

Guidelines: Advertising or Publicity for Offers of Securities (s708(1))

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(1) (20/12 Rule) Offers

The Corporations Act

Section 734(1) of the Act states that *no advertising or publicity is allowed for small scale offers made under the s708(1) exemption* and simply put, the Act prohibits the promotion and advertising in relation to small scale offerings.

However, pursuant to s708(2) a company may make a personal offer of its securities directly to persons who are likely to be interested in the offer (provided the offer is only accepted by the person to whom it is made), having regard to:

- a) previous contact;
- b) some professional or other connection or statements; or
- c) actions by that person that indicate that they are interested in offers of such kind – (s708(1)).

The following is an example of a personal offer of securities:

[date]

[name of potential investor]

[address]

[city/state/postal code]

Dear [Name]:

I am currently seeking an investor for my company, _____, which _____.

Due to our previous/current relationship as _____ and based on your interest in _____, I believe that our opportunity may be of personal interest to you, and have enclosed a copy of our investment document. Before reviewing the investment document, please ensure that you read the Investor Warning which is located on page _____.

Our company is an industry leader in <_____>. Our mission is to <_____>. We have targeted _____ for our product / service because of <_____>. Our competitive advantage stems from <_____>.

We also have a strong management team and Board of Directors, which includes _____.

Thank you _____ for your consideration and interest in _____. Please contact me with any questions you have, and I will be pleased to provide any additional information you require. If, upon completing your review, you would like to discuss this matter further, please do not hesitate to contact me, by telephone at <_____>, by email at <_____>, or by pager at <_____>.

Yours truly

[Name of company]

[name of person signing]

[title of person signing]

The Class Order 02/273

Whilst the Act prohibits the advertising and publicity of small scale offers, 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 *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 provides an exemption to the s734(1) restriction in relation to circulating (publishing) material about a small scale offer by a business introduction service, provided such promotion is done within the restrictive and prescribed manner set forth in the Class Order.

Summary

Whilst a company may personally offer to those persons deemed as 'interested in offers of this kind', a company should **NEVER** advertise, promote, publicise its own s708(1) offer of securities publicly without a current disclosure document or without being exempted from the fund raising provisions of the Act through the engagement of a business introduction or matching service provider.

If a company wants to advertise or promote its own s708(1) 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 are a breach of the Act and 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.