

Australian Securities and Investments Commission
Corporations Act 2001 – Subsections 601QA(1), 741(1) and 1020F(1) – Variation

Enabling provisions

1. The Australian Securities and Investments Commission makes this instrument under subsections 601QA(1), 741(1) and 1020F(1) of the *Corporations Act 2001*.

Title

2. This instrument is ASIC Class Order [CO 10/105].

Commencement

3. This instrument commences on the day after the day it is registered under the *Legislative Instruments Act 2003*.

Note: An instrument is registered when it is recorded on the Federal Register of Legislative Instruments (*FRLI*) in electronic form: see *Legislative Instruments Act 2003*, s 4 (definition of *register*). The FRLI may be accessed at <http://www.frli.gov.au/>.

Variation

ASIC Class Order [CO 05/26]

4. ASIC Class Order [CO 05/26] is varied by after subparagraph 5(a) inserting:
“(aa) where subsection 601GAA(4) as notionally inserted into the Act by this instrument applies—treating members who hold interests of the same class differently by offering and issuing interests in accordance with ASIC Class Order [CO 09/425]; or”.

ASIC Class Order [CO 09/425]

5. ASIC Class Order [CO 09/425] is varied as follows:
 - (a) omit paragraph 8, substitute:
 - “8. Subject to paragraph 9, the issuer must not issue shares or interests to a registered holder under the purchase plan unless:
 - (a) the holder has, on application for the shares or interests, provided the issuer with a certificate to the effect that the total of the application price for the following does not exceed \$15,000:
 - (i) the shares or interests the subject of the application;

- (ii) any other shares or interests in the class applied for under the purchase plan or any shares or interests in the class issued under a similar arrangement in the 12 months before the application;
 - (iii) any other shares or interests in the class which the holder has instructed a custodian to acquire on their behalf under the purchase plan;
 - (iv) any other shares or interests in the class issued to a custodian under an arrangement similar to the purchase plan in the 12 months before the application as a result of an instruction given by the holder to the custodian or another custodian and which resulted in the holder holding beneficial interests in the shares or interests; or
- (b) if the holder has applied for shares or interests using an electronic payment facility referred to in the written offer document, the part of the offer document containing instructions for use of the facility includes:
- (i) a unique identifier in relation to the holder that must be provided by the holder when making a payment using the facility and that is not provided by the issuer to the holder other than in the offer document; and
 - (ii) a prominent statement to the effect that the holder, in applying for shares or interests, represents to the issuer that the total of the application price for the following does not exceed \$15,000:
 - (A) the shares or interests the subject of the application;
 - (B) any other shares or interests in the class applied for under the purchase plan or any shares or interests in the class issued under a similar arrangement in the 12 months before the application;
 - (C) any other shares or interests in the class which the holder has instructed a custodian to acquire on their behalf under the purchase plan;
 - (D) any other shares or interests in the class issued to a custodian under an arrangement similar to the purchase plan in the 12 months before the application as a result of an instruction given by the holder to the custodian or another custodian and which resulted in the holder holding beneficial interests in the shares or interests.”;
- (b) omit paragraph 9, substitute:

“9. If the purchase plan involves custodian offers, the issuer must not issue shares or interests to a custodian with a total application price exceeding \$15,000 in any 12 month period unless on application for the shares or interests, the custodian certifies the following in writing to the issuer:

- (a) either or both of the following:
 - (i) that the custodian holds shares or interests in the class on behalf of one or more other persons (each a *participating beneficiary*) that are not custodians;
 - (ii) that another custodian (*downstream custodian*) holds beneficial interests in shares or interests in the class on behalf of one of more other persons (each a *participating beneficiary*), and the custodian holds the shares or interests to which those beneficial interests relate on behalf of the downstream custodian or another custodian;

on the date referred to in paragraph (a) of the definition of *purchase plan* and that each participating beneficiary has subsequently instructed the following persons:

- (iii) where subparagraph (i) applies—the custodian; and
- (iv) where subparagraph (ii) applies—the downstream custodian;

to apply for shares or interests on their behalf under the purchase plan;

- (b) the number of participating beneficiaries;
- (c) the name and address of each participating beneficiary;
- (d) in respect of each participating beneficiary:
 - (i) where subparagraph (a)(i) applies—the number of shares or interests in the class that the custodian holds on their behalf; and
 - (ii) where subparagraph (a)(ii) applies—the number of shares or interests in the class to which the beneficial interests relate;
- (e) in respect of each participating beneficiary:
 - (i) where subparagraph (a)(i) applies—the number or the dollar amount of shares or interests they instructed the custodian to apply for on their behalf; and
 - (ii) where subparagraph (a)(ii) applies—the number or the dollar amount of shares or interests they instructed the downstream custodian to apply for on their behalf;
- (f) there are no participating beneficiaries in respect of which the total of the application price for the following exceeds \$15,000:

- (i) the shares or interests applied for by the custodian under the purchase plan in accordance with the instructions referred to in subparagraph (e); and
- (ii) any other shares or interests in the class issued to the custodian in the 12 months before the application as a result of an instruction given by them to the custodian or the downstream custodian to apply for shares or interests on their behalf under an arrangement similar to the purchase plan;
- (g) that a copy of the written offer document was given to each participating beneficiary;
- (h) where subparagraph (a)(ii) applies—the name and address of each custodian who holds beneficial interests in the shares or interests in the class held by the custodian in relation to each participating beneficiary.

In providing a certificate under this paragraph, the custodian may rely on information provided to it by the participating beneficiary and any custodian who holds beneficial interests in the shares or interests in the class held by the custodian.

- (c) in paragraph 10:
 - (i) in subparagraph (c) after “the custodian”, insert “or another custodian”;
 - (ii) in subparagraph (d) after “the custodian”, insert “or another custodian”;
- (d) in paragraph 14:
 - (i) omit the definition of *custodian*, substitute:

“*custodian* means a person:

 - (a) that holds an Australian financial services licence that:
 - (i) covers the provision of a custodial or depositary service; or
 - (ii) includes a condition requiring the holder to comply with the requirements of ASIC Class Order [CO 02/294]; or
 - (b) that is exempt under:
 - (i) paragraph 7.6.01(1)(k) of the *Corporations Regulations 2001*; or
 - (ii) ASIC Class Order [CO 05/1270] to the extent that it relates to ASIC Class Order [CO 03/184]; or
 - (iii) paragraph 911A(2)(h) of the Act;

from the requirement to hold an Australian financial services licence for the provision of a custodial or depositary service;
or

- (c) that is a trustee of a:
 - (i) self-managed superannuation fund; or
 - (ii) superannuation master trust; or
- (d) that is the responsible entity of an IDPS-like scheme; or
- (e) that is the registered holder of shares or interests in the class and is noted on the register of members of the body or scheme (as the case may be) as holding the shares or interests on account of another person.”;

- (ii) after the definition of *excluded order* insert:

“*IDPS-like scheme* has the meaning given by ASIC Class Order [CO 02/296] or any class order that replaces that class order.

instruction includes a direction or request.”;

- (iii) in the definition of *purchase plan*:

(A) in paragraph (e) omit “the issue price is less than the market price”, substitute “the issue price of the shares or interests is less than the market price of the shares or interests”;

(B) omit paragraph (f), substitute:

“(f) the total application price for the shares or interests acquired:

- (i) by a person on their own behalf; and
- (ii) by a custodian on behalf of the person; and
- (iii) by a custodian in relation to which another custodian holds beneficial interests in the shares or interests on behalf of the person;

in any 12 month period does not exceed \$15,000.”;

- (iv) after the definition of *registered holder* insert:

“*regulated superannuation fund* has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

self-managed superannuation fund has the meaning given by section 17A of the *Superannuation Industry (Supervision) Act 1993*.

superannuation master trust means a regulated superannuation fund under which:

- (a) a member of the fund is, or is entitled, to give an instruction (including a direction or request) that a particular financial product is to be acquired; and
- (b) if the member gives such an instruction, the trustee, or a custodian who holds financial products on behalf of the trustee, must (subject to any discretion they have to refuse) acquire the financial product; and
- (c) if the trustee or custodian acquires the financial product pursuant to an instruction given by the member, the member is to have rights or benefits calculated by reference to dividends or other benefits derived from the product.”;
- (v) in subparagraph (c) omit “if a custodian”, substitute “subject to subparagraph (ca), if a custodian”;
- (vi) after subparagraph (c) insert:
 - “(ca) If, in relation to an IDPS-like scheme, a superannuation master trust or a self-managed superannuation fund, a member of the scheme, trust or fund has their distributions of capital and income from the scheme, trust or fund determined by reference to shares or interests that are held by the responsible entity or trustee of the trust or fund (or, if applicable, another custodian) as a result of an instruction given by the member to the responsible entity or trustee, then:
 - (i) any shares or interests held by the responsible entity or trustee (or, if applicable, another custodian) as a result of the instruction are taken to be held on behalf of the member;
 - (ii) any instruction given by the member to the responsible entity or trustee to acquire shares or interests is taken to be an instruction to acquire shares or interests on behalf of the member; and
 - (iii) any application for shares or interests by the responsible entity or trustee (or, if applicable, another custodian) as a result of an instruction given by the member is taken to be an application to acquire shares or interests on behalf of the member.

Note: In IDPS-like schemes, superannuation master trusts and self-managed superannuation funds, the responsible entity or trustee may hold trust property on behalf of members as a whole rather on behalf of a specific member even if the property was acquired on the instructions of that member.”;

- (vii) after subparagraph (e)(i) insert:

“(ia) references to issue price and market price of shares or interests in paragraph (e) of the definition of *purchase plan* apply to the stapled security as if its component shares or interests constituted a single share or interest and not to any of those components separately;”;

(viii) after subparagraph (h)(i) insert:

“(ia) where both the arrangement and the purchase plan involve custodian offers—only one of them involves offers to a custodian to acquire shares or interests in the class where another custodian holds beneficial interests in the shares or interests on behalf of another person; or”.

Transitional

6. The variations made by paragraph 5 of this instrument do not apply to a purchase plan under which the first offer was made before the commencement of this instrument.

Interpretation

7. In paragraph 6 of this instrument:

purchase plan has the same meaning as in ASIC Class Order [CO 09/425] as originally made.

Dated this 10th day of March 2010

Signed by Stephen Yen PSM
as a delegate of the Australian Securities and Investments Commission