

ASIC CLASS ORDER [CO 10/789]

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 10/789] *Variation of Class Order [CO 09/425]* under paragraphs 741(1)(a) and 1020F(1)(a) of the *Corporations Act 2001* (the **Act**).

Paragraph 741(1)(a) provides that ASIC may exempt a class of persons from the provisions of Chapter 6D of the Act. Paragraph 1020F(1)(a) provides that ASIC may exempt a class of persons from the provisions of Part 7.9 of the Act.

1. Background

Class Order [CO 09/425] *Share and interest purchase plans* provides conditional relief from the disclosure requirements in:

- Ch 6D of the Act for shares offered by ASX-listed companies to existing members under a share purchase plan; and
- Part 7.9 of the Act for interests offered by ASX-listed managed investment schemes to existing members under an interest purchase plan.

As well as providing relief for offers to investors who hold their shares or interests directly, [CO 09/425] also provides relief for offers to investors who hold their shares or interests through one or more “custodian”, as defined in [CO 09/425].

2. Purpose of the class order

The purpose of [CO 10/789] is to extend the definition of “custodian” to cover entities that provide a custodial or depositary service under certain exemptions relieving them from the requirement to hold an Australian financial services (**AFS**) licence.

“Custodian” is currently defined in [CO 09/425] to include persons who hold an appropriate AFS licence, as well as persons who are not required to hold an AFS licence for the provision of a custodial or depositary service because of one of the following:

- (i) paragraph 7.6.01(1)(k) of the *Corporations Regulations 2001* (the **Regulations**);
- (ii) ASIC Class Order [CO 05/1270] to the extent that it relates to ASIC Class Order [CO 03/184]; and
- (iii) paragraph 911A(2)(h) of the Act.

The variation made by [CO 10/789] will allow share and interest purchase plans to be extended to persons who hold their securities through a custodian that does not hold an AFS licence because it relies on one of the following exemptions:

- (i) paragraph 7.6.01(1)(na) of the Regulations;

- (ii) ASIC Class Order [CO 03/1099], [CO 03/1100], [CO 03/1101], [CO 03/1102], [CO 04/829] or [CO 04/1313] – the foreign financial service provider (FFSP) class orders; or
- (iii) individual instruments of relief granted by ASIC on similar terms to the FFSP class orders.

The exemption under paragraph 7.6.01(1)(na) of the Regulations allows foreign entities to provide custodial or depositary services (among other things) to both retail and wholesale clients if the foreign entity is related to an AFS licensee and the licensee arranges for the foreign entity to provide the service. The licensee is required as a condition of its licence to be responsible for the conduct of the foreign entity. These requirements provide protection for investors who hold securities through such a custodian.

The FFSP class orders are made under paragraph 911A(2)(l) of the Act. Their requirements are similar to the requirements of an exemption under paragraph 911A(2)(h) (which is already covered by [CO 09/425]). In order to rely on one of the FFSP class orders, an entity must be regulated by an overseas regulatory authority in their home jurisdiction, and the custodial or depositary service may only be provided to wholesale clients in Australia.

3. Operation of the class order

This class order varies the definition of “custodian” to include persons exempted from the AFSL requirement under:

- (i) paragraph 7.6.01(1)(na) of the Regulations;
- (ii) ASIC Class Orders [CO 03/1099], [CO 03/1100], [CO 03/1101], [CO 03/1102], [CO 04/829] or [CO 04/1313] – the FFSP class orders; or
- (iii) individual instruments of relief granted by ASIC on similar terms to the FFSP class orders.

4. Consultation

The variation under [CO 10/789] was made after industry stakeholders raised with ASIC the fact that entities relying on the AFS licensing exemptions discussed above were not included in the definition of “custodian” in [CO 09/425].

Due to the minor and machinery nature of the variation under [CO 10/789], no general public consultation was undertaken.