ASIC
Australian Securities & Investments Commission

REGULATION IMPACT STATEMENT

Unlisted property schemes: Update to RG 46

March 2012

About this Regulation Impact Statement

This Regulation Impact Statement (RIS) addresses ASIC's proposed policy for amending the disclosure principles and introducing benchmarks under Regulatory Guide 46 *Unlisted property schemes: Improving disclosure for retail investors* (RG 46). The policy intends to improve the quality of disclosure available to retail investors, while not unduly interfering with the marketing and sale of these financial products.

What this Regulation Impact Statement is about

1 This Regulation Impact Statement (RIS) addresses ASIC's proposed policy for amending the disclosure principles and introducing benchmarks under Regulatory Guide 46 *Unlisted property schemes: Improving disclosure for retail investors* (RG 46). This follows a consultation paper published in July 2011, setting out our proposals and supporting rationale for clarifying the content requirements for disclosure documents for unlisted property schemes: see Consultation Paper 163 *Unlisted property schemes: Update to RG 46* (CP 163). A summary of submissions made in response to CP 163 and our consideration of those responses can be found in our report *Response to submissions on CP 163 Unlisted property schemes: Update to RG 46* (REP 280), as well as in Section D of this RIS.

2 We initiated this work because we have concerns about the quality of disclosure available to retail investors in unlisted property schemes. We have reached this view based principally on the review of Product Disclosure Statements (PDSs) in the context of recent market conditions. Our conclusion from this review is that many PDSs currently in use for these products disclose information consistent with our guidance in RG 46. However, a number of key disclosures are not adequately addressed.

3 The regulatory framework in the *Corporations Act 2001* (Corporations Act) (outlined in paragraphs 21–28 of this RIS) is intended to provide adequate disclosure about financial products, including unlisted property schemes. In meeting this regulatory framework, a responsible entity must provide a great deal of information to prospective investors. However, the responsible entity is largely free to structure and present this information as it chooses. We are concerned that current disclosure practices are not resulting in documents that clearly and adequately discuss the risks associated with investing in an unlisted property scheme.

4 If investors are better informed about the risks involved in the investments they are about to make, they are better equipped to make an investment decision that suits their needs and future circumstances. We consider that better investment decisions can be made when investors receive clear, consistent and comparable disclosure about the key risks of investing in an unlisted property scheme and about responsible entities' business models.

5 Therefore, the overall aim of our work is to improve the quality of disclosure available to retail investors in unlisted property schemes to assist them to evaluate whether such products are appropriate for them. This aligns with ASIC's strategic priorities, including promoting:

- confident and informed investors and financial consumers; and
- fair and efficient financial markets.

6 In developing our final position, we have considered the regulatory and financial impact of our proposals. We are aiming to strike an appropriate balance between:

- promoting disclosure that assists investors to make better-informed decisions about investing in unlisted property schemes;
- not unduly interfering with the marketing and sale of these financial products; and
- promoting efficiency in the capital markets.

7 This RIS sets out our assessment of the regulatory and financial impacts of our proposed policy and our achievement of this balance. It deals with:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Contents

A Introduction

Background

What are unlisted property schemes?

8 An unlisted property scheme is defined in Regulatory Guide 46 *Unlisted property schemes: Improving disclosure for retail investors* (RG 46) as an unlisted managed investment scheme that has or is likely to have at least 50% of its non-cash assets invested in real property and/or in unlisted property schemes.

9 RG 46 applies to registered unlisted property schemes in which retail investors invest directly or indirectly (e.g. through an investor directed portfolio service).

10 RG 46 does not apply to:

(a) listed property schemes;

(b) property securities funds whose only exposure to property is through investments in listed property schemes;

(c) property schemes that do not have any direct or indirect investment by retail investors; or

(d) serviced strata schemes or timeshare schemes.

The unlisted property scheme market

11 In December 2008, ASIC identified 268 schemes that met the definition of 'unlisted property scheme' under RG 46. We estimated the value of funds under management in these identified schemes, as at 31 December 2008, was approximately $58 billion.

12 As at December 2011, ASIC's register records 536 registered managed investment schemes that may meet the definition of 'unlisted property scheme' in RG 46. Around 203 responsible entities are responsible for operating one or more of these schemes.

13 Unlisted property schemes often appeal to retail investors, who may believe that the investment offers capital stability and consistent ongoing returns that are not likely to vary significantly. This is not always the case, and retail investors need better information on the risks associated with investment in unlisted property schemes.

Disclosure requirements for responsible entities of unlisted property schemes

14 Responsible entities of unlisted property schemes are subject to the disclosure obligations of Ch 7 of the Corporations Act, including the requirement to prepare a PDS for the offer of interests in the schemes.

15 In September 2008, ASIC introduced RG 46, which established eight disclosure principles that responsible entities of unlisted property schemes are expected to disclose against.

16 These disclosure principles were introduced to help retail investors to understand the key characteristics of unlisted property schemes and assess the risks associated with these schemes by clarifying the disclosure requirements of the law.

17 The disclosure principles in the existing version of RG 46 address the matters summarised in Table 1.

Table 1: Disclosure principles for unlisted property schemes in which retail investors invest

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

18 Since the introduction of RG 46, there have been a number of developments in the unlisted property scheme sector, including:

(a) significant changes in financial market conditions, resulting in investors reassessing their risk appetite;

(b) investors not being paid distributions from their investment;

(c) responsible entities of unlisted property schemes not being able to realise sufficient assets in deteriorating market conditions to satisfy requests for redemption within the time set out in the scheme's constitution for redemption;

(d) responsible entities of unlisted property schemes extending the investment period for the scheme due to deteriorating market conditions and the likelihood of having to sell assets at a low price in depressed markets; and

(e) volatility in asset values resulting in issues with compliance in respect of credit facility covenants.

19 A review of 78 industry disclosure documents under the existing RG 46, conducted between 2008 and 2011, demonstrated that key disclosures were not being adequately addressed, and that there was little consistency or comparability in the form of disclosure applied by responsible entities.

20 As a result, ASIC published Consultation Paper 163 *Unlisted property schemes: Update to RG 46* (CP 163). To make it easier for investors to understand the characteristics and risks of unlisted property schemes, and for responsible entities to improve disclosure information, we proposed:

(a) the introduction of disclosure benchmarks, and the provision of this information on an 'if not, why not' basis;

(b) clarification on how to comply with the disclosure principles; and

(c) additional clarification on how to present disclosure information in a clear, concise and effective manner.

Current regulation of unlisted property schemes

21 A managed investment scheme is defined in the Corporations Act and has the following features:

(a) people contribute money or money's worth as consideration to acquire rights (interests) to benefits produced by the scheme (whether the rights are actual, prospective or contingent, and whether they are enforceable or not);

(b) any of the contributions are to be pooled, or used in common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (members) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders); and

(c) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or give directions).

22 Because managed investment schemes, and consequently unlisted property schemes, are financial products, the offer of these products is regulated under the Corporations Act. The obligations for the offer of financial products in Pt 7.9 apply, including the requirement to prepare a PDS, ongoing disclosure obligations and requirements relating to the advertising of the offer.

Note: All sections (s), chapters (Chs) and parts (Pts) referred to in this RIS are from the Corporations Act, unless otherwise stated.

PDS disclosure

23 The Corporations Act requires disclosure in the form of a PDS for an offer of interests in an unlisted property scheme to retail investors. The PDS must:

(a) be worded and presented in a clear, concise and effective manner (s1013C(3));

(b) make specific disclosures, including about the significant risks associated with holding the product (s1013D); and

(c) include all other information that might reasonably be expected to have a material influence on the decision of a reasonable person (when investing as a retail investor) about whether or not to invest in the product (s1013E).

24 The general PDS content requirement in s1013E is designed to:

(a) promote efficiency in the capital markets;

(b) promote disclosure of relevant information;

(c) reduce the likelihood of omitting information;

(d) focus responsible entities on the information needs of investors; and

(e) be sufficiently flexible to accommodate changes in investors' information needs.

Ongoing disclosure

25 A responsible entity of an unlisted property scheme has obligations to provide ongoing disclosure to investors under the Corporations Act, including:

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

(b) disclosure of material changes and significant events (s1017B).

ASIC's role in administering the law

26 We administer the law relating to financial products, within the powers granted by the Corporations Act. This includes conducting surveillance and undertaking enforcement action in cases of any breach of the Corporations Act (as well as the *Australian Securities and Investments Commission Act 2001* (ASIC Act)).

27 While PDSs are generally not required to be lodged with ASIC, and we do not approve PDSs, we have powers to make a stop order on a PDS if we are satisfied that:

(a) information in a PDS is not worded and presented in a clear, concise and effective manner; or

(b) an offer under a PDS contains a misleading or deceptive statement, or omits information from the disclosure statement that is required under the Corporations Act (s1020E).

28 In administering the law, we are able to exercise our regulatory powers without notice. However, it can be more effective and efficient to provide the market with specific and clear guidance on our views of the existing requirements of the Corporations Act as they apply to particular financial products. This approach informs the industry as a whole about our views, as opposed to on an individual basis, which can be disruptive to individual fundraising and inefficient for ASIC.

Identifying and assessing the problem

Our investigation of the problem

29 Around the time of publishing RG 46, the global financial crisis resulted in substantial upheaval in the property investment sector in Australia. These events included debt market turbulence, high interest rates and a softening in the real property market. These factors have affected unlisted property schemes. This was evident in the significant liquidity issues faced by a number of unlisted property schemes, which were forced to suspend distributions to investors, and in the ability of investors to redeem their investment.

Disclosure to investors

30 The existing RG 46 sets out eight disclosure principles that address gearing, interest cover, scheme borrowing, portfolio diversification, valuation policy, related party transactions, distribution practices and withdrawal arrangements.

31 The disclosure principles address common risks associated with investments in unlisted property schemes so that investors can make more informed decisions about whether to invest in an unlisted property scheme.

32 At the time RG 46 was published, we considered that clear and prominent disclosure of the disclosure principle information would also allow retail investors to compare the relative risk and return of investments in unlisted property schemes more generally.

33 In RG 46, we indicated that we would review the disclosures made by responsible entities in the unlisted property scheme sector to check that their disclosure against the disclosure principles in RG 46 was adequate.

34 From our review of the disclosure documents, we found that the form of this disclosure varied significantly between responsible entities. Our review identified a number of key disclosures that were not adequately addressed. These included disclosure of:

(a) the risks associated with the borrowing maturity profile and the extent of hedging;

(b) details about property development activities (primarily timetables and funding);

(c) the basis of valuations and the risks associated with 'as if complete' valuations;

(d) reasons for distributions being made from sources other than income and the sustainability of these distributions over the next 12 months; and

(e) withdrawal rights and the risks associated with withdrawal arrangements promoted to investors.

35 We found a number of disclosures summarised information and referred investors to other sources of information for the disclosure principles. In many cases, this cross-referencing did not enable investors to find the information, or the information did not adequately address the disclosure principles.

36 Our further reviews of disclosure in this sector have identified ongoing concerns with disclosure relating to issues dealt with in RG 46, such as the prominence of disclosure, income support arrangements, withdrawal arrangements, the debt position of the scheme, portfolio information and distributions from capital.

37 Responsible entities were generally willing to amend their disclosure to address these concerns. However, these issues highlighted the need for additional clarification of our disclosure expectations.

38 The review also revealed that the different forms of disclosure used by responsible entities did not achieve the aim of comparative disclosure across investments in unlisted property schemes. It was clear that making comparisons between similar products would have been difficult and time-consuming for investors where the information was not contained within the one document, and where cross-referencing was inadequate.

39 Each of these risks is discussed in more detail below.

Risks not adequately addressed by the existing disclosure principles

Gearing ratio

40 Under the current disclosure principle, responsible entities should provide the property scheme's gearing ratio, which indicates the extent to which the scheme's assets are funded by external liabilities.

41 A number of responsible entities in the unlisted property scheme sector have raised concerns with us about their ability to provide a 'look through' gearing ratio, where they are unable to confirm the details of borrowing in the underlying scheme(s).

42 We also found that responsible entities could provide investors with a better explanation of the gearing ratio and how this ratio can be used to determine the scheme's level of risk. In addition, where a responsible entity is unable to determine the gearing ratio, responsible entities were not always providing the reasons for this.

Interest cover ratio

43 Under the current disclosure principle, responsible entities should provide the property scheme's interest cover, which indicates the scheme's ability to meet interest payments from earnings.

44 After the release of RG 46, we received feedback from a number of responsible entities that indicated that they may not be able to disclose an interest cover ratio where the property was not earning an income. This feedback was often provided for developments where interest payments are capitalised and no earnings will be recorded until the completion of the project.

45 We found that responsible entities could provide investors with a better explanation of the interest cover ratio and how this ratio can be used to determine the scheme's level of risk. In addition, where a responsible entity is unable to determine an interest cover ratio, responsible entities were not always providing the reasons for this.

Scheme borrowing

46 Under the current disclosure principle, responsible entities should disclose key information about the scheme's borrowings and credit facilities.

47 We consider that the risks associated with financing facilities obtained by a scheme, its borrowing maturity profile and whether borrowings have been hedged is often inadequately disclosed to investors. Inadequate disclosure, along with unlisted property schemes facing problems with their finance facilities due to the global financial crisis, has highlighted the need for clarification of our expectations.

Portfolio diversification

48 Under the current disclosure principle, responsible entities should disclose details of their investment portfolio and their investment strategy.

49 We consider that responsible entities have not adequately disclosed the investment strategies of schemes. More specifically, there is a lack of disclosure relating to strategies on investing in other unlisted property schemes and the description of any significant non-direct property assets of the scheme, including the value of those assets.

50 There is also a need for responsible entities to more clearly identify those schemes that are involved in property development and construction. Property development and construction projects have unique risks, and current disclosure does not typically provide investors with significant detail about project milestones, funding arrangements and the status of the development.

Valuation policy

51 Under the current disclosure principle, responsible entities should disclose key aspects of the scheme's valuation policy for real property assets.

52 We consider that disclosure of valuation policies has been inadequate in giving investors enough information to understand and assess the valuation practices of many responsible entities and the risks associated with these practices.

Related party transactions

53 Under the current disclosure principle, responsible entities should disclose details of related party transactions, and their policy on entering into and monitoring these transactions.

54 We consider that responsible entities have been deficient in their disclosure of the assessment, approval and monitoring of related party transactions. These failings have included failures to disclose loans made to related parties, and the responsible entity's processes for managing conflicts of interest, and monitoring related party transactions.

Distribution practices

55 Under the current disclosure principle, responsible entities should disclose the expected source of distributions, and where those distributions are not sourced from income, they should outline why.

56 We consider that disclosure of distribution practices is inadequate and does not give investors enough information to assess why distributions may be paid from sources other than realised income.

Withdrawal arrangements

57 Under the current disclosure principle, responsible entities should disclose details of investors' ability to withdraw from the scheme, including any significant risk factors or limitations that may affect their ability to withdraw.

58 We consider that disclosure in this area has been inadequate. Responsible entities have often failed to provide investors with clarity on their rights of withdrawal, or these have differed from those outlined in the scheme's constitution. Additionally, responsible entities have often confused withdrawals under 'withdrawal rights' and a 'withdrawal offer'.

Our conclusions on the nature of the problem

59 Case-by-case assessment of unlisted property disclosure documents is resource intensive. It is also time-consuming for individual responsible entities to amend deficiencies in their disclosure documents, and disruptive for their fundraising.

60 In general, the PDSs we reviewed did not always meet our expectations of a 'clear, concise and effective' document within the meaning of s1013C(3). We do not have any evidence to suggest, however, that responsible entities are not attempting to comply with their obligations. Indeed, the length of many documents we reviewed suggests that they are attempting to include as much relevant information about the product as possible, and this is having the effect that PDSs become too long and complicated for investors to understand. Rather, we think that, because the PDS content requirements (described in paragraph 24) are principles-based and very broad, this is not assisting responsible entities to ensure that the information they provide in a PDS is appropriately targeted to the needs of investors.

61 Our conclusions are as follows:

(a) The structure of unlisted property schemes and the associated risks mean that they are different to other financial products offered to investors.

(b) The disclosure of the risks of these products has in many cases been insufficient to ensure that retail investors are provided with adequate information about the unlisted property scheme and whether the products will meet their investment needs, objectives and risk profile.

(c) Because the PDS is the primary document provided to retail investors, the information it contains must be of high quality to address the information needs of retail investors. However, we have concerns about the general quality and comparability of information for retail investors in PDSs for unlisted property schemes. If PDSs fail to disclose key information in a clear, concise and effective manner such that investors can easily identify it, investors are less likely to understand these products.

(d) The problem can be characterised as one of market failure through asymmetric availability of information. Investors do not have access to sufficiently clear information about unlisted property schemes because the current product disclosure information available to them does not describe the risks of the product clearly enough. As a result, investors may not receive the information they require to make an informed decision about whether to invest.

(e) We understand industry's view that some information may be commercially sensitive (such as terms of debt facilities raised during our consultation) and this may be a reason for not disclosing certain information to investors. Responsible entities are required to disclose at least some of this commercial information about the schemes to investors (e.g. in statutory accounts). However, such information tends to be provided after an investment in the scheme and therefore may not always be available to investors when they are considering investing in the scheme.

(f) Each responsible entity gives different prominence to characteristics of their unlisted property scheme and follows its own approach to disclosure.

(g) In addition, where industry associations have identified key information that should be available to investors (e.g. the net asset backing per unit of a scheme that was raised during consultation), it appears that responsible entities in the industry have not generally provided this information to investors, or have provided it by disparate means which do not facilitate comparison. This indicates that industry may not be in a position to rectify the problem of asymmetric information on a whole-of-industry basis.

(h) The problem is also one of legislative failure. The PDS content requirements (described in paragraph 24) are principles-based and apply to all financial products, without specifically addressing the risks and characteristics of unlisted property schemes. As discussed in paragraph 60, we believe that responsible entities are attempting to comply with the law, but the law is not sufficiently clear on how to produce a good PDS for this product.

62 Because we think that the problem is partly one of legislative failure, and not necessarily the lack of compliance, we do not think that targeting individual responsible entities is an efficient solution to the problem. Rather, a holistic solution to improve disclosure is required.

63 While the regulatory framework in the Corporations Act (see paragraphs 23–27) is intended to provide adequate disclosure for the offer of interests in an unlisted property scheme, there appears to be a need for clarification of the requirements of the Corporations Act to improve disclosure in PDSs to enable investors to have access to better information to support an assessment of the risks associated with an investment in an unlisted property scheme.

64 If investors are better informed about the risks involved in the investments they are about to make, they are better equipped to make an investment decision that suits their needs. However, even where disclosure of key information, such as the benchmark and disclosure principle information, is provided in a clear, concise and effective manner, the benefits of that disclosure may not result for every investor for a range of reasons (e.g. the financial literacy of the investor).

Our objectives

65 In doing this work, we are aiming to improve the quality of disclosure available to retail investors on unlisted property schemes in order to maximise the chance that they will make an informed investment decision about whether the product is appropriate for them.

66 As outlined above, we are concerned that current disclosure practices are resulting in documents that fail to clearly and adequately discuss the risks involved in individual unlisted property schemes. Under current practices, a number of key disclosures are not being adequately addressed, and the different approaches to disclosing this information do not facilitate comparison by retail investors of relative risks and returns across these schemes.

67 We aim to strike an appropriate balance between:

(a) promoting disclosure that assists investors to make better-informed decisions about investing in unlisted property schemes;

(b) not unduly interfering with the marketing and sale of these financial products; and

(c) promoting efficiency in the capital markets.

68 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 ASIC Act.

B Options

69 We think that the following options are likely to meet our objectives:

Option 1: Current disclosure guidance applies (status quo).

Option 2: ASIC provides additional clarification (preferred option).

Option 3: Current disclosure guidance applies, with increased supervision.

Option 1: Current disclosure guidance applies (status quo)

70 Under Option 1, the existing disclosure requirements in the Corporations Act would continue to apply without any additional clarification from ASIC for unlisted property schemes. We would use our existing powers to take action on a case-by-case basis against defective PDSs and disclosure.

71 Under this option, we would continue to administer the law under our current policy settings. For example, we would expect PDSs for unlisted property schemes to be provided as and when required by law and to include the disclosure principle information set out in the existing RG 46.

72 To solve the problem we have identified (i.e. the need for improved disclosure to facilitate the ability of retail investors to compare relative risks and returns in unlisted property schemes), we would rely on the regulatory tools already available to us—that is, we would continue to:

(a) work with responsible entities on a case-by-case basis;

(b) undertake a risk-based assessment approach to the review of PDSs; and

(c) expect responsible entities to improve deficiencies in their PDSs.

73 Industry would have no additional clarification on the issues likely to give rise to regulatory concerns.

Option 2: ASIC provides additional clarification (preferred option)

74 Under this option, we would provide additional clarification to responsible entities on how to comply with the Corporations Act, with the goal of improving risk assessment by retail investors.

75 We think the best and most efficient means of achieving this is by:

(a) making amendments to the current disclosure principles in RG 46, and providing responsible entities with further guidance on how they should apply the disclosure principles;

(b) introducing six benchmarks addressing gearing policy, interest cover policy, interest capitalisation, valuation policy, related party transactions and distribution practices; and

(c) providing additional clarification on how responsible entities can word and present disclosure documents in a clear, concise and effective manner to assist investors in their assessment of the investment.

The disclosure principle model of disclosure

76 The disclosure principle model of disclosure:

(a) identifies, for a particular financial product, the key risk areas potential investors should understand before making a decision to invest;

(b) assumes that a responsible entity will disclose those key risks and the details underlying the key risks, where appropriate; and

(c) sets out our expectations that a responsible entity will state in the PDS and other disclosures that its scheme applies the disclosure principles.

77 The disclosure principle model of disclosure provides retail investors with key information in a standardised manner, to help them assess financial products for which there are typically few readily comparable products.

Revised disclosure principles

78 The existing disclosure principles would be amended to clarify a number of issues and provide further guidance on our expectations for applying the disclosure principles. We have also identified some areas that could benefit from additional disclosure.

79 The amendments to the disclosure principles are outlined in more detail below.

Gearing ratio

80 We propose to clarify that:

(a) where a responsible entity does not base the gearing ratio and/or 'look through' gearing ratio on the latest financial statements, it should disclose the source(s) of the information, and the date of the information, used to calculate the ratio;

(b) when explaining what these ratios mean in practical terms, a responsible entity should ensure that the explanation addresses the risks associated with the level of gearing within the scheme;

(c) where the responsible entity is unable to calculate the ratio, it should disclose this along with:

(i) the reasons why the ratio(s) cannot be calculated;

(ii) an explanation of the risks and impact of being unable to calculate the ratio(s); and

(iii) the steps being undertaken by the responsible entity to address these risks.

Interest cover ratio

81 We propose to clarify that:

(a) where a responsible entity does not base the interest cover ratio on the latest financial statements, it should disclose the source(s) of the information, and the date of the information, used to calculate the ratio;

(b) when explaining what this ratio means in practical terms, a responsible entity should ensure that this explanation addresses the relationship between the income received by the scheme and the amounts required to be paid under the terms of any relevant finance facility, and the ability of the scheme to meet its other financial obligations; and

(c) where a responsible entity is unable to calculate the interest cover ratio—for example, in a property development or in circumstances where the interest is capitalised—it should disclose this along with:

(i) the reasons why the ratio cannot be calculated;

(ii) an explanation of the arrangements it has entered into to meet the payment obligations related to the borrowed funds; and

(iii) the risks associated with these arrangements.

Scheme borrowing

82 We propose that responsible entities should disclose additional information about their finance facilities, including:

(a) the amount (expressed as a percentage) by which either the operating cash flow or the value of the asset(s) used as security for the facility must fall before the scheme will breach any covenants in any credit facility;

(b) for each credit facility:

(i) the aggregate undrawn amount;

(ii) the assets to which the facility relates;

(iii) the loan-to-valuation and interest cover covenants under the terms of the facility;

(iv) the interest rate of the facility; and

(v) whether the facility is hedged; and

(c) details of any terms within the facility that may be invoked as a result of scheme members exercising their rights under the constitution of the scheme.

Portfolio diversification

83 We propose that responsible entities should disclose the following additional information about a scheme's portfolio:

(a) whether the current assets of a scheme conform to the investment strategy of the responsible entity for the scheme, and an explanation of any significant variance from this strategy;

(b) the current value of the development and/or construction assets of a scheme as a percentage of the current value of the total assets of the scheme;

(c) in the case of a scheme involved in property development, for each significant development asset:

(i) the development timetable with key milestones;

(ii) a description of the status of the development against the key milestones identified;

(iii) a description of the nature of the funding arrangements for the development (including the sources of funding and repayment strategies if borrowing is used to fund the development);

(iv) the total amounts of pre-sale and lease pre-commitments, where applicable;

(v) whether the loan-to-valuation ratio for the asset(s) under development exceeds 70% of the 'as is' valuation of the asset(s); and

(vi) the risks associated with the property development activities being undertaken; and

(d) where a scheme has over 20% of its property assets in development, based on an 'as if complete' basis, the responsible entity should clearly identify the scheme as a development and/or construction scheme.

Valuation policy

84 We propose to remove existing Disclosure Principle 5: Valuation policy, and introduce Benchmark 4, as proposed in Table 2.

Related party transactions

85 We propose to amend Disclosure Principle 6: Related party transactions to state that responsible entities should provide information consistent with Section E of Regulatory Guide 76 *Related party transactions* (RG 76). The disclosure should address:

(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 or ASX

Listing Rules—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 exception applies, or we have granted relief;

(d) whether scheme member approval for the transaction has been sought and, if so, when (e.g. where member approval was obtained prior to the issue of interests in the scheme);

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

(f) whether the responsible entity is in compliance with its policies and procedures for entering into related party transactions, in respect of the particular related party arrangement, and how this is monitored.

Distribution practices

86 We propose to amend Disclosure Principle 7: Distribution practices to state that responsible entities should disclose the following additional information about their distribution practices:

(a) whether the current or forecast distributions are sustainable over the next 12 months;

(b) if the current or forecast distribution is not solely sourced from cash from operations (excluding borrowings) available for distribution, the sources of funding and the reasons for making the distribution from these other sources; and

(c) the impact of, and any risks associated with, the payment of distributions from the scheme from sources other than cash from operations (excluding borrowings) available for distribution.

Withdrawal arrangements

87 We propose to amend Disclosure Principle 8: Withdrawal arrangements to state that responsible entities should disclose the following additional information about their withdrawal arrangements:

(a) whether the constitution of the scheme makes provision for investors to withdraw from the scheme and a description of the circumstances in which investors can withdraw; and

(b) any significant risk factors or limitations that may affect the ability of investors to withdraw from the scheme or the unit price at which any withdrawal will be made (including risk factors that may affect the ability of the responsible entity to meet a promoted withdrawal period).

Net tangible assets

88 We propose to introduce a new Disclosure Principle 8: Net tangible assets to state that responsible entities of closed-end schemes should clearly disclose

the value of the net tangible assets (NTA) of the scheme on a per unit basis in pre-tax dollars.

89 Responsible entities should also consider whether the disclosure of other measures such as net asset value may assist investors in understanding the value of their investment.

> Note: Open-end schemes regularly disclose the NTA or net asset value of units to support pricing of units for the purposes of new applications and redemptions from the scheme.

The benchmark model of disclosure

90 The benchmark model of disclosure:

(a) identifies, for a particular financial product, the key risk areas potential investors should understand before making a decision to invest;

(b) sets a benchmark for how a responsible entity should address these risks in establishing its business model and compliance procedures; and

(c) sets out our expectation that a responsible entity will state in the PDS and other disclosure whether it meets the benchmark, and if not, why not.

91 This model of disclosure provides concrete standards by which retail investors can assess the financial products for which there are typically few such external benchmarks.

92 Disclosing on an 'if not, why not' basis means, for each benchmark, stating that the responsible entity either:

(a) meets the benchmark; or

(b) does not meet the benchmark, and explaining why not.

93 'Why not' means explaining how a responsible entity deals with the business factor or concern underlying the benchmark (including the alternative systems and controls it has in place to deal with the concern). Failing to meet one or more of the benchmarks does not mean that a product necessarily represents a poor investment. However, the responsible entity will need to explain what alternative measures it has in place to mitigate the concern underlying the benchmark.

94 We are proposing that disclosure against the benchmarks should be:

(a) addressed up-front in the PDS;

(b) updated in ongoing disclosures as material changes occur (e.g. in a supplementary PDS); and

(c) supported in, and not undermined by, advertising material.

Benchmarks for unlisted property schemes

95 We propose to introduce the six benchmarks listed in Table 2, which reflect key areas of risk associated with unlisted property schemes. Our view is that disclosure about whether a responsible entity meets the benchmark is required under the law. No responsible entity is under an obligation to adopt the benchmark. However, we consider responsible entities are under an obligation to disclose whether or not the benchmark is met.

Table 2: Proposed benchmarks for unlisted property schemes

Benchmark	Expected disclosure
1. Gearing policy The responsible entity maintains and complies with a written policy that governs the level of gearing at an individual credit facility level.	If a responsible entity meets this benchmark, it should disclose its gearing policy and that the scheme currently complies with this policy. If the benchmark is not met, the responsible entity should explain why not, and disclose the risks associated with the approach that it has adopted.
2. Interest cover policy The responsible entity maintains and complies with a written policy that governs the level of interest cover at an individual credit facility level.	If a responsible entity meets this benchmark, it should disclose its interest cover policy and that the scheme currently complies with this policy. If the benchmark is not met, the responsible entity should explain why not, and disclose the risks associated with the approach it has adopted.
3. Interest capitalisation The interest expense of the scheme is not capitalised.	If a responsible entity meets this benchmark, it should disclose that the interest expense of the scheme is not capitalised. If the benchmark is not met, the responsible entity should explain why not, and disclose the risks associated with the capitalisation of interest. It should also provide details about how it intends to meet its repayment obligations for any borrowing undertaken on behalf of the scheme.
4. Valuation policy The responsible entity maintains and complies with a written valuation policy that requires: (a) a valuer to: (i) be registered or licensed in the relevant state, territory or overseas jurisdiction in which the property is located (where a registration or licensing regime exists) or otherwise be a member of an appropriate professional body in that jurisdiction; and (ii) be independent; (b) procedures to be followed for dealing with any conflicts of interest;	If a responsible entity meets this benchmark, it should disclose a summary of its valuation policy, that the scheme currently complies with this policy and where an investor can obtain a copy of the full valuation policy. If the benchmark is not met, the responsible entity should explain why not, and disclose the risks associated with this approach. When the responsible entity discloses the value of a property under development on an 'as if complete' basis, the 'as is' basis of the valuation should also be disclosed. The responsible entity should also disclose the risks associated with 'as if complete' valuations, including the risk that assumptions on which such valuations are based may be proved inaccurate.

Benchmark	Expected disclosure
(c) rotation and diversity of valuers; (d) valuations to be obtained in accordance with a set time table; and (e) for each property, an independent valuation to be obtained: (i) before the property is purchased: (A) for a development property, on 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 the view that there is a likelihood that there has been a material change in the value of the property.	
5. Related party transactions The responsible entity maintains and complies with written policies on related party transactions, including the assessment and approval processes for such transactions and arrangements to manage conflicts of interest.	If a responsible entity meets this benchmark, it should disclose a summary of the key elements of the policies and procedures that responsible entity has in place for entering into related party transactions, including how compliance with these policies and procedures is monitored and that the responsible entity currently complies with its policies and procedures. The responsible entity should also disclose where an investor can obtain more detail on the responsible entity's policies and procedures for related party transactions. If the benchmark is not met, the responsible entity should explain why not, the implications of not meeting the benchmark, and disclose the arrangements it has in place and the risks associated with the approach it has adopted.
6. Distribution practices The scheme will only pay distributions from its cash from operations (excluding borrowings) available for distribution.	If a responsible entity meets this benchmark, it should disclose that the scheme will only pay distributions from its cash from operations (excluding borrowings) available for distribution. If the benchmark is not met, the responsible entity should explain why not, and provide details of the sources of funds it intends to use to meet distributions and outline any risks to the scheme of using these funds for this purpose.

Purpose of the benchmarks

96 We first introduced benchmark disclosure for unlisted, unrated debentures in October 2007: see Regulatory Guide 69 *Debentures and unsecured notes: Improving disclosure for retail investors* (RG 69). Since then, we have introduced benchmarks for contracts for differences (CFDs) in Regulatory Guide 227 *Over-the-counter contracts for difference*: *Improving disclosure for retail investors* (RG 227), and consulted on benchmarks for mortgage schemes (see Regulatory Guide 45 *Mortgage schemes: Improving disclosure for retail investors* (RG 45)), as well as agribusiness schemes.

97 The benchmarks we have published in these guides relate to matters that must be disclosed under s1013D–1013E of the Corporations Act. Issues addressed by the benchmarks are all matters that might reasonably be expected to have a material influence on the decision of a reasonable person whether to invest in this type of product, when investing as a retail investor.

98 It is not a requirement of the law for a responsible entity to meet the benchmarks, but we consider it is a legal requirement for it to disclose whether or not it meets each of the benchmarks.

99 CP 163, released in July 2011, set out our proposals on benchmark disclosure for unlisted property schemes. The results of this consultation are summarised in more detail in Section D of this RIS.

Form of disclosure

100 To help responsible entities improve their disclosure practices and make it easier for investors to identify and engage with the benchmark and disclosure principle information for an individual scheme and compare schemes, we would provide additional clarification on the form of disclosure, including that:

(a) guidance should be 'clear, concise and effective', and be consistent with our guidance in Regulatory Guide 228 *Prospectus disclosure: Improving disclosure for retail investors* (RG 228);

(b) PDSs should include an investment overview within the first few pages that highlights information that is key to retail investors' investment decisions and refers to where further information can be found; and

(c) responsible entities should specify the date on any ongoing disclosure to which RG 46 applies.

101 We propose to provide guidance that 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.

102 An investment overview is an introduction to the responsible entity 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.

103 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 (e.g. a table that says 'the scheme's gearing ratio is x; see page x for an explanation of what this gearing ratio means').

104 The guidance is intended to assist responsible entities to present information in a manner that will assist investors to identify the key information more easily. We consider that our guidance may assist responsible entities to reduce the length of their PDSs through a reduction in repetition of information and more focused disclosure.

Investor guide

105 We have already developed and released an investor guide, *Investing in property trusts?*, providing broad and clear information about unlisted property schemes and the risks associated with these products. To complement the presentation of benchmark and disclosure principle information in PDSs, we will release an amended investor guide that provides a deeper explanation about each of the risk areas, and how to evaluate a responsible entity's responses. This measure would assist investors to understand and use the benchmarks, together with a responsible entity's 'if not, why not' responses, in their investment decision making.

Option 3: Current disclosure guidance applies, with increased supervision

106 Under this option, ASIC would review all PDSs that are issued by responsible entities of unlisted property schemes to raise the standards and quality of disclosure as well as to ensure compliance with the requirements of the Corporations Act.

107 The existing requirements of the Corporations Act would still apply in relation to a PDS, including that a PDS must:

(a) include any information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product (s1013E);

(b) make specific disclosures (s1013D); and

(c) word and present the PDS in a clear, concise and effective manner (s1013C(3)).

108 We would continue to apply the disclosure principles currently contained in RG 46 to any reviews of PDSs and ongoing disclosures for unlisted property schemes.

109 The Corporations Act currently provides ASIC with the power to deal with PDSs that are defective on a case-by-case basis.

110 However, we do not think that this is a realistic and efficient option to address the problems identified in Section A.

C Impact analysis

Affected parties

111 Parties affected by the proposed policy would include:

(a) responsible entities in the unlisted property sector;

(b) current and prospective retail investors in unlisted property schemes;

(c) advisers to responsible entities of unlisted property schemes;

(d) entities providing finance and other administrative services to responsible entities operating in the unlisted property sector;

(e) valuers; and

(f) ASIC.

Costs and benefits of each option

Option 1: Current disclosure guidance applies (status quo)

Benefits

112 In the short term, providing no additional clarification to industry would avoid imposing direct costs on industry immediately.

113 Investor protection would continue at least at its current level as we would continue to monitor potential issues in this area, and take action on a case-by-case basis against responsible entities where PDSs or disclosures were defective.

Costs

114 We think that this option will impose costs on investors because it will not effectively address the problems identified in Section A of this RIS.

115 Maintaining the status quo is likely to impose some costs on industry. The risks associated with unlisted property schemes have been subject to significant media attention in the past few years, particularly with respect to a lack of distributions and liquidity issues in frozen funds. This being the case, doing nothing (i.e. no changes to the regulatory setting) may mean that, in the future, some potential investors may avoid this sector and pursue other investments.

116 Providing no additional clarification also means that that there may be no amelioration of the problems identified in Section A, which may dampen general confidence in the unlisted property sector.

117 Over time, the lack of regulatory response may compound the cost for industry and investors—that is, not intervening now may mean that the cost of any eventual intervention is much higher. It is possible that some unlisted property schemes may act on their own accord to provide investors with better disclosure addressing the key risk information in a form that clearly identifies this information. However, it is our experience from the reviews we have conducted that responsible entities are unlikely to anticipate all of our regulatory concerns. For instance, the principles-based disclosure requirements under the Corporations Act mean that each responsible entity places different prominence on characteristics of their unlisted property scheme and each follows its own approach to disclosure.

118 We also note that while industry has adopted the current guidance in RG 46, industry associations have, through our consultation process, identified key information that they consider should be disclosed (i.e. net tangible asset backing per unit) and that industry generally does not uniformly disclose, or the information is provided by disparate means which do not facilitate comparison. This indicates that industry has identified information that it considers should be disclosed but has been unable to address the omission of this information on an industry-wide basis. Given this, it appears unlikely that industry is in a position to address market failures around the provision of information in disclosure documents.

119 It is also unlikely that such an approach would provide investors with the level of comparability between unlisted property schemes that is possible through our proposals.

120 Failing to provide clarification forgoes the opportunity for reducing the risk of investors failing to understand the nature of these schemes and their associated risks in the future and may fail to effectively address the problems identified in Section A.

121 A risk-based approach to reviewing PDSs means that only PDSs that are considered to pose significant risks are identified for review. This would mean that some deficient PDSs may still remain in the market. Hence, the inconsistencies in the level of disclosure and the incomparability of different unlisted property schemes would continue.

Option 2: ASIC provides additional clarification (preferred option)

Benefits

122 We think this approach would effectively address the problems identified in Section A.

123 This option is designed to benefit investors and responsible entities in the unlisted property sector of the managed investment industry by:

(a) improving investor understanding of the business practices of unlisted property schemes;

(b) enhancing investor analysis of the risks associated with unlisted property schemes;

(c) better aligning investor expectations about investments in unlisted property schemes with the characteristics of those schemes;

(d) influencing the ability of responsible entities to meet investor expectations;

(e) improving confidence in the unlisted property sector of the managed investment industry; and

(f) increasing consistency of disclosure without being unreasonably burdensome on responsible entities.

124 We consider that investors will benefit from disclosure of the benchmark and disclosure principle information as it may improve their understanding of the business practices of unlisted property schemes and enhance their analysis of the risks associated with these schemes. This will be achieved by:

(a) focusing investor attention through the benchmarks and disclosure principles on key risk areas in unlisted property schemes that investors should consider before investing—such as gearing, interest cover, interest capitalisation, valuations, related party transactions and distribution practices;

(b) identifying the issues that we consider investors should take into account before investing in unlisted property schemes;

(c) posing the benchmarks in a way that creates an expectation for investors that an unlisted property scheme would normally be expected to meet the benchmarks;

(d) expecting responsible entities to provide further explanation to investors on why the unlisted property scheme has not met a benchmark; and

(e) requiring fewer resources to address investor complaints arising from investors not understanding these products, and the risks associated with them, or the product not performing in accordance with their expectations.

125 We think that this will have a direct positive impact on the ability of retail investors to make informed decisions about whether to invest in unlisted property schemes.

126 There are also a number of more specific benefits, which are described below.

Benefits of benchmarks and revised disclosure principles

127 Our rationale for revising the disclosure principles and developing each of the benchmarks was outlined in CP 163. While some amendments have been made to the proposed disclosure principles and benchmarks to address concerns raised during consultation, the rationale behind the proposals remains the same.

128 We consider that clarifying our expectations about disclosure of relevant risk areas for these schemes (e.g. through the use of an investment overview) would have significant benefits for investors by ensuring that the PDS more easily and effectively identifies key information about the particular unlisted property scheme in a way that facilitates comparison of the characteristics and risks of different schemes.

129 While clarifying the requirements of the law would not directly prevent unlisted property schemes from experiencing financial stress or failure, it is likely to raise governance standards for unlisted property schemes (e.g. through increased disclosure of their financial position and performance) and increased investor understanding of the key risks associated with these schemes. In addition to improving investor understanding of unlisted property schemes, our proposals are likely to encourage responsible entities of unlisted property schemes to adopt more robust and transparent business models, and improve the practices that they put in place to mitigate the risks as a result of making specific disclosures about these practices.

130 An additional benefit of this particular approach is flexibility. The 'if not, why not' approach means that, if a responsible entity does not meet a particular benchmark for good reason, it can explain that this is because it has alternative methods of mitigating the relevant risk area. The benchmark disclosure model proposes disclosure of key areas of potential risks for investors and would apply, where appropriate, to ensure that investors obtain adequate information.

Encouraging business practices that better reflect risks

131 Encouraging responsible entities to disclose the risks associated with their business practices may result in changes to these business practices that better reflect the risk areas that investors should be aware of in unlisted property schemes. These characteristics include:

(a) the responsible entity disclosing situations where it is borrowing funds to pay distributions to members;

(b) the responsible entity disclosing situations where interest is being capitalised, rather than paid from scheme earnings;

(c) the responsible entity disclosing its valuation policy; and

(d) responsible entities being transparent with their related party transactions.

Dissemination of accurate information to investors

132 The proposals outlined under this option should result in investors being provided with the most up-to-date and relevant information the responsible entity has access to. This is achieved by encouraging responsible entities to:

(a) publish gearing and interest cover ratios based on the latest statements;

(b) disclose significant additional details on their finance facilities;

(c) disclose additional information about the scheme's portfolio of assets;

(d) implement greater transparency for related party transactions;

(e) outline their expectations on distributions, and identify the funding source of these distributions; and

(f) clarify for investors whether they can withdraw from the scheme, and under what circumstances.

Clearer disclosure of key information

133 We consider that the guidance about including an investment overview that highlights the benchmark and disclosure principle information within the first few pages of the PDS may help investors to identify and engage with this information more effectively for the particular unlisted property scheme as well as enabling comparison across different unlisted property schemes.

Clearer expectations

134 We consider that additional clarification for responsible entities on how to apply the disclosure principles and the introduction of the benchmarks will benefit investors and responsible entities because:

(a) responsible entities will have a clearer understanding of our expectations regarding disclosure;

(b) disclosure will reflect our further clarification, resulting in more consistent disclosure to investors; and

(c) we will require fewer resources to supervise compliance with the regulatory guide if our expectations are clearer.

Improved confidence in the sector

135 We consider that investors and responsible entities in the unlisted property sector of the managed investment industry will benefit from the benchmarks and disclosure principles through improved confidence in this sector because:

(a) investors will better understand the business practices and procedures that responsible entities have in place to manage unlisted property schemes; and

(b) investors will be able to more easily identify and assess the risks associated with unlisted property schemes.

Benefits of investor education

136 The proposal to complement the additional disclosure with investor education materials would help investors to understand the benchmark information and explanations given by responsible entities. This would help investors better understand the products offered to them, and thus enable them to make better choices that suit their own risk tolerance.

137 We consider that ASIC will benefit from the implementation of the benchmarks and investor education. We anticipate that investors who have a better understanding of these products will make fewer complaints, meaning that our resources can be focused on other areas.

Costs

138 This section considers the potential costs for responsible entities, industry and investors of implementing the benchmarks and revised disclosure principles proposed for RG 46.

139 Overall, it is not anticipated that the benchmarks and revised disclosure principles will result in significant costs for industry or investors. The benchmarks and disclosure principles do not impose additional requirements on responsible entities, but provide clarification on how we expect to see disclosure provided to investors. The proposed clarification to be provided in RG 46 relates to information that should be available and easily accessible to responsible entities.

Costs associated with disclosure

140 Amending our guidance to clarifying the requirements of the law is, in our view, the best way to assist responsible entities to provide disclosure about the risks associated with investing in unlisted property schemes. However, there is no formal legal requirement to follow our guidance. If a responsible entity believes it can meet its obligations to provide clear, concise and effective disclosure (s1013C(3)), and make disclosure about the significant risks associated with holding the product (s1013D) in some other way, it may do so.

141 We also propose that the benchmark and disclosure principle information should be included in ongoing disclosures to existing investors under s1017B (the requirement to provide ongoing disclosure of material changes and significant events). This proposal may result in some initial compliance costs in understanding how to apply our expectations in the context of ongoing disclosure and collating relevant information. However, as we think that all the benchmarks deal with significant characteristics of the product, responsible entities should already be providing information about material changes and significant events in relation to these matters. Therefore, the direct costs of this proposal are likely to be low and restricted to the implementation stage.

142 In CP 163, we asked specific questions about the likely costs of implementing our proposals. Respondents to the consultation paper generally stated that it would be difficult to quantify the costs at this stage but, because updating disclosure documents is a cost already borne by industry, the quantum of direct costs resulting from our proposals would not be significant.

143 We have undertaken further enquiries with individual responsible entities on the incremental costs associated with providing the ongoing disclosure proposed under this option in line with their continuous disclosure obligations. As a result, we estimate that there may be an initial cost of up to approximately $1,700 per scheme to collate and prepare the initial revised benchmark and disclosure principle information under this option, over and above the costs of preparing the information under the current version of RG 46. However, the costs associated with providing the benchmark and disclosure principle information as outlined under this option on an ongoing basis would be the same as for providing the information under the current version of RG 46.

144 We would expect there to be similar cost implications involved in the preparation of a PDS that includes the benchmark and disclosure principle information.

Costs of meeting the benchmarks

145 If responsible entities decide to change their business practices to meet the benchmarks, this may have the effect of imposing indirect costs. However, our guidance on implementing the benchmarks makes it clear that responsible entities are not required to 'pass' each of the benchmarks, and may meet the area of concern underlying each benchmark using some alternative business practice. It is difficult to quantify this cost, as it will depend on the practices and decisions of individual responsible entities.

146 Schemes are more likely to restructure to meet the benchmarks if the responsible entity considers that it will be able to attract new investors to the scheme.

147 During consultation, responsible entities raised concerns that they would not be able to meet a number of benchmarks as proposed in CP 163, being the benchmarks relating to gearing, interest cover, valuation policy and distribution practices. Primarily, concerns related to the costs of meeting the proposed valuation benchmark.

148 As a result of the consultation, we have revised the proposed benchmarks to take into consideration the concerns raised by industry. In developing the proposed benchmarks, we have also considered existing guidance issued by ASIC, including Regulatory Guide 132 *Managed investments: Compliance plans* (RG 132) on the obligations of responsible entities under s601FC(1) of the Corporations Act. Our guidance addresses the measures that responsible entities need to take within a compliance plan (e.g. measures for valuations, distributions and monitoring of compliance with obligations, including any restrictions on borrowing set out in the constitution for the scheme).

149 Based on the submissions we received during this consultation, we expect that responsible entities will now be more likely to meet the benchmarks without having to make significant amendments to their existing policies. We have also compared the benchmarks to the measures set out in compliance plans of schemes operated by entities that made submissions in response to CP 163. We found that the measures in these compliance plans are consistent with the proposed benchmarks, indicating that the responsible entities currently collate the information covered by the benchmarks and would be likely to meet the benchmarks.

Costs of not meeting the benchmarks

150 Where a responsible entity does not meet the benchmark, there is no requirement for the responsible entity to amend its practices to meet the benchmark. However, responsible entities may incur costs to amend their processes (if they choose to do so in order to meet the benchmark). They may also incur opportunity costs of lost fees if investors choose to exit from these schemes (assuming investors have access to withdrawal arrangements), or if prospective investors seek out different investments on the basis that the responsible entity does not meet all the benchmarks.

151 It is hard to quantify how significant these costs may be. As the issues addressed by the benchmarks cover those key features of the scheme which are already required to be disclosed under s1013E, we expect responsible entities would already have considered the key risks addressed by the benchmarks, including policies on gearing, valuations, distributions and related parties. As a result, we would expect an entity to change its policies to meet the benchmarks if it believed there was a commercial advantage in doing so.

152 We anticipate that there may be a large number of schemes that choose not to meet all the benchmarks. There will likely still be some demand for these schemes from some investors. However, there is likely to be a perception that those schemes are somewhat inferior.

153 It is possible that unwillingness by responsible entities to change their business practices to meet the benchmarks could reduce the overall appetite of investors for unlisted property schemes. This, combined with the impact of the global financial crisis on consumer confidence and the problems relating to frozen funds, could see money withdrawn from unlisted property schemes and diverted into traditionally safer alternative investments, such as bank deposits or listed securities.

Costs associated with not providing disclosure principle information

154 Where a responsible entity does not provide the disclosure principle information (e.g. where the responsible entity considers the information to be commercially confidential or sensitive), it may have an impact on the ability of the responsible entity to attract new investors.

155 Our proposed guidance addresses circumstances in which responsible entities choose to omit key information under a disclosure principle if the information is likely to mislead investors or where the responsible entity is unable to apply a disclosure principle. If key information is omitted, the responsible entity should tell investors the information has been omitted and explain why it would be misleading or inappropriate to include the information. If the responsible entity is unable to apply a disclosure principle, it should consider whether it can disclose other information that would allow investors to assess the relevant risk factor.

Costs to investors

156 For schemes for which the responsible entity determines to change its business practices to meet the benchmarks, investors may incur minor costs associated with this restructuring, including legal and administrative costs. The costs will vary depending on the current business practices and procedures in place for the scheme, including the complexity of the scheme's existing arrangements and the scheme's current practices in relation to the benchmarks. These costs could vary significantly, but it is not anticipated that they would be especially onerous.

Option 3: Current disclosure guidance applies, with increased supervision

Benefits

157 This option would result in ASIC reviewing all unlisted property scheme PDSs that are issued to ensure that the PDS deals with the requirements of Subdiv C of Pt 7.9 of the Corporations Act, particularly in addressing the key risks in a clear, concise and effective manner.

158 Investor protection would continue at its current level, while ASIC would become more proactive on a case-by-case basis with responsible entities whose disclosure documents were deficient or inadequate. Through increased enforcement, ASIC would be in a position to take action to influence disclosure and, in particular, to improve disclosure of key risks of these schemes on a more consistent basis.

Costs

159 In the short term, increasing surveillance activities by ASIC would avoid any immediate direct costs on an industry-wide basis. However, this would impose costs on investors because it would not effectively address the problems identified in Section A of this RIS. It would also result in additional costs for responsible entities of unlisted property schemes that we consider are not presently meeting their legal obligations (because there is a lack of clarity about those obligations).

160 There may be additional costs incurred by individual responsible entities in responding to concerns identified by ASIC that may result in additional disclosure being required or amendments to existing disclosure. These costs would only be borne by those responsible entities where concerns are identified in the PDS, and may include the costs associated with obtaining legal advice, drafting and issuing revised disclosure and the effects of having to offer investors the opportunity to have their investment refunded where the document is defective under the Corporations Act.

161 In addition, there may be other implications. For example, investors may assume that, because we review each PDS, ASIC may have in some way approved the unlisted property scheme. Or responsible entities may adopt an approach that transfers their consideration of disclosure issues to ASIC, which we consider to be inappropriate.

162 Under this option, we expect ASIC would require additional resources to undertake PDS reviews and spend time working with responsible entities of unlisted property schemes to improve processes. To carry out reviews of all PDSs, including follow-up surveillance work at the desired level to produce effective change, ASIC would incur additional costs in staff, estimated at two full-time equivalents (estimated to cost approximately $170,000 per year),

to monitor the industry and effectively understand all the products and carry out reviews of all PDSs. Additional resources may be required in future years as the number of PDSs increases following recovery of investor confidence.

163 A further cost for ASIC associated with this option is that it would require a continuing focus on the unlisted property sector, resulting in a less efficient use of resources, where there may be greater risks arising in other sectors over time. The failure to introduce consistency through clarification of the requirements of the law may result in reduced effectiveness of disclosure in circumstances where ASIC no longer has the resources to continue to apply this approach to the sector.

164 We do not think that Option 3 would be an appropriate solution to the problems we have identified. As noted in Section A, there is no evidence to suggest that responsible entities of unlisted property schemes are not attempting to comply with their disclosure obligations, but we do think further clarification would assist responsible entities to comply.

165 An option relying on our compliance and enforcement regulatory tools would not be as effective as a more holistic, guidance-based solution because:

(a) given that the problem extends across the industry, targeting particular responsible entities of unlisted property schemes would not be efficient;

(b) responsible entities would have less certainty about the expected disclosure;

(c) the process for identifying the standards required would be less transparent and only emerge as issues arose on a case-by-case basis; and

(d) investors would be less likely to be given key risk information that was readily comparable between unlisted property schemes.

D Consultation

166 We released CP 163 in July 2011, proposing to amend the disclosure principles and introduce benchmarks for unlisted property schemes. We proposed that a responsible entity following the benchmark disclosure model should explain in its PDS whether or not it meets the benchmark, and, if it does not, whether it deals with the concern underlying the benchmark in some other way.

167 We received 11 submissions in total—from current responsible entities, two peak industry bodies, law firms and individuals. Submissions were fairly consistent in their views, and we have made a number of changes to the benchmarks and disclosure principles proposed in CP 163 as a result of concerns raised in these submissions about issues such as:

(a) focusing on gearing at an individual asset level;

(b) the relevance of a benchmark relating to interest capitalisation for schemes that did not undertake development;

(c) the inclusion of a benchmark that requires a valuer to be registered in the jurisdiction in which the property was located, more regular valuations of properties and the costs associated with this proposal;

(d) the disclosure of additional information about scheme borrowing and portfolio diversification;

(e) clarity of terms such as ‘realised income’; and

(f) the commercial sensitivity of some of the information proposed to be disclosed.

168 In CP 163, we asked specific questions about the likely costs of implementing our proposals. Respondents to the consultation paper generally stated that it would be too difficult to quantify. However, we have subsequently obtained some cost information from responsible entities as a result of further inquiries.

169 The proposed final form of the benchmarks is set out in Table 2, and the proposed final form of the disclosure principles is set out in Section B at paragraphs 80–87. Table 3 summarises the original proposed benchmarks and disclosure principles, the feedback we received on each, and our responses to this feedback.

170 Following our review of the submissions, we held further discussions with six respondents to clarify a number of issues they had raised, as well as to discuss further our proposed disclosure principles and benchmarks. The

respondents broadly represented the unlisted property sector, and were made up of law firms, responsible entities and peak industry bodies.

171 The focus of these discussions was predominantly to get an understanding of the real costs and impact that industry anticipated incurring as a result of our proposed disclosure principles and benchmarks. We also sought additional clarification where respondents had indicated that the drafting of some disclosure principles and benchmarks was unclear or would not prove effective in practice.

172 These discussions helped us tailor our proposals to better address our concerns and gave us a better understanding of their impact on industry.

173 During the course of these discussions, an industry body reiterated its view (as previously stated in its submission) that we should include an additional benchmark for NTA of the scheme on a per-unit basis. This industry body indicated that there was strong support for this benchmark among responsible entities in the unlisted property sector.

174 To gauge industry support for including NTA as an additional benchmark or disclosure principle, we decided to write to each of the original respondents to CP 163.

175 We felt that this approach would achieve a good coverage of the unlisted property sector's views on the inclusion of NTA, especially given that the industry bodies contacted represented approximately a third of responsible entities operating in this sector. These industry bodies represented not only responsible entities in the unlisted property sector, but also a significant number of major investors, property owners and developers, as well as the industry's professional service and trade providers (e.g. valuers, advisers, financiers).

176 We received a total of six written responses to this secondary consultation. These responses were received from both peak industry bodies, a law firm, two significant responsible entities in the sector and an investment adviser. The responses indicated that including NTA as either an additional benchmark or disclosure principle would have strong industry support, and would not impose a significant additional burden or cost on responsible entities in the unlisted property sector.

177 As a result of this consultation, we considered that it was appropriate to introduce a new disclosure principle for responsible entities of closed-end funds to disclose the NTA of the scheme.

Table 3: Proposed benchmarks and disclosure principles for unlisted property schemes

Benchmark/disclosure principle proposed in CP 163	Feedback on benchmark/disclosure principle	How we propose to revise the benchmark/disclosure principle in RG 46
Benchmark 1: Gearing policy The responsible entity maintains and applies a written policy that governs the level of gearing at an individual asset level.	Some respondents were concerned that the benchmark does not cover situations that would prevent a gearing level being determined at an individual asset level in schemes. It was also suggested that it would be more relevant and useful to investors to set the gearing policy at the scheme level, or security pool.	We agree with the submissions suggesting that the benchmark should refer to each individual credit facility, rather than each individual asset within a scheme. The revised benchmark states that the responsible entity maintains and complies with a written policy that governs the level of gearing at an individual credit facility level.
Benchmark 2: Interest cover policy The responsible entity maintains and applies a written policy that governs the level of interest cover at an individual asset level.	Most respondents stated that calculating the interest cover ratio at an individual asset level was not possible and was impractical. It was also suggested that the proposed benchmark would not promote clear, concise and effective disclosure for non-development trusts.	We agree with the submissions suggesting that the benchmark should refer to each individual credit facility, rather than each individual asset within a scheme. The revised benchmark states that the responsible entity maintains and complies with a written policy that governs the level of interest cover at an individual credit facility level.
Benchmark 3: Interest capitalisation The interest expense of the scheme is not capitalised.	Most respondents stated that the interest would not be capitalised unless the fund was a development fund, and found disclosure by exception to be more appropriate. One respondent thought the benchmark was irrelevant.	Most respondents did not voice opposition to this benchmark, and our view is that this benchmark is one that responsible entities can easily address. There are no changes to this proposed benchmark.
Benchmark 4: Valuation policy The responsible entity maintains and applies a written valuation policy which requires responsible entities to use valuers who are independent and have a professional connection to the area in which the property is located. The responsible entity must also ensure it has procedures to deal with conflicts of interest, and rotates its use of valuers.	Approximately half of the respondents agreed with this proposal, although there was opposition to the following: • the requirement for the valuer to be registered in the state or territory where the property is located; • the timing of valuations; and • the application where there is a view of a decrease in valuation, it should be applied to an increase also. Two respondents considered this disclosure would provide little or no real benefit at significant cost to the fund.	The revised benchmark states that the responsible entity maintains and complies with a written policy that requires, among other things, a valuer to be registered or licensed in the relevant state, territory or overseas jurisdiction in which the property is located (where a registration or licensing regime exists), or otherwise be a member of an appropriate professional body in that jurisdiction; and that an independent valuation should be obtained within two months after the directors form the view that there is a likelihood that there has been a material change in the value of the property.

Benchmark/disclosure principle proposed in CP 163	Feedback on benchmark/disclosure principle	How we propose to revise the benchmark/disclosure principle in RG 46
Responsible entities must receive independent valuations for the property prior to its purchase, and within two months where directors form the view that a decrease in the value of the security property may have caused a material breach of a loan covenant.	One respondent also highlighted the fact that not all states and territories have a registration or licensing regime in place. It was proposed that valuers should be members of the Australian Property Institute and a certification of Certified Practising Valuer (CPV) with a minimum five years experience as a CPV in valuing property similar to the property in question.	In relation to concerns about the cost of additional valuations, we consider that these costs would only be incurred in a downward market phase, and it is at these times that a responsible entity should disclose the value of underlying property. We acknowledge that the issue of a decline in security property applies to other products. A matter for our future consideration is whether to extend this benchmark to other products.
Benchmark 5: Related party transactions The responsible entity maintains and applies written policies on related party transactions, including the assessment and approval processes for such transactions and arrangements to manage conflicts of interest.	All respondents agreed with this proposal, although one respondent noted that under a 'responsible entity for hire' arrangement, the related party policy of the fund manager rather than the responsible entity may be more relevant. One respondent thought that in light of the existing related party policy and conflicts management obligations, this benchmark was not necessary. Another respondent agreed with the proposal, and stated that it would create transparency in any related party transactions, and consequently would be brought to the attention of retail investors.	We note the concerns expressed by one respondent about additional obligations. However, this benchmark has not been drafted to impose further obligations on responsible entities for related party transactions. It has been drafted to be consistent with RG 76. We have revised the proposed benchmark to clarify that the responsible entity is required to maintain and comply with its policies.
Benchmark 6: Distribution practices The scheme will only pay distributions from the realised income of the scheme.	A number of respondents indicated that the term 'realised income' was unclear in its definition. Two respondents suggested replacing 'realised income' with 'cash from operations available for distribution', as this would provide a better measure of cash available for distribution. Some respondents stated that the payment of distributions from sources besides realised income was generally due to timing issues. In their view, responsible entities generally intended to make distributions based on realised income—however, they must deal with timing issues.	We have considered the submissions made on this benchmark and agree that it should be amended. The revised benchmark states that the scheme will only pay distributions from its cash from operations (excluding borrowings) available for distribution.

Benchmark/disclosure principle proposed in CP 163	Feedback on benchmark/disclosure principle	How we propose to revise the benchmark/disclosure principle in RG 46
Disclosure Principle 1: Gearing ratio We proposed to clarify that gearing ratios should be based on the latest financial statements, but where this is not the case the source and date of the information should be disclosed. The ratio should be explained in practical terms and the risks associated with the level of gearing in the scheme addressed. Finally, where the gearing and/or 'look through' ratio cannot be calculated, the reasons why, the risks associated with this inability to calculate the ratio, and the steps taken to address the risks should be outlined.	Generally, respondents agreed with this proposal, with one respondent stating that the disclosure needs to be balanced with clear, concise and effective requirements. One respondent thought that this disclosure is only the first step, and that the maturity date, interest rate, facility limits and undrawn amounts should be disclosed for each loan facility. It was also suggested that this disclosure principle should focus on the risks and impact of not knowing the gearing ratio, rather than the risks and impact of being unable to calculate the ratio.	We agree that this disclosure is only the first step. However, we note that Disclosure Principle 3: Scheme borrowing already requires responsible entities to disclose information such as maturity dates, facility limits and undrawn or drawn amounts. Further discussion on the provision of interest rates for each facility is considered under Disclosure Principle 3.
Disclosure Principle 2: Interest cover ratio We proposed to clarify that interest cover ratios should be based on the latest financial statements. Where this is not the case, the source and date of the information should be disclosed. The ratio should be explained in practical terms and the relationship between the income received by the scheme and amounts required to be paid under the terms of any relevant finance facility should be addressed, as well as the ability of the scheme to meet its financial obligations. Finally, the reasons why and an explanation of the arrangements in place to meet payment obligations for borrowed funds if the responsible entity cannot calculate the interest cover ratio should be provided.	Generally, all respondents agreed with our proposal.	Given the lack of opposition to this proposal, no changes have been made to our proposed amendment for this disclosure principle.

Benchmark/disclosure principle proposed in CP 163	Feedback on benchmark/disclosure principle	How we propose to revise the benchmark/disclosure principle in RG 46
Disclosure Principle 3: Scheme borrowing We proposed that additional information about finance facilities should be disclosed. For a full list of this information, see Section B. In summary, we proposed that responsible entities should disclose whether a scheme would be in breach of any covenants in a credit facility if either the operating cash flow or the value of the asset(s) used as security fell by more than 10%. Additionally, for credit facilities we proposed the disclosure of information such as undrawn amounts, the assets to which the facility relates, loan-to-valuation and interest cover covenants, interest rates, and any hedging of the facility.	Most respondents did not agree with this proposal, as many considered this information to be confidential between the scheme and financiers. Respondents were of the view that this information is commercially sensitive, and would disadvantage the responsible entity when it sought to refinance. One respondent noted that most of the proposed disclosure under this principle should be removed as it duplicates what is required under Australian Accounting Standard AASB 7 *Financial instruments: Disclosures*, with much of this detail being provided in the financial accounts of the scheme. It was suggested that this level of disclosure was overly complicated, and instead should focus primarily on details of any keys terms within the facility. One respondent also stated that use of a 10% arbitrary figure for the fall in the value of asset(s) used as security would not be as relevant as disclosure of the actual buffer.	We note that the proposed amendments raised concerns among respondents about the commercially sensitive nature of the information they may have to disclose. However, we have reviewed a number of schemes and found that this information is generally already disclosed as per the requirements/suggestions in AASB 7. Given the requirements outlined in AASB 7, we do not consider this information to be commercially sensitive and detrimental to a responsible entity's ability to refinance its facilities. In response to submissions on the 10% fall in the value of asset(s) used as security resulting in a covenant breach, we have amended the disclosure principle to state that the responsible entity should disclose the amount (as a percentage) by which either the operating cash flow or the value of the asset(s) used as security for the facility must fall before the scheme will breach any covenants in any credit facility.
Disclosure Principle 4: Portfolio diversification We proposed that additional information about a scheme's portfolio should be disclosed. For a full list of this information, see Section B. In summary, we proposed that responsible entities should disclose whether the current assets of the scheme conform to the investment strategy of the responsible entity for the scheme, and an explanation of any variance from this strategy. Additionally, the current value of development and/or construction assets of the scheme as a percentage of the value of total assets of the scheme should be disclosed.	Approximately half of the respondents agreed with this proposal, with one respondent stating that disclosure would help investors assess the development risk in the fund. One respondent noted that in relation to conforming to investment strategies, responsible entities are already obliged not to be misleading and deceptive, and on this basis thought the proposal was unnecessary. A suggestion was made that key milestones should be specified in the disclosure document to ensure consistency in reporting milestones. It was suggested that land settlement, planning approval, construction commencement and completion, sales settlement and project finalisation could be used.	In our view, the milestone examples suggested by one respondent, including land settlement, planning approval, construction commencement and completion, sales settlement, and project finalisation, to promote consistency in reporting are valid. We have amended the disclosure principle using the examples of milestones. We would expect that information about the project milestones would be on hand with any major development project and that material amounts of extra time and money would not be required to disclose this type of information. We believe this to be an important disclosure for investors in relation to property development schemes.

Benchmark/disclosure principle proposed in CP 163	Feedback on benchmark/disclosure principle	How we propose to revise the benchmark/disclosure principle in RG 46
Finally, for schemes involved in property development, responsible entities should disclose a number of key pieces of information.	A few respondents stated that significant amounts of management time and money would be required to apply this disclosure principle. Approximately half of the respondents agreed with the 20% development/construction rule. However, they said they required further guidance on how to arrive at that figure. It was suggested we provide a definition of the term 'development', and how it applies to refurbishments and redevelopments.	For the purposes of this disclosure principle, we have clarified the term 'development' to be the construction of a new building, significant increases to the lettable area of the building, or significant changes to the nature or use of the property; and that refurbishment of existing assets need not be considered to be development. When determining whether over 20% of the property assets of the scheme are development assets, we consider that the basis of the calculation should not include portions of existing assets that are not in development in this calculation.
Disclosure Principle 5: Valuation policy We proposed to remove RG 46.68 and RG 46.71 if Benchmark 4 was implemented.	All of the respondents agreed with this proposal, and were of the view that RG 46.68 and RG 46.71 would be unnecessary if Benchmark 4 was implemented.	With the introduction of Benchmark 4, this disclosure principle has been deleted and replaced with Benchmark 4.
Disclosure Principle 6: Related party transactions We proposed that this disclosure principle should ensure responsible entities provide information consistent with Section E of RG 76. For a full list of this information, see Section B. In summary, we proposed that responsible entities should disclose information relating to the transaction that may assist investors to understand the responsible entity's policies and procedures, and the nature of each transaction.	Generally, respondents agreed with this proposal. It was suggested that the responsible entity's related party policy should be available on its website. One respondent suggested that this proposal was unnecessary, as these obligations were significantly covered in the Corporations Act, and that it created an unlevel playing field, as this burden appeared greater for responsible entities of unlisted property schemes. Two respondents considered that immaterial related party disclosure and related party transactions at arm's length should not need to be disclosed because it would not promote clear, concise and effective disclosure. It was suggested that a materiality threshold would be useful.	Related party transactions disclosure in RG 46 is not intended to be inconsistent with RG 76. We do not consider the requirements in RG 46 to go any further than RG 76, which applies to all issuers of disclosure. As such, we have made no changes to the proposed amendments for this disclosure principle. Note: Due to the deletion of Disclosure Principle 5, this disclosure principle is now Disclosure Principle 5 in RG 46.

Benchmark/disclosure principle proposed in CP 163	Feedback on benchmark/disclosure principle	How we propose to revise the benchmark/disclosure principle in RG 46
Disclosure Principle 7: Distribution practices We proposed to amend the disclosure principle to include the following additional information: • whether the current or forecast distributions are sustainable over the next 12 months; and • if the current or forecast distributions are not solely sourced from realised income, the sources of funding and the reasons for making the distributions from sources other than realised income.	Generally, most respondents agreed with this proposal. Concerns were expressed over forecasting, and one suggestion was that if the responsible entity does not forecast, it should not need to disclose the information outlined in this disclosure principle. Another respondent stated that responsible entities make no promises about the amount of distributions and, if they are sustainable at a particular level for 12 months, no disclosure should be required. It was noted that many responsible entities do not forecast for a variety of reasons, but particularly due to legal risks and associated costs. Respondents sought guidance on two undefined terms, 'sustainable' and 'realised income', as schemes might have differing views on these terms in practice. One respondent thought this disclosure principle disadvantages responsible entities of unlisted property funds compared to other asset types making distributions.	We note the concerns expressed by respondents about forecasting, and reiterate that, unless a distribution is forecasted and/or being paid, the source of the distribution and its sustainability need not be disclosed. Where forecasted distributions or current distributions are not being paid from cash available for distributions (excluding borrowing), we expect this information to be disclosed. Note: Due to the deletion of Disclosure Principle 5, this disclosure principle is now Disclosure Principle 6 in RG 46.
Disclosure Principle 8: Withdrawal arrangements We proposed to amend the disclosure principle to include the following additional information: • whether the constitution of the scheme makes provision for investors to withdraw from the scheme and the circumstances in which investors are able to withdraw; and • any significant risk factors that may affect the unit price at which a withdrawal will be made.	Generally, respondents agreed with this proposal, although one respondent stated that unlisted property schemes were being singled out through additional risk factors that may affect the unit price. Another respondent was of the view that the PDS should emphasise that property trusts are a long-term investment and that investors should not expect property trusts to be similar to a mark-to-market equity.	Generally, we consider that any impact on unit pricing should be disclosed as a matter of course. This applies to all products, not just unlisted property schemes. As such, we have made no changes to the proposed amendments for this disclosure principle. Note: Due to the deletion of Disclosure Principle 5, this disclosure principle is now Disclosure Principle 7 in RG 46.

Benchmark/disclosure principle proposed in CP 163	Feedback on benchmark/disclosure principle	How we propose to revise the benchmark/disclosure principle in RG 46
New disclosure principle: Net tangible assets This disclosure principle did not appear in CP 163, but was developed after further consultation with industry. It is Disclosure Principle 8 in RG 46.	During the consultation period, we received submissions that included a suggestion that NTA disclosure for closed-end schemes should be included in the updated RG 46, as this is important for retail investors in such schemes. Because we had not consulted on the inclusion of such disclosure in CP 163 we conducted further consultation, which included the suggested calculation for NTA for consistency of disclosure across funds. We found the majority to be supportive of such an initiative. NTA will provide investors with a better understanding of the value of the assets upon which the value of their unit is determined. Open-end schemes regularly disclose the NTA for the scheme, or a similar measure such as net asset backing or net asset value, to support the pricing of units in the scheme. Generally, this is not replicated for closed-end schemes.	In the updated RG 46 we have stated that, 'the responsible entity of a closed-end scheme should clearly disclose the value of the net tangible assets (NTA) of the scheme on a per unit basis in pre-tax dollars'. We consider that responsible entities should calculate the NTA of the scheme using the following formula: $$\text{NTA} = \frac{\text{Net assets – intangible assets +/- any other adjustments}}{\text{Number of units in the scheme on issue}}$$ Note: When making this NTA calculation, we expect responsible entities to comply with all relevant accounting standards. All NTA calculations should consider the joint ASIC and APRA unit pricing guide: Regulatory Guide 94 *Unit pricing: Guide to good practice* (RG 94). The responsible entity should disclose the methodology for calculating the NTA and details of the adjustments used in the calculation, including the reasons for the adjustments. Responsible entities should also explain to investors what the NTA calculation means in practical terms and how investors can use the NTA calculation to determine the scheme's level of risk.

E Conclusion and recommended option

178 We recommend Option 2.

179 We think that implementing Option 2 will result in improved disclosure documents, which better address (compared to current disclosure documents):

(a) the risks associated with unlisted property schemes; and

(b) whether the responsible entity has strategies in place to mitigate these risks, where possible.

180 We think that this option will have a direct positive impact on the ability of retail investors to make informed decisions about whether to invest in unlisted property schemes, thereby addressing the problems identified in Section A of this RIS.

181 This option may result in responsible entities incurring additional costs in spending time understanding the new approach and updating documents. These costs are likely to vary between responsible entities, depending on their current systems, and are difficult to quantify. None of the submissions we received provided a specific indication of these costs. However, it was suggested by respondents that disclosure of the benchmark and revised disclosure principle information would not be particularly onerous.

182 We anticipate that these costs will be limited for the following reasons:

(a) This option does not require responsible entities to make any changes to their business practices other than to the form of any current disclosure (although some may choose to change so that they meet the benchmarks in order to appear more attractive).

(b) Where respondents to CP 163 expressed concerns about the content of individual benchmarks, we have considered these comments, and have made changes that we think reflect reasonable industry practices (see Table 3).

(c) Responsible entities need to update their PDSs and provide ongoing disclosure on a regular basis to meet the current requirements of the law. The costs associated with this option are therefore not dissimilar to those that would be incurred by maintaining the status quo (other than where entities change their practices to meet the benchmarks).

(d) While we will monitor the uptake of the benchmark disclosure approach and assess the quality of disclosure documents using our guidance as a starting point, we propose to provide a long lead-in time for responsible entities to implement our updated guidance (i.e. until 1 November 2012) before we would start doing this (see Section F).

F Implementation and review

Implementing our proposals

183 While it is not a formal legal requirement to implement the benchmarks, our previous experience with implementing this kind of approach is that responsible entities are likely to follow our guidance. We expect that responsible entities will provide the benchmark and disclosure principle information in both their PDSs and ongoing disclosure documents.

184 Our proposed transition period is as follows:

(a) responsible entities should provide the benchmark and disclosure principle information to existing investors by 1 November 2012; and

(b) an existing PDS still in use or new PDSs issued on or after 1 November 2012 should disclose the benchmark and disclosure principle information.

185 We will review PDSs and other disclosures to monitor whether and how the benchmarks and disclosure principle information is being addressed from 1 November 2012 onwards. This review will check that the benchmark and disclosure principle information is being adequately disclosed to investors, and the new approach is resulting in improved documents.

186 We will also:

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

(b) discuss with responsible entities any concerns we have about their disclosure and, where necessary, require additional disclosure from them (e.g. about the practical impact of not following a particular benchmark and the associated risks for investors);

(c) conduct surveillance visits, as needed, to reinforce our disclosure expectations; and

(d) assess the relevance of the benchmarks and disclosure principles on an ongoing basis to ensure they remain relevant.

187 As outlined in paragraph 27, we can use our stop-order powers if we consider that a PDS does not comply with the PDS content requirements. At the end of the transition period, we will continue to review disclosure documents on an ongoing basis. We will have recourse to the stop-order powers if the documents do not disclose against the benchmarks on an ‘if not, why not’ basis or apply the disclosure principles, and do not meet the

requirements of the law in some alternative manner (i.e. by providing clear, concise and effective disclosure using some alternative format).

Our guidance

188 Our proposed policy will be implemented by publishing four documents:

(a) an updated regulatory guide (RG 46), explaining the amended disclosure principles, the benchmarks and the 'if not, why not' approach, and our expectations of responsible entities;

(b) a revised investor guide on unlisted property schemes, which explains the benchmarks and disclosure principles to prospective investors in more detail, to be released closer to the implementation date of 1 November 2012;

(c) a report summarising submissions received; and

(d) this RIS.