclosed.

RG 45.145 We will consider exercising our stop order powers under s1020E if we consider there is material non-disclosure or misleading disclosure of these matters. The benchmarks and disclosure principles relate to matters that must be disclosed under the Corporations Act. Material non-disclosure or misleading disclosure may also result in liability to investors.

RG 45.146 We will also:

(a) work with responsible entities to ensure that the benchmarks and disclosure principles, and our expectations, are understood;

(b) discuss any concerns we have about 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 expectations.

F Advertising standards for all mortgage schemes

Key points

Responsible entities of all mortgage schemes (whether listed or unlisted) can promote investor understanding and minimise the risk of mis-selling by ensuring that advertising for their products meets certain standards: see RG 45.147–RG 45.169.

Responsible entities that fail to comply with these standards risk making false or misleading statements or engaging in misleading or deceptive conduct: see RG 45.170–RG 45.171.

Under general law, a publisher or other media conduit may have some responsibility for an advertisement's content: see RG 45.172–RG 45.177.

Standards for advertisements

Repayment of principal investment

RG 45.147 Retail investors may confuse products where returns, interest rates or fixed-term investment periods are advertised with bank or other deposits. Many mortgage schemes advertise one or more of these features. Retail investors may fail to realise that a mortgage scheme investment is an equity investment in a managed investment scheme, and there is a higher risk of losing some or all of their money than is the case with a bank deposit.

RG 45.148 For this reason, any advertisements for mortgage scheme investments that are offered to retail investors should contain prominent disclosure that investors risk losing some or all of their money.

Returns on investment and investment ratings

RG 45.149 Advertisements for mortgage schemes that are offered to retail investors should *only* quote returns on the investment if they are accompanied by prominent disclosure that there is a risk that the investment may achieve lower than expected returns.

> Note: This includes advertisements with generic references to the return (e.g. to a 'very high', 'highly competitive', 'regular' or 'consistent' return), as well as to a specific return.

RG 45.150 References to returns in advertising can be very influential to retail investors. These references can be misleading if at the same time the investor is not given information about the likelihood of being paid that return.

RG 45.151 If an investment rating is used in a mortgage 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 45.152 Responsible entities should ensure that:

(a) the impression the investment rating creates about the mortgage scheme being advertised is not misleading; and

(b) investment ratings used in advertisements for mortgage schemes are only quoted from research houses that hold an AFS licence.

Comparisons with bank deposits and 'risk-free' suggestions

RG 45.153 Advertisements for mortgage schemes should state that the mortgage scheme is *not* a bank deposit. Advertisements should also *not* suggest that:

(a) the mortgage scheme is, or compares favourably to, a bank deposit or other deposit product; or

(b) there is little or no risk of the investor losing their principal or not being paid a return.

RG 45.154 This means that the following terms should be avoided in advertisements for mortgage schemes: 'secure', 'secured', 'guaranteed', 'warranted', 'safe', 'deposit', 'first ranking' and 'fixed income'.

RG 45.155 We consider that the use of these (or similar) terms creates a misleading impression about the mortgage scheme and the risks involved with investing in it. They contribute to the misconception that investors can achieve higher returns than a bank deposit without the risk of losing their money.

RG 45.156 Terms such as 'secure', 'secured', 'guaranteed' and 'warranted' convey an impression of a safe investment and, in our experience, they have a disproportionate effect on retail investors. We consider that investors will be left with a misleading impression about the risk profile of the mortgage scheme without a detailed explanation of:

(a) the nature of the security, guarantee or warranty;

(b) the fact that investors in the scheme are unsecured equity investors; and

(c) the fact that lenders to the scheme have priority over the assets of the scheme.

RG 45.157 We consider the use of terms such as ‘fixed income’ may also create a misleading impression that the returns an investor receives are not subject to change and that the returns are in the form of interest rather than a return from the revenue generated by the scheme.

Withdrawal periods, withdrawal rights and investment periods

RG 45.158 Many mortgage schemes operate on the basis that withdrawal requests will be satisfied within a relatively short period even though the constitution of the scheme allows for a much longer maximum period to satisfy withdrawal requests.

RG 45.159 We consider that an advertisement that promotes a withdrawal period or withdrawal rights will be misleading unless there is prominent disclosure:

(a) of any longer period within which the responsible entity may satisfy withdrawal requests;

(b) that there are circumstances in which the responsible entity may suspend withdrawals (if this is the case); and

(c) that members will only have limited rights to withdraw if the scheme does not satisfy the statutory liquidity test in the Corporations Act.

RG 45.160 Some mortgage schemes advertise fixed-term investments (e.g. six months or 12 months). If the investor can only withdraw at the end of the fixed term by making a withdrawal request, the reference to the fixed-term investment is likely to be misleading unless it is accompanied by prominent disclosure of the risk that the investor will not be paid their withdrawal proceeds within a reasonable period after the end of the fixed term.

Fees

RG 45.161 Some mortgage schemes advertise that a particular type of fee is not payable or is payable at a low rate. If this arrangement is dependent on conditions being satisfied (e.g. it is a requirement that the member not withdraw from the scheme for a specified period of time), we consider the advertisement will be misleading unless there is prominent disclosure of:

(a) if it is advertised that no fee is payable, the circumstances in which a fee is payable, together with the amount of the fee; and

(b) if it is advertised that a fee is payable at a particular rate, the circumstances in which a higher fee is payable, together with the amount of the higher fee.

Suitability statements

RG 45.162 Advertisements for mortgage schemes should not state or imply that the investment is suitable for a particular class of investor (e.g. 'this product is suitable for a conservative investor' or 'this product is suitable for a self-managed super fund'). Such a statement may be misleading because it may convey the impression that the responsible entity has actually assessed the suitability of the mortgage scheme for particular investors targeted by the advertisement.

Consistency with PDS disclosure

RG 45.163 Statements in advertisements for mortgage 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 about the benchmarks in Section C and the disclosure principles in Section D.

RG 45.164 In ensuring consistency with disclosure in the PDS, responsible entities should be aware that an advertisement may be misleading if it quotes a statement from the PDS out of context. For example, while it may not be misleading to describe a return on a mortgage scheme product as 'guaranteed' in the PDS, where sufficient information is given about the guarantee and its likely efficacy, using the term 'guaranteed' in an advertisement is likely to be misleading.

Telephone inquiries

RG 45.165 Statements made over the telephone or in any correspondence in response to inquiries about mortgage schemes are subject to the same regulation for misleading and deceptive conduct as the advertisements. Therefore, the same restrictions apply (e.g. about using words such as 'secure', 'secured' and 'guaranteed').

RG 45.166 Responsible entities of mortgage schemes should ensure that all statements made by call centre staff (or other staff or contractors engaged by them) to prospective investors who respond to advertisements for mortgage schemes are consistent with disclosures on that subject in the PDS. In the case of returns, withdrawal periods, withdrawal rights, investment periods and fees, no statements should be made that would have been prohibited in the advertisement to which the inquiry related.

RG 45.167 To ensure compliance with this standard, responsible entities could develop a script and a list of questions and answers that call centre staff and any other staff fielding these inquiries should adhere to.

Warning statements generally

RG 45.168 The warning statements referred to in RG 45.148–RG 45.153 and RG 45.159–RG 45.161 should be prominent. For example, investors who notice a statement about returns (if any) should also be reasonably likely to notice the corresponding warning statement and be able to easily understand it. This will help ensure investors have a balanced impression of the mortgage scheme offering.

RG 45.169 We are not prescribing 'boilerplate' or standardised warning statements. It is the responsibility of the responsible entity to ensure that its advertisement is not misleading or deceptive and that the warning statements referred to in RG 45.148–RG 45.153 and RG 45.159–RG 45.161 are effective.

How ASIC deals with contraventions

RG 45.170 Responsible entities of mortgage schemes who fail to comply with the advertising standards risk making false or misleading statements or engaging in misleading or deceptive conduct in contravention of the Corporations Act or ASIC Act.

RG 45.171 The law provides ASIC with various options for dealing with false or misleading advertisements for mortgage schemes, or mortgage scheme advertising that constitutes misleading or deceptive conduct. These include:

(a) issuing a stop order on any false or misleading statements in an advertisement for a mortgage scheme;

(b) seeking an injunction against a responsible entity for mortgage scheme advertising that constitutes misleading or deceptive conduct;

(c) investigating potential criminal action for contraventions of s1041E of the Corporations Act or s12DF of the ASIC Act; and

(d) taking other regulatory action against a responsible entity where mortgage scheme advertising contravenes its obligations as an AFS licensee.

Note: See Regulatory Guide 156 *Advertising of debentures and notes to retail investors* (RG 156) at RG 156.29–RG 156.30 for further guidance about when advertising may be misleading or deceptive.

The role of publishers and the media

RG 45.172 While the primary responsibility for advertising material rests with the organisation placing the advertisement, under general law the publisher may also have some responsibility for its content. This depends on whether the publisher received the 'advertisement for publication in the ordinary course of that business and did not know, and had no reason to believe, that its publication would amount to an offence against that provision': s1044A, Corporations Act; s12GI(4), ASIC Act.

RG 45.173 We believe that the advertising standards in this guide give publishers knowledge of the type of conduct that would contravene the law. This means that publishers should ensure that they are in a position to decline advertisements for mortgage schemes that:

(a) fail to contain the statements referred to in RG 45.148–RG 45.153 and RG 45.159–RG 45.161;

(b) have any references to returns that fail to comply with the standards in RG 45.149–RG 45.150;

(c) have any references to withdrawal periods, withdrawal rights or investment periods that fail to comply with the standards in RG 45.158–RG 45.160;

(d) use the terms 'secure', 'secured', 'guaranteed' or 'warranted' (or similar terms) (see RG 45.156); or

(e) contain suitability statements (see RG 45.162).

RG 45.174 Generally, responsible entities will use the terms 'mortgage', 'mortgage scheme', 'mortgage trust' or 'mortgage fund' to describe products subject to this regulatory guide. But we encourage publishers to specifically ask their advertising clients if the product they are advertising is regulated by this guide.

RG 45.175 To help publishers identify potentially problematic advertisements, we will make available details of responsible entities of mortgage schemes that have previously had a stop order made against either their PDS or any of their advertisements. We expect publishers to scrutinise advertisements by these responsible entities with particular care.

RG 45.176 We also expect publishers to cease publishing an advertisement if we inform them that it is currently subject to a stop order. We will assist publishers by making this information available.

RG 45.177 If a publisher contributes to the content of the advertisement (e.g. in writing advertorials) or otherwise has an active involvement in the promotion of the financial product (e.g. through co-branding or where a media personality uses their influence to promote a product), we regard the publisher as being in the same position as the responsible entity in terms of its responsibility to comply with the advertising standards in this guide. We consider that this level of active involvement may mean that the general defence that publishers might claim against liability for content of an advertisement under s1044A is unlikely to apply.

G 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 mortgage schemes to set out adequate measures to ensure compliance with the disclosure and advertising obligations discussed in this guide.

We expect compliance committees and compliance plan auditors to be aware of these disclosure and advertising obligations and to have regard to them in carrying out their duties.

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

The compliance plan

RG 45.178 Compliance plans play a key role in protecting investors and promoting their interests. The law requires managed investment schemes 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 45.179 Compliance plans should contain adequate procedures to ensure that responsible entities comply with their upfront and ongoing disclosure obligations, including their disclosure obligations in this guide. Compliance plans should also contain adequate procedures to ensure that responsible entities comply with their advertising obligations.

RG 45.180 We do not expect that responsible entities will necessarily need to change their compliance plans to deal expressly with the disclosure and advertising obligations discussed in this guide. Good compliance plans should already contain procedures to ensure that responsible entities comply with all of their disclosure and advertising obligations under the law.

RG 45.181 However, we do 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. 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 45.182 Many mortgage 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 the compliance plan is adequate.

RG 45.183 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, report to the responsible entity on the assessment and make recommendations to the responsible entity about any changes that it considers should be made to the plan: s601JC(1).

RG 45.184 We expect compliance committees for mortgage schemes to be aware of the disclosure 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, including the benchmark information in Section C and the disclosure principle information in Section D; and

(b) advertising obligations as discussed in Section F.

RG 45.185 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 45.186 A compliance committee should also monitor compliance by the responsible entity with the compliance plan. Where a compliance committee identifies non-compliance or a possible breach of the law (including a breach relating to the responsible entity's disclosure and 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 45.187 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 45.188 We expect compliance plan auditors to be aware of the disclosure 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 compliance with these disclosure and advertising obligations.

Appendix: Example of disclosure against the benchmarks

Benchmark	Statement	Explanation	Reference
Benchmark 1: Liquidity			
For a pooled mortgage scheme, the responsible entity has cash flow estimates for the scheme that: (a) demonstrate the scheme's capacity to meet its expenses, liabilities and other cash flow needs for the next 12 months; (b) are updated at least every three months and reflect any material changes; and (c) are approved by the directors of the responsible entity at least every three months.	The benchmark is not met.	The scheme will not be able to meet its expected liabilities after 6 months because [*insert details of how the liabilities will be funded*].	For additional disclosure on this benchmark, see [*section X*] of this [*relevant disclosure document*].
Benchmark 2: Scheme borrowing			
The responsible entity does not have current borrowings and does not intend to borrow on behalf of the scheme.	The benchmark is met.	N/A	For additional disclosure on this benchmark, see [*section X*] of this [*relevant disclosure document*].
Benchmark 3: Loan portfolio and diversification			
For a pooled mortgage scheme: (a) the scheme holds a portfolio of assets diversified by size, borrower, class of borrower activity and geographic region; (b) the scheme has no single asset in the scheme portfolio that exceeds 5% of the total scheme assets; (c) the scheme has no single borrower who exceeds 5% of the scheme assets; and (d) all loans made by the scheme are secured by first mortgages over real property (including registered leasehold title).	The benchmark is not met.	The scheme lends to [*insert borrower's details*], who accounts for more than 5% of the scheme's total assets, because [*insert explanation*]. The increased concentration risk is addressed by [*insert details*].	For additional disclosure on this benchmark, see [*section X*] of this [*relevant disclosure document*].
Benchmark 4: Related party transactions			
The responsible entity does not lend to related parties of the responsible entity or to the scheme's investment manager.	The benchmark is not met.	The responsible entity lends to companies with common directors on the same commercial basis as loans to unrelated parties because [*insert explanation*], which requires [*insert details of procedures*].	For additional disclosure on this benchmark, see [*section X*] of this [*relevant disclosure document*].

Benchmark	Statement	Explanation	Reference
Benchmark 5: Valuation policy			
In relation to valuations for the scheme's mortgage assets and their security property, the board of the responsible entity requires: (a) a valuer to be a member of an appropriate professional body in the jurisdiction in which the relevant property is located; (b) a valuer to be independent; (c) procedures to be followed for dealing with any conflict of interest; (d) the rotation and diversity of valuers; (e) in relation to security property for a loan, an independent valuation to be obtained: (i) before the issue of a loan and on renewal: (A) for development property, on both an 'as is' and 'as if complete' basis; and (B) for all other property, on an 'as is' basis; and (ii) within two months after the directors form a view that there is a likelihood that a decrease in the value of security property may have caused a material breach of a loan covenant.	The benchmark is met.	N/A	For additional disclosure on this benchmark, see [*section X*] of this [*relevant disclosure document*].
Benchmark 6: Lending principles—Loan-to-valuation ratios			
If the scheme directly holds mortgage assets: (a) where the loan relates to property development—funds are provided to the borrower in stages based on independent evidence of the progress of the development; (b) where the loan relates to property development—the scheme does not lend more than 70% on the basis of the latest 'as if complete' valuation of property over which security is provided; and (c) in all other cases—the scheme does not lend more than 80% on the basis of the latest market valuation of property over which security is provided.	The benchmark is met.	N/A	For additional disclosure on this benchmark, see [*section X*] of this [*relevant disclosure document*].
Benchmark 7: Distribution practices			
The responsible entity will not pay current distributions from scheme borrowings.	The benchmark is met.	N/A	For additional disclosure on this benchmark, see [*section X*] of this [*relevant disclosure document*].

Benchmark	Statement	Explanation	Reference
Benchmark 8: Withdrawal arrangements			
Liquid schemes			
For liquid schemes: (a) the maximum period allowed for in the constitution for the payment of withdrawal requests is 90 days or less; (b) the responsible entity will pay withdrawal requests within the period allowed for in the constitution; and (c) the responsible entity only permits members to withdraw at any time on request if at least 80% (by value) of the scheme property is: (i) money in an account or on deposit with a bank and is available for withdrawal immediately, or otherwise on expiry of a fixed term not exceeding 90 days, during the normal business hours of the bank; or (ii) assets that the responsible entity can reasonably expect to realise for market value within 10 business days.	The benchmark is not met.	The scheme constitution provides a period of 3 years for the responsible entity to meet withdrawal requests, which means such requests may be delayed for at least 3 years because [*insert explanation*] and [*insert details of how withdrawals will be satisfied*].	For additional disclosure on this benchmark, see [*section X*] of this [*relevant disclosure document*].
Non-liquid schemes			
For non-liquid schemes, the responsible entity intends to make withdrawal offers to investors at least quarterly.	Not applicable		

Key terms

Term	Meaning in this document
AASB 107 (for example)	An Australian accounting standard made for the purposes of the Corporations Act (in this example, numbered 107)
advertisements	Includes comment and promotion of mortgage schemes in media programs or publications (generally known as ‘advertorials’) and statements about mortgage schemes published by responsible entities on their websites that are intended to promote the scheme to retail investors (but does not include statements in the PDS)
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an Australian financial services licence under s913B of the Corporations Act Note: This is a definition contained in s761A of the Corporations Act.
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
‘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)
Australian accounting standards	Standards made for the purposes of s296(1) of the Corporations Act
benchmark information	A statement in relation to each benchmark that the scheme either: • meets the benchmark; or • does not meet the benchmark *and* explains how and why the responsible entity deals with the business factors or issues underlying the benchmark in another way
cash or cash equivalents	Has the same meaning as in AASB 107: see Note 2 to RG 45.34
Ch 2E (for example)	A chapter of the Corporations Act (in this example, numbered 2E)
[CO 03/237] (for example)	An ASIC class order (in this example, numbered 03/237)

Term	Meaning in this document
contributory mortgage scheme	A mortgage scheme under which an investor invests in a single mortgage loan through: • a general authority, where the investor receives a summary after the application is approved followed by a cooling-off period; or • a specific authority, where the investor receives a supplementary PDS before investing
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
CP 99	An ASIC consultation paper (in this example, numbered 99)
disclosure principle information	Information covered by the disclosure principles in Section D of this guide
feeder fund	A scheme that invests all or most of its assets in other unlisted mortgage schemes
liquidity	For the purposes of Benchmark 1 and Disclosure Principle 1, the proportion of cash or cash equivalents in a scheme's assets Note: 'Liquidity' for the purposes of this benchmark and disclosure principle is not the same as 'liquidity' for the purposes of Pt 5C.6 (which relates to satisfying a statutory test).
market value	An estimate of the amount for which the property or asset could exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction
mortgage loan	A loan secured by a mortgage over real property (including residential, commercial, industrial or retail property, or vacant land)
mortgage scheme	A managed investment scheme that has, or that is likely to have, at least 50% of its non-cash assets invested in mortgage loans and/or unlisted mortgage schemes Note: This definition includes contributory mortgage schemes.
Product Disclosure Statement (PDS)	A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act Note: See s761A for the exact definition.
Pt 5C.7 (for example)	A part of the Corporations Act (in this example, numbered 5C.7)
registered managed investment scheme	A managed investment scheme registered under s601EB of the Corporations Act
registered scheme	A registered managed investment scheme

Term	Meaning in this document
related party	Has the meaning given to that term in s228, or as modified by Pt 5C.7 for registered schemes, as the case may be
responsible entity	The public company named in ASIC's record of the scheme's registration as the responsible entity or temporary responsible entity of a registered scheme
retail client	A client as defined in s761G of the Corporations Act and associated Corporations Regulations
retail investor	For the purposes of this guide, a retail client who invests in a mortgage scheme
RG 69	An ASIC regulatory guide (in this example, numbered 69)
rollovers	Where an existing investor keeps their money in the existing mortgage scheme for an additional term (whether on the same or slightly different terms)
s1017B (for example)	A section of the Corporations Act (in this example, numbered 1017B), unless otherwise specified

Related information

Headnotes

advertising, benchmarks, compliance committees, compliance plan auditors, compliance plans, contributory mortgage schemes, deceptive, disclosure, disclosure principles, listed, misleading, mortgage schemes, pooled mortgage schemes, PDSs, Product Disclosure Statements, responsible entities, unlisted, valuers

Class order

[CO 03/237] *Updated information in product disclosure statements*

Regulatory guides

RG 69 *Debentures and notes: Improving disclosure for retail investors*

RG 76 *Related party transactions*

RG 118 *Commentary on compliance plans: Contributory mortgage schemes*

RG 119 *Commentary on compliance plans: Pooled mortgage schemes*

RG 132 *Managed investments: Compliance plans*

RG 144 *Mortgage investment schemes*

RG 156 *Advertising of debentures and notes to retail investors*

RG 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)*

RG 170 *Prospective financial information*

RG 198 *Unlisted disclosing entities: Continuous disclosure obligations*

RG 228 *Prospectuses: Effective disclosure for retail investors*

Legislation

ASIC Act, s12DF and 12GI(4)

Corporations Act, Chs 2E, 2M and 6CA, Pts 5C.6, 5C.7 and 7.9, s228, 601EA, 601FC, 601HA, 601JA, 601JC, 675, 769C, 912A, 1013C, 1013D, 1013E, 1017B, 1017D and 1020E

Consultation papers

CP 99 *Mortgage schemes: Improving disclosure for retail clients*

CP 141 *Mortgage schemes: Strengthening the disclosure benchmarks*