

ASIC CLASS ORDER [CO 07/42]

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

Paragraphs 741(1)(b) and 1020F(1)(c) – Variation

The Australian Securities and Investments Commission (**ASIC**) makes Class Order [CO 07/42] *Disclosure for onsale of securities and other financial products - Variation* under paragraphs 741(1)(b) and 1020F(1)(c) of the *Corporations Act 2001* (the **Act**). Paragraph 741(1)(b) provides that ASIC may declare that Chapter 6D applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration. Paragraph 1020F(1)(c) provides that ASIC may declare that Part 7.9 applies in relation to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

1. Background

Prospectus relief for secondary sales of securities received under foreign schemes

Chapter 6D regulates the making of offers for the issue or sale of securities. It provides a disclosure and liability regime so as to ensure adequate investor protection in circumstances where an investor may not know all the information needed to make a decision whether to accept an offer of securities.

In addition to requiring disclosure for the issue of securities, the provisions set out where an offer for the sale of securities needs disclosure to investors. The following sale offers need disclosure under Chapter 6D (unless an exemption applies):

- an offer of a body's securities for sale by the body's controller where the securities are either not quoted or not offered for sale in the ordinary course of trading on a relevant financial market;
- an offer of a body's securities for sale within 12 months after their issue without disclosure where either the body issued the securities, or the person to whom they were issued acquired them, with the purpose of the securities being on-sold; and
- an offer of a body's securities for sale within 12 months after their sale without disclosure by the body's controller where the securities were at the time of sale by the controller either not quoted or not offered for sale in the ordinary course of trading on a relevant financial market and either the controller sold the securities, or the person to whom they were sold acquired them, with the purpose of the securities being on-sold.

The offer of securities for issue under a Part 5.1 scheme of arrangement (**Part 5.1 scheme**) is exempt from the prospectus requirement under subsection 708(17) of the Act. [CO 04/671] gives disclosure relief for secondary sales of securities where the

securities were issued without disclosure because of subsection 708(17) to facilitate the on-sale of securities received in a Part 5.1 scheme.

[CO 07/9] gives disclosure relief for offers of securities for issue under schemes of arrangement (*foreign schemes*) regulated by or under a law in force in certain foreign countries. This is because these jurisdictions provide scheme regulation that offers a comparable level of disclosure and investor protection to that provided in Australia. Similarly to securities received under Part 5.1 schemes, secondary sales of securities received under a foreign scheme would be inhibited by the requirement to prepare a prospectus.

PDS relief for secondary sales of financial products received under Part 5.1 schemes and foreign schemes

Part 7.9 regulates the issue, sale and purchase of financial products (except securities). It provides a disclosure and liability regime so as to ensure adequate protection in circumstances where a person who is a retail client may not know all the information needed to make a decision whether to acquire a financial product.

The provisions set out where the sale of a financial product needs disclosure, generally in the form of a Product Disclosure Statement (*PDS*). A PDS may need to be given (unless an exemption applies):

- by a person who gives personal advice recommending a particular financial product; and
- by a person who sells a financial product in certain situations.

[CO 07/9] gives relief from the requirement to prepare a PDS for financial products offered under a Part 5.1 scheme or foreign scheme because the offers are likely to be accompanied by adequate disclosure. However, secondary sales of financial products received under a Part 5.1 scheme or foreign scheme would be inhibited by the requirement under Part 7.9 to prepare a PDS.

PDS relief for secondary sales of financial products received under an employee share scheme

Class Order [CO 04/671] grants disclosure relief for the on-sale of securities that were issued without disclosure because the issuer relied on relief from the provisions of Chapter 6D granted by ASIC in relation to an employee share scheme.

ASIC class order and individual relief instruments also allow financial products other than securities to be issued under an employee share scheme without a PDS being prepared. Before Class Order [CO 07/42] came into effect, a PDS was required for the on-sale of financial products that were issued without a PDS in reliance on ASIC relief relating to an employee share scheme.

2. Purpose of the class order

The purpose of [CO 07/42] is to provide relief from the disclosure requirements to persons who make offers to sell:

- (a) securities received under a foreign scheme; or
- (b) financial products received under a Part 5.1 scheme or a foreign scheme.

3. The class order

[CO 07/42] varies [CO 04/671] to:

- (a) give disclosure relief for the on-sale of securities or financial products where the securities or products were issued without disclosure to investors under Part 6D.2 or without a PDS for the product being prepared because:
 - (i) subsection 708(17) applied; or
 - (ii) the issuer relied upon Class Order [CO 07/9]; and
- (b) extend the on-sale disclosure relief that applies where offers were made without disclosure in reliance on ASIC relief for an employee share scheme so that a PDS will not be required for the on-sale of financial products that were issued without a PDS in reliance on that relief.

4. Consultation

In July 2005, ASIC released a Policy Proposal Paper *Disclosure in reconstructions (PPP)* seeking submissions from interested parties on a range of proposals, including the relief in [CO 07/42]. Submissions received in response to the PPP supported the relief in [CO 07/42].