

# ASIC CLASS ORDER [CO 12/1482]

## 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 12/1482] under paragraph 283GA(1)(b) of the *Corporations Act 2001* (the *Act*).

Section 283GA provides that ASIC may declare that Chapter 2L of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

### **1. Background**

A “debenture” in its simplest form is an undertaking to repay money.

Section 283BH of the Act sets out rules on how debentures may be described in a document relating to an offer (eg. a prospectus or an advertisement). Section 283BH includes three permitted categories, being a mortgage debenture, debenture and an unsecured note (or unsecured deposit note). The applicable category depends on the nature of any security, the type of property offered as collateral under the security and whether the property that constitutes the security is sufficient to meet the obligations under the debenture. Relevantly, only security over “tangible property” is taken into account for this purpose.

“Tangible property” is property that has an actual physical existence (for example, goods and land). Tangible property is distinguished from intangible or incorporeal property such as a chose in action (e.g. a receivable). A charge in favour of a trustee over a loan receivable by an issuer does not constitute a charge over the “tangible property” of the issuer. The law therefore requires that debentures that are only secured by receivables and other intangible property to be called an unsecured note or unsecured deposit note.

A large number of issuers in this market offer security in favour of the trustee over intangible property (eg. loans receivable) and the law requires that their product be described as an 'unsecured note' or 'unsecured deposit note'. ASIC has had a no-action position in the market since 2005 so that the reference to 'unsecured' could be avoided where the 'tangible property' requirement was not met. ASIC was asked to consult on the operation of the law in section 283BH of the Act out of concern from issuers and their representative groups that the law was unfair and led to a misleading description of certain products. We consulted on introducing a new category to sit between ‘unsecured note’ and ‘debenture’ in the hierarchy of how these products can be described under the Act.

## **2. Purpose of the class order**

The purpose of this class order is to introduce a new “secured notes” category for the purposes of section 283BH of the Act where security has been provided over intangible property, subject to various conditions.

The class order provides issuers who offer debentures with sufficient first ranking security that do not satisfy the higher “debenture” or “mortgage debenture” naming tests with an alternative to “unsecured notes” for the purposes of section 283BH provided they meet the terms of the class order. Where the terms of the Class Order are met, a debenture will be able to be called a “secured note”.

The key objective of the class order is to strike an appropriate balance between assisting issuers avoid a label that their product is unsecured where there is sufficient security in place and ensuring that investors are aware of the risk of loss and readily understand the underlying security.

## **3. Operation of the class order**

The class order declares that Chapter 2L of the Act applies to all persons as if section 283BH were modified or varied to introduce a new way of referring to a debenture in section 283BH, namely the “secured note” description. This is done by inserting a new category of “secured notes” into the table in subsection 283BH(1).

The class order introduces a new subsection 283BH(4) into the Act that set out the circumstances in which the “secured notes” description can be used. The key requirements are that:

- the issuer has provided a first ranking security interest in favour of the trustee; and
- the security under the security interest is sufficient and is reasonably likely to be sufficient to meet the liability for the repayment of investor’s money.

There are also requirements for an issuer to ensure that advertisements for the product makes it clear that the secured note is not a bank deposit and there is a risk that investors could lose some or all of their money; and to make ongoing disclosure about the nature of the security interest and the secured property and related party exposures. An issuer using the term “secured note” is also required to make available on their website its most recent quarterly reports, its current disclosure document and the last 12 months of continuous disclosure notices.

## **4. Statement of Compatibility with Human Rights**

This statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

This class order is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act because it does not engage any of the applicable rights or freedoms. The effect of the class order is to modify the operation of statutory obligations which apply to bodies (for example, companies) but not to individuals.

## **5. Consultation**

Before making this class order, ASIC engaged in public consultation.

In March 2011, ASIC released Consultation Paper 151: *Debt securities: Modifying the naming provisions and advertising requirements*.

In August 2011, ASIC conducted further consultation with respondents to the Consultation Paper and other interested parties.