

ASIC Class Order [CO 04/1313]

German BaFin regulated financial service providers

This instrument has effect under s911A(2)(l) of the *Corporations Act 2001*.

This compilation was prepared on 17 July 2012 taking into account amendments up to [CO 12/572]. See the table at the end of this class order.

Prepared by the Australian Securities and Investments Commission.

Australian Securities and Investments Commission Corporations Act 2001 — Paragraph 911A(2)(l) — Exemption

Under paragraph 911A(2)(l) of the *Corporations Act 2001* (the *Act*) the Australian Securities and Investments Commission (*ASIC*) exempts the persons referred to in Schedule A from the requirement to hold an Australian financial services licence in the case referred to in Schedule B.

Schedule A

A foreign company (the *body*) to which all of the following apply:

- (a) the body holds a German Banking Licence;
- (b) the body is either a body corporate incorporated in Germany or a partnership formed in Germany;
- (c) the body:
 - (i) is registered under Division 2 of Part 5B.2 of the Act; or
 - (ii) has an Agent at the time the body first purports to rely on this instrument and, from that time, has not failed to have an Agent for any consecutive period of 10 business days;
- (d) the body's primary business is the provision of financial services;
- (e) neither the body nor its Agent has been notified by ASIC that the body is excluded from relying on this instrument;
- (f) if the body becomes aware or should reasonably have become aware of matters that give it reason to believe that it has failed, other than in an immaterial respect, to comply with a requirement set out in Schedule C:
 - (i) 15 business days have not passed since the body became so aware or should reasonably have become so aware without the body providing full particulars of the failure to ASIC (to the extent that the body knows those particulars or would have known them if it had undertaken reasonable enquiries); and
 - (ii) 30 business days have not passed from ASIC receiving those particulars from the body without ASIC notifying the body that it may continue to rely on this instrument; and

- (g) the body has not notified ASIC that it will not rely on this instrument.

Schedule B

Where:

1. the body provides any of the following financial services (the *financial services*) in this jurisdiction to wholesale clients:
 - (a) providing financial product advice;
 - (b) dealing in a financial product;
 - (c) making a market for a financial product; or
 - (d) providing a custodial or depository service;in respect of any of the following financial products:
 - (e) derivatives;
 - (f) foreign exchange contracts;
 - (g) securities;
 - (h) debentures, stocks or bonds issued by a government;
 - (i) interests in a managed investment scheme that is not required to be registered under Chapter 5C of the Act;
 - (j) managed investment products;
 - (k) deposit-taking facilities that are not deposit products; or
 - (l) facilities through which a person makes non-cash payments; and
2. the body has provided ASIC with:
 - (a) evidence that paragraph (a) of Schedule A is satisfied that ASIC has stated in writing is adequate;
 - (b) a notice that it will provide financial services in this jurisdiction in reliance on this instrument;
 - (c) a deed of the body for the benefit of and enforceable by ASIC and the other persons referred to in subsection 659B(1) of the Act that applies notwithstanding that the body may have ceased to rely, or never have relied, on this instrument, which deed provides that:
 - (i) the deed is irrevocable except with the prior written consent of ASIC;
 - (ii) the body submits to the non-exclusive jurisdiction of the Australian courts in legal proceedings conducted by ASIC (including under section 50 of the ASIC Act) and, in relation to proceedings relating to a financial services law,

by any person referred to in subsection 659B(1) of the Act and whether brought in the name of ASIC or the Crown or otherwise;

- (iii) the body covenants to comply with any order of an Australian court in respect of any matter relating to the provision of the financial services;
 - (iv) if the body is not registered under Division 2 of Part 5B.2 of the Act, service of process on the body in relation to legal proceedings conducted by ASIC (including under section 50 of the ASIC Act) and, in relation to proceedings relating to a financial services law, by any person referred to in subsection 659B(1) of the Act and whether brought in the name of ASIC or the Crown or otherwise can be effected by service on the Agent; and
 - (v) the body covenants that, on written request of either BaFin or ASIC, it will give or vary written consent and take all other practicable steps to enable and assist BaFin to disclose to ASIC and ASIC to disclose to BaFin any information or document that BaFin or ASIC has that relates to the body; and
- (d) written consents to the disclosure by BaFin to ASIC and ASIC to BaFin of any information or document that BaFin or ASIC has that relates to the body (being consents in such form (if any) as ASIC specifies in writing).

Schedule C

1. The body must provide each of the financial services in this jurisdiction in a manner which would comply, so far as is possible, with the German regulatory requirements if the financial service were provided in Germany in like circumstances.
2. The body must:
 - (a) notify ASIC, as soon as practicable and in any event within 15 business days after the body became aware or should reasonably have become aware, and in such form if any as ASIC may from time to time specify in writing, of the details of:
 - (i) each significant change to, including the termination of, the German Banking Licence applying to the body relevant to the financial services the body provides or intends to provide in this jurisdiction; and
 - (ii) [deleted];
 - (iii) each significant particular exemption or other relief which the body obtains from the German regulatory requirements relevant to the financial services the body provides or intends to provide in this jurisdiction; and
 - (iv) each significant investigation, enforcement or disciplinary action taken by BaFin or other overseas regulatory authority against the body in a foreign jurisdiction in relation to financial services provided in the foreign jurisdiction; and;

- (b) provide written disclosure to all persons to whom the financial services are provided in this jurisdiction (before the financial services are provided) containing prominent statements to the following effect:
 - (i) the body is exempt from the requirement to hold an Australian financial services licence under the Act in respect of the financial services; and
 - (ii) the body is regulated by BaFin under German laws, which differ from Australian laws; and
- (c) if ASIC gives the body a written notice directing the body to lodge with ASIC, within the time specified in the notice, a written statement containing specified information about any financial service provided by the body in this jurisdiction—comply with the notice.

Interpretation

In this instrument:

address, in relation to a company, means the address of the registered office of the company;

Agent means a natural person resident in this jurisdiction or a company, whose name and address were last notified to ASIC by the body for the purposes of this instrument, and who is authorised to accept on the body's behalf, service of process from ASIC and, in relation to proceedings relating to a financial services law, from any person referred to in subsection 659B(1) of the Act;

BaFin means the Bundesanstalt für Finanzdienstleistungsaufsicht of Germany;

custodial or depository service has the meaning given by section 766E of the Act;

deposit product has the meaning given by section 761A of the Act;

derivative has the meaning given by section 761D of the Act;

financial product advice has the meaning given by section 766B of the Act;

financial services law has the meaning given by section 761A of the Act;

foreign exchange contract has the meaning given by section 761A of the Act;

German Banking Act means the Gesetz über das Kreditwesen of Germany;

German Banking Licence means a licence granted by BaFin under section 32 of the German Banking Act or deemed to be so granted under section 61 or section 64e of the German Banking Act;

German regulatory requirements means the rules that apply in relation to the financial services including any applicable legislation, instruments made under that legislation and any relevant policies or other documents (however described) issued by BaFin;

makes non-cash payments has the meaning given by section 763D of the Act;

making a market has the meaning given by section 766D of the Act;

managed investment product has the meaning given by section 761A of the Act;

notice and *notified* mean, respectively, written notice and notified in writing;

overseas regulatory authority means a foreign regulatory authority (other than BaFin) which regulates financial services and which is established by or for the purposes of a foreign government or legislative body;

securities has the meaning given in section 761A of the Act; and

wholesale client has the meaning given in section 761G of the Act.

Note: By subsection 761H(1) of the Act, the operation of this instrument in relation to partnerships is affected by section 761F and subsection 769B(4) of the Act.

Commencement

This instrument takes effect on gazettal.

Notes to ASIC Class Order [CO 04/1313]

Note 1

ASIC Class Order [CO 04/1313] (in force under s911A(2)(l) of the *Corporations Act 2001*) as shown in this compilation comprises that Class Order amended as indicated in the tables below.

Table of Instruments

Instrument number	Date of making or FRLI registration	Date of commencement	Application, saving or transitional provisions
[CO 04/1313]	21/10/2004 (<i>see</i> F2006B01475)	26/10/2004	
[CO 05/308]	17/5/2005 (<i>see</i> F2005L01187)	17/5/2005	-
[CO 12/572]	3/7/2012 (<i>see</i> F2012L01500)	3/7/2012	-

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Sch A	am. [CO 05/308] and [CO 12/572]
Sch C.....	am. [CO 05/308] and [CO 12/572]