



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 201

# Unsolicited credit cards and debit cards

July 2010

### **About this guide**

This is a guide for people (card providers) who send out credit or debit cards to consumers.

It sets out ASIC's position on the prohibition of the unsolicited sending of credit cards and debit cards in s12DL of the *Australian Securities and Investments Commission Act 2001* (ASIC Act), and in particular the scope of the exceptions to that prohibition.

## About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

## Document history

This version was issued on 15 July 2010 and is based on legislation and regulations as at 15 July 2010.

Previous version:

- Superseded Regulatory Guide 201, issued 6 August 2009

## Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

## When is the sending of credit cards and debit cards allowed by s12DL of the ASIC Act?

### Key points

The sending out of credit cards and debit cards is prohibited by s12DL of the ASIC Act except in circumstances set out in s12DL(2).

We consider that credit cards and debit cards can be sent to a consumer where they have been solicited either:

- directly through a written request by the consumer; or
- indirectly because the card replaces another card that has previously been requested or used by the consumer and has substantially the same features.

RG 201.1 Section 12DL(1) of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) provides that a person must not send another person (called the ‘targeted person’ in the section) a credit card or debit card, except in accordance with s12DL(2).

RG 201.2 Section 12DL(2) of the ASIC Act sets out three circumstances in which a card may be sent out. These are:

- (a) in response to a request in writing by the person who will be liable to the issuer of the card in respect of the use of the card (see s12DL(2)(a));
- (b) in renewal or replacement of, or in substitution for, a card of the same kind previously sent to the targeted person after a request in writing to the issuer of the previous card (see s12DL(2)(b)(i)); and
- (c) in renewal or replacement of, or in substitution for, a card of the same kind previously sent to the targeted person and used for a purpose for which it was intended to be used (see s12DL(2)(b)(ii)).

RG 201.3 Card providers may be uncertain about what conduct is permitted by s12DL(2). This guide sets out how we will administer this provision.

### Purpose of s12DL

RG 201.4 This provision mirrors s63A of the *Trade Practices Act 1974* (TPA). Section 63A of the TPA was introduced following a large number of unsolicited credit cards being sent to consumers who did not have an existing credit arrangement with the relevant credit provider. The concerns that arose as a result of this conduct were identified as:

- (a) credit cards, if sent out unsolicited, could fall into the wrong hands;

- (b) the risk that a mail out of unsolicited credit cards might breach the privacy of consumers;
- (c) the risk that consumers would be confused and anxious about receiving unsolicited credit cards; and
- (d) the potential for increased consumer debt as a result of the availability of unsolicited credit.

RG 201.5 We think that cards that are sent in the following circumstances are sent in compliance with s12DL(2) of the ASIC Act:

- (a) A card (the initial card) is sent in response to a written request by a consumer: see s12DL(2)(a). The initial card is directly solicited by the consumer, and the consumer is in a position to know what the features of the card are before asking for it to be sent.
- (b) A card (the first replacement card) is sent to renew or replace, or as a substitute for, the initial card: see s12DL(2)(b)(i).
- (c) A card (a subsequent replacement card) is sent to renew or replace, or as a substitute for, the first replacement card or a subsequent replacement card that has been used by the consumer: see s12DL(2)(b)(ii).

RG 201.6 As each card that is sent is either directly requested by the consumer, the same as the card that was directly requested or is used for the purpose for which it was intended to be used, the consumer will not receive a card they have not asked for or agreed to.

### **What is the meaning of ‘in renewal or replacement of, or in substitution for’?**

RG 201.7 These terms are not defined in the ASIC Act. We will apply them in accordance with the decision in *Westpac Banking Corporation v. Australian Securities & Investments Commission* [2009] FCA 1506 (*Westpac v. ASIC*). In that case, the court considered the operation of s12DL.

#### **Renewal**

RG 201.8 Renewal of a card will occur close to the expiry date of the credit or debit card. By renewing the card, the issuer creates a new expiry date for the card: see *Westpac v. ASIC* at 28.

#### **Replacement**

RG 201.9 A replacement card ordinarily would be one sent to take the place of a card that had been lost or stolen from the cardholder: see *Westpac v. ASIC* at 28.

### Substitution

RG 201.10 A card in substitution is not normally an exact replica. Often a substitute will have different characteristics, even though it will be able to take the place of the original: see *Westpac v. ASIC* at 28.

### What is the meaning of ‘a card of the same kind’?

RG 201.11 The phrase ‘a card of the same kind’ was considered in *Westpac v. ASIC* and was found by the court to have the following meaning:

the defining characteristic of each ‘kind’ of card in s12DL(2) is the ability to use it for one particular purpose, whatever other functions or purposes it may have. That defining characteristic is either to obtain credit from the issuer for which the customer will be liable or to obtain access to the customer’s funds from the issuer. The former characteristic means that the card is a credit card, the latter that it is a debit card. (*Westpac v. ASIC* at 43)

RG 201.12 This means that:

- (a) where a consumer has a credit card, they may be sent another credit card in renewal, replacement or substitution of the previous credit card, whether or not the new card has additional functionality or purpose; and
- (b) where a consumer has a debit card, they may be sent another debit card in renewal, replacement or substitution of the previous debit card, whether or not the new card has additional functionality or purpose.

### Examples

RG 201.13 Table 1 describes some situations in which cards are sent to existing cardholders and gives guidance on whether we consider that the sending of the cards would be allowed under s12DL.

**Table 1: Examples illustrating how s12DL may apply to different conduct**

Example	How s12DL applies
1 A person loses their credit card and asks in writing for a new card to be sent.	The consumer has solicited the sending of the card. This would be allowed under s12DL(2)(a).
2 A card provider sends a replacement card with expanded functionality (compared to the existing card). The replacement card is the same type of card (i.e. credit card or debit card) as the existing card.	As held in <i>Westpac v. ASIC</i> this would be allowed by s12DL(2)(b) because it is ‘a card of the same kind’.

Example	How s12DL applies
3 A card provider sends a new card to an existing cardholder whose existing card is close to expiry.	<p>If the existing card was sent out in response to a written request from the consumer, this situation would be covered by s12DL(2)(b)(i). Because the consumer previously requested a particular kind of card, the consumer has indirectly solicited the sending of the replacement card.</p> <p>If the existing card is itself a replacement of a previous card and the cardholder has used the existing card, this situation would be covered by s12DL(2)(b)(ii).</p> <p>However, if the cardholder has not used their existing card, the connection to the original written request would be broken. Sending a new card in these circumstances would not be allowed under s12DL.</p>
4 A card provider wishes to send unsolicited 'companion cards' to each existing cardholder in addition to their existing card. A companion card may, for example, allow the client to use an additional payment system to access the client's existing account. Loyalty points are offered to encourage use of the additional card.	This situation would not be allowed under s12DL. The companion card is an additional card and not a replacement of, or substitute for, an existing card.

### Applications for a no-action letter where the application of s12DL is not clear

- RG 201.14 We have previously refused to take a no-action position in the circumstances where a card provider has sent a new card to an existing cardholder whose existing card is close to expiry but the cardholder has not used their existing card. This is because we consider that s12DL is intended to prohibit this conduct for the benefit of consumers, and it would not serve a clear regulatory purpose to provide a no-action letter.
- RG 201.15 We have also previously refused to take a no action position in the circumstances where a card provider wishes to send unsolicited 'companion cards' to each existing cardholder in addition to their existing card.
- RG 201.16 However, we recognise that product development and innovations by card providers may result in some circumstances where the application of s12DL is not clear. If you consider that it is not clear whether a particular card distribution would be permitted under s12DL, you may apply to ASIC for a no-action letter. Our policy on considering applications for a no-action position is set out in Regulatory Guide 108 *No-action letters* (RG 108).