

Guidelines: Advertising or Publicity for Offers of Securities (s708(8), (10) & (11))

Promotion of Offers - Generally

Section 708 of the *Corporations Act 2001 (Cth)* (the **Act**) provides an exemption to companies from having to use a Disclosure Document when issuing or selling securities to certain types of investors (Disclosure Document meaning an ASIC registered disclosure document such as a prospectus, product disclosure statement or offer information statement).

To put simply, when you read s708 you will see that:

1. Personal offers of securities to those investors known to the company do not need disclosure if ... certain conditions are met;
2. An offer of securities to sophisticated investors do not need disclosure if... certain conditions are met;
3. An offer to professional investors do not need disclosure if ... certain conditions are met;
4. And so forth, with the remaining prescribed exempted offers of securities to specific types of investors if ... certain conditions are met.

However, you will notice that s708 **does not** entitle a company to freely advertise its offer to issue or sell securities. The only offers that may be openly advertised (subject to certain conditions prescribed by the Corporations Act) are Disclosure Documents lodged with the Australian Securities & Investment Commission (**ASIC**) (and even so, advertising and publicity must accord with the relevant provisions of the Act).

Promotion of s708(8), (10) & (11) (Sophisticated, Institutional or Professional Investor) Offers

The Corporations Act

Pursuant to sections 708(8), 708(10) and 708(11) of the Act, companies may promote its offer of securities to sophisticated, institutional (offers made through financial services licensees) or professional investors subject to certain conditions and exemptions such as 736(2)(a) (*Exemptions to prohibitions of prohibited securities hawking*).

The first question that needs to be asked by a company seeking investment from a sophisticated, institutional or professional investor is "how do I know you are a sophisticated, institutional or professional investor before I provide you with details in relation to an offer of securities?"

To avoid any suspected breach of s727(1) in relation to offering securities to investors without a disclosure document, an offer to sophisticated, institutional or professional investors being advertised or promoted to, must first be moulded to such an investor and thus such investors must be qualified as excluded investors prior to receiving information in relation to the offer of securities. Otherwise the company may be offering securities to investors without a disclosure document because the requirements of s708 have not been properly considered.



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Any promotion or advertising about an offer to sell securities must be anonymous (i.e. no company name) and expressly state that the advertisement is calling attention only to sophisticated, institutional and/or professional investors and must be advertised in a form directly able to qualify investors of this type prior to a company publishing details of its offer, otherwise, the company may be liable to ASIC for advertising contrary to s727(1).

The following is an example of a printed advertisement calling attention to sophisticated and/or professional investors:

**INVESTMENT OPPORTUNITY
INDUSTRIAL MANUFACTURER**

For the last 12 years this public unlisted company has been delivering high quality competitively priced products and services to all major industrial sectors from its bases in Queensland and China. This industrial manufacturing company is now looking to expand from this solid base to New South Wales, then the rest of Australia, followed by New Zealand. During this expansion of the marketplace, this company is also expanding its range of products whilst maintaining its core focus on the highest levels of customer service, loyalty and integrity.

This Company invites sophisticated, institutional and professional investors wishing to participate in the Company's expansion plans, to contact:

This advertisement does not constitute an offer or invitation to subscribe for shares. Any implied offer herein is an excluded offer pursuant to sections 708 (8), (10) & (11) of the Corporations Act 2001 (Cth).



This sample advertisement does not directly or indirectly advertise that the company is seeking capital or fund raising, however should an offer for securities be implied, the advertisement is targeted directly at sophisticated, institutional or professional Investors.

To ensure that s708 is not breached, the advertisement requires investors to contact a person (rather than obtain an investment document detailing the offer), which provides the company with the opportunity to qualify the investor as sophisticated, institutional or professional prior to promoting or disclosing a company's offer of securities.

To avoid ambiguity, any direct or indirect advertising or promotion of details about a company and its offer of securities (or an implied offer) in an attempt to raise funds through open forums or mass-media (for example, the Financial Review or Sydney Morning Herald, or any other general medium which is not specifically targeted to qualify investors) may be deemed by ASIC as advertising contrary to s727(1) (*offering securities without a disclosure document*).

In the event a company wishes to advertise its investment opportunity through its own website (which effectively discloses the fund raisers name), it would be prudent for a company to directly target sophisticated or professional investors and not simply invite people to invest.

To ensure that a company adequately complies with the provisions of the Act in relation to advertising to an excluded s708 investor (but not s708(1) investors), the Company should include wording to ensure that it targets only that type of investor and avoid words indicating that may imply fund raising or capital raising. To ensure that the offer is moulded to its target, the company should also include wording to express exactly what a sophisticated or professional investor is.

The following is an example of a company's website calling attention to sophisticated and/or professional investors:

Sophisticated or Professional Investors Only

ABC Corporation invites sophisticated and professional investors wishing to participate in the Company's expansion plans.

To invest in ABC Corp Limited, under the provisions of sections 708(8) or 708(11) of the *Corporations Act 2001 (Cth)*, investors need to be classified as "Sophisticated" or "Professional".

The tests for Sophisticated Investors relate to an Income and an Asset test, namely:

- Net assets of at least \$2.5m, or
- An aggregated gross income for each of the last two (2) financial years of at least \$250,000 per year.

The tests related to Professional Investors relate to:

- Management of funds in the amount of \$10 million dollars, or
- Holder of an Australian Financial Services Licence.

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If you meet either or both of these criteria, you may consider investing in our company. To do so, please download the Sophisticated Investor Certificate, complete the relevant parts and return the completed application to us where we will discuss our plans for growth and expansion with you.



Sophisticated Investor Certificate

Please note, the information contained on this webpage does not constitute an offer or invitation to subscribe for shares, however any implied offer herein is an excluded offer pursuant to sections 708 (8) & (11) of the Corporations Act 2001 (Cth).

The Class Order 02/273

Whilst companies may promote their offer of securities to qualified sophisticated, institutional or professional investors subject to certain conditions contained in the Act, companies may not promote or advertise offers of securities to the general public without a disclosure document.

The Australian Securities & Investment Commission (**ASIC**) recognised the need to allow some types of offers or invitations for securities to be circulated by an introduction service, subject to limits on the material that may be circulated about the offer and warnings about the use of information. Thus, ASIC (through its powers as prescribed in the Act) issued the *ASIC Class Order 02/273 "Business Introduction or Matching Services"* (**Class Order**).

The purpose of the Class Order is to provide certain exemptions from the fund raising provisions of the Act for persons involved in the making or calling attention to offers of securities through a business introduction service. For the purposes of this paper, the Class Order gives a business introduction or matching service provider the ability to make or call attention to an offer on behalf of a company.

Specifically, through the use of a business introduction or matching service provider a company can publish (and therefore promote) its name, logo and offer of securities, provided the recipient of that information has subscribed to receive the publication and has read the investor warnings and prominent statements (Class Order Warnings) as prescribed in the Class Order.

Summary

If a company wants to advertise or promote its own s708(8),(10) or (11) offer or implied offer to issue or sell securities openly in the public domain (website, media, print, etc.) it should be explained to the company that such actions need to be carefully moulded to ensure that there is no breach of the Act which may expose the company and its directors to civil and criminal liability: substantial fines, possible jail terms and the potential winding up of the company by ASIC.

Where any advertisement, document, editorial or press-release (with the exception of any Class Order related publication or website that needs to be "subscribed" to) leads a person to enter into a course of negotiations calculated to result in the issue or sale of securities (shares), and such conduct is regulated by the Act, then any person circulating the material (or placing the advertisement) may be liable to prosecution for breach of the Law.



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