

ASIC CLASS ORDER [05/308]

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

Paragraph 911A(2)(1) – Variation

The Australian Securities and Investments Commission (ASIC) makes Class Order [C0 05/308] *Foreign financial services providers - amendment* under s911A(2)(1) of the *Corporations Act 2001* (the Act). Section 911A(2)(1) provides that a person is exempt from the requirement to hold an Australian financial services licence for a financial service they provide if the provision of the service is covered by an exemption specified by ASIC in writing and published in the *Gazette*.

1. Background

ASIC has adopted Policy Statement 176 *Licensing: Discretionary powers-wholesale foreign financial services providers* [PS 176] which outlines when ASIC will grant exemptions from the requirement to hold an Australian financial services (AFS) licence to financial services providers who:

- provide services in Australia only to wholesale clients; and
- are regulated by an overseas regulatory authority.

ASIC has granted class order relief under [PS 176] to foreign financial services providers (FFSPs) regulated by a number of overseas regulatory authorities (existing [PS 176] class orders). The existing [PS 176] class orders are listed at the end of this Explanatory Statement.

Under these existing [PS 176] class orders, an FFSP is only exempt from the obligation to hold an AFS licence if the FFSP meets certain requirements. These requirements include an obligation to notify ASIC as soon as practicable of the following matters (***notification requirements***):

- any significant change to the authorisation granted by the relevant overseas regulatory authority to the FFSP relevant to the actual financial services provided in Australia under the exemption;
- any exemptions granted to the FFSP under the relevant overseas regulatory regime;
- any significant changes to the relevant overseas regulatory regime relevant to the actual financial services provided in Australia under the exemption; and
- any enforcement or disciplinary action against the FFSP in any foreign jurisdiction by any overseas regulatory authority and the nature of such action.

In addition, under the existing [PS 176] class orders an FFSP's exemption lapses unless, within 10 business days of the day on which the FFSP becomes aware (or should reasonably have become aware) of a breach of the notification requirements or certain other requirements, the FFSP has provided full particulars of the breach to

ASIC and ASIC has notified the FFSP that it may continue to rely on the exemption (*lapsing provisions*).

2. Purpose of the class order

The purpose of [CO 05/308] is to facilitate the administration of and compliance with class orders issued under [PS 176].

3. The class order

[CO 05/308] amends the notification requirements and the lapsing provisions included in the existing [PS 176] class orders.

Notification provisions

[CO 05/308] amends the notification requirements of the existing [PS 176] class orders to permit 6-monthly reporting, including nil returns, in relation to the following two notification requirements:

- any significant changes to the relevant overseas regulatory regime relevant to the actual financial services the FFSP is providing in Australia under any exemption; and
- any enforcement or disciplinary action against the FFSP in any foreign jurisdiction by any overseas regulator and the nature of such action.

These notification requirements have been modified to facilitate FFSPs' compliance with our requirements and to make the policy easier for ASIC to enforce. Other notification requirements in the existing [PS 176] class orders are not affected by [CO 05/308].

Lapsing provisions

[CO 05/0308] modifies the lapsing provisions of the existing [PS 176] class orders in order to create more realistic time periods before relief lapses. Rather than 10 business days during which the FFSP must notify ASIC of its failure to comply with requirements of the class order and ASIC must respond, [CO 05/0308] provides that the FFSP has 15 business days during which to notify ASIC of such a failure, and ASIC has a further 30 business days to consider whether relief should continue to apply.

4. Consultation

In preparing [CO 05/308], ASIC has taken into account industry views expressed at regular industry liaison meetings. In addition, officers of ASIC met with representatives of IBSA, certain FFSPs, and their legal representatives to discuss the details of this class order.

ASIC did not undertake further consultation because [CO 05/308] is of a minor and machinery nature and does not substantially alter ASIC's existing policy in [PS 176].

5. Existing [PS 176] class orders

ASIC has granted class order relief under [PS 176] to FFSPs regulated by:

- the UK Financial Services Authority (Class Order [CO 03/1099] *UK FSA regulated financial service providers*, as amended by Class Order [CO 04/100] *Foreign financial services providers: licensing relief – amendment*);
- the US Securities and Exchange Commission (Class Order [CO 03/1100] *US SEC regulated financial service providers*, as amended by Class Order [CO 04/100] *Foreign financial services providers: licensing relief – amendment*);
- the US Federal Reserve and Office of Comptroller of Currency (Class Order [CO 03/1101] *US Federal Reserve and OCC regulated financial service providers*, as amended by Class Orders [CO 04/100] *Foreign financial services providers: licensing relief - amendment* and [CO 04/213] *US Federal Reserve and OCC regulated financial service providers - amendment*);
- the Monetary Authority of Singapore (Class Order [CO 03/1102] *Singapore MAS regulated financial service providers*, as amended by [CO 04/100] *Foreign financial services providers: licensing relief – amendment*);
- the Securities and Futures Commission of Hong Kong (Class Order [CO 03/1103] *Hong Kong SFC regulated financial service providers*, as amended by [CO 04/100] *Foreign financial services providers: licensing relief - amendment*);
- the US Commodity Futures Trading Commission (Class Order [CO 04/829] *US CFTC regulated financial services providers*); and
- the Bundesanstalt für Finanzdienstleistungsaufsicht of Germany (BaFin) (Class Order [CO 04/1313] *German BaFin regulated financial service providers*).

These class orders were made under s911A(2)(l) of the Act. Future [PS 176] class orders will be made under s911A(2)(h) of the Act, as a result of amendments to the Act by the *Financial Services Reform Amendment Act 2003*.