

ASIC CLASS ORDER [CO 10/737]

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes ASIC Class Order [CO 10/737] under paragraph 911A(2)(1) of the *Corporations Act 2001 (Act)*.

Paragraph 911A(2)(1) provides that a person is exempt from the requirement to hold an Australian financial services (**AFS**) 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 Regulatory Guide 176 *Licensing: Discretionary powers - wholesale foreign financial services providers* (RG 176) which outlines when ASIC will grant exemptions from the requirement to hold an 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 RG 176 to foreign financial services providers (FFSPs) regulated by a number of overseas regulatory authorities (existing RG 176 class orders). The existing RG 176 class orders are listed at the end of this Explanatory Statement.

2. Purpose of the class order

The purpose of [CO 10/737] is to update a number of the existing RG 176 class orders.

Changes to Class Order's [03/1099], [03/1100], [03/1103] and [04/829] (the class orders)

Since the class orders were issued ASIC has received a number of relief applications seeking relief to allow FFSPs to offer financial services to wholesale investors in respect of interests in registered managed investment schemes (managed investment products). Managed investment products were not included in the class orders when they were first issued, as it was not required by the original applicants. ASIC's policy, upon receiving applications to include this financial service, has been to provide this relief on a case-by-case basis through individual relief instruments. We are now amending the class orders to include managed investment products in the list of financial services covered by the relief. It is also noted that [CO 03/1101], [CO

03/1102] and [CO 04/1313] (also granted under RG 176) already include "managed investment products" as one of the financial products being made available to FFSPs providing financial services to wholesale clients. The amendment ensures consistency across all RG 176 class orders.

Additional changes to Class Order [CO 03/1100]

All broker-dealers in the United States who are doing business with the public are required to become a member of a national securities association approved by the SEC. In July 2007, the National Association of Securities Dealers (**NASD**) changed its name to the Financial Industry Regulatory Authority (**FINRA**) and took on the member firm regulatory functions of the New York Stock Exchange (**NYSE**). Also at that time, US regulations were amended so that FINRA became the only association to which broker-dealers who dealt with the public could be a member. To date we have dealt with this by individual relief instruments. Given the other changes, it is now appropriate to update [CO 03/1100] by removing the reference to NYSE and replacing the reference to NASD with FINRA.

On 17 February 2004 [CO 03/1100] was amended by expanding the scope of the term 'body' in paragraph (aa) of Schedule A to include a 'partnership formed in the US or a State of the US'. The Information Release issued by ASIC on 17 February 2004 as a practical guide for wholesale FFSPs seeking licensing relief using the amended [CO 03/1100] states that either bodies corporate or partnerships may rely on the relief. Although [CO 03/1100] was amended to include 'partnerships', the corresponding amendment to the definition of a 'registered investment adviser' was overlooked. The proposed amendment to the definition of a "registered investment adviser" is necessary to reflect the change envisaged in February 2004.

3. Operation of the class order

Under paragraph 4 of [CO 10/737] we add the words 'managed investment products' to the list of financial products in paragraph 1 of Schedule B of [CO 03/1099].

Under paragraph 5(a) of [CO 10/737] we amend [CO 03/1100] *US SEC regulated financial service providers* by removing the reference to NYSE and replacing the reference to NASD with FINRA.

Under paragraph 5(b) of [CO 10/737] we amend [CO 03/1100] by adding 'managed investment products' to the list of financial products in paragraph 1 of Schedule B of.

Under paragraph 5(c) of [CO 10/737] we amend the interpretation section of [CO 03/1100] to reflect the above changes, and we add the words 'partnership formed in the US or a State of the US' to the definition of a registered investment adviser.

Under paragraph 6 of [CO 10/737] we amend [CO 03/1103] by adding 'managed investment products' to the list of financial products in paragraph 1 of Schedule B.

Under paragraph 7 of [CO 10/737] we amend [CO 04/829] by adding 'managed investment products' to the list of financial products in paragraph 1 of Schedule B.

4. Consultation

ASIC did not undertake consultation with regard to the changes because they are minor and technical in nature.

5. Existing RG 176 class orders

ASIC has granted class order relief under RG 176 to FFSPs regulated by:

- the UK Financial Services Authority (Class Order [CO 03/1099] *UK FSA regulated financial service providers*, as amended);
- the US Securities and Exchange Commission (Class Order [CO 03/1100] *US SEC regulated financial service providers*, as amended);
- 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);
- the Monetary Authority of Singapore (Class Order [CO 03/1102] *Singapore MAS regulated financial service providers*, as amended);
- the Securities and Futures Commission of Hong Kong (Class Order [CO 03/1103] *Hong Kong SFC regulated financial service providers*, as amended);
- the US Commodity Futures Trading Commission (Class Order [CO 04/829] *US CFTC regulated financial services providers*, as amended); and
- the Bundesanstalt für Finanzdienstleistungsaufsicht of Germany (BaFin) (Class Order [CO 04/1313] *German BaFin regulated financial service providers*, as amended).