

# ASIC CLASS ORDER [CO 12/572]

## EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (**ASIC**) makes Class Order [CO 12/572] under paragraph 911A(2)(l) of the *Corporations Act 2001 (the Act)*.

Paragraph 911A(2)(l) 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 Regulatory Guide 176 *Licensing: Discretionary powers – wholesale foreign financial services providers (RG 176)* outlines when ASIC will grant conditional relief from the requirement to hold an AFS licence to foreign financial services providers (**FFSPs**) who:

- (a) provide services in Australia only to wholesale clients; and
- (b) are regulated by overseas regulatory authorities.

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

- the UK Financial Services Authority ([CO 03/1099] *UK FSA regulated financial service providers*);
- the US Securities and Exchange Commission ([CO 03/1100] *US SEC regulated financial service providers*);
- the US Federal Reserve and Office of Comptroller of Currency ([03/1101] *US Federal Reserve and OCC regulated financial service providers*);
- the Monetary Authority of Singapore ([CO 03/1102] *Singapore MAS regulated financial service providers*);
- the Securities and Futures Commission of Hong Kong ([CO 03/1103] *Hong Kong SFC regulated financial service providers*);
- the US Commodity Futures Trading Commission ([CO 04/829] *US CFTC regulated financial service providers*); and

- the Bundesanstalt für Finanzdienstleistungsaufsicht of Germany (BaFin) ([CO 04/1313] *German BaFin regulated financial service providers*).

## 2. Purpose of the class order

The purpose of [CO 12/572] is to amend the abovementioned principal RG 176 class orders to effect recent changes made to RG 176, designed to:

- clarify wording; and
- reduce the reporting burden on exempt FFSPs while ensuring ASIC has timely access to important information about those FFSPs which ASIC may not otherwise have access to.

The clarification of wording is to ensure that at the time a FFSP purports to rely on relief, the FFSP is registered as a foreign company under Division 2, Part 5B.2 of the Act, or has appointed a local agent.

We have removed the requirement for exempt FFSPs to report to ASIC every 6 months of any significant regulatory changes in their home regulatory regime, as this is information that ASIC can obtain by other means now. This reduces the reporting burden on exempt FFSPs.

We have also removed the requirement for exempt FFSPs to report to ASIC every 6 months of details of each enforcement or disciplinary action taken by an overseas regulatory authority against the FFSP. Instead, we now only require notifications of significant investigation, enforcement or disciplinary actions on an ongoing basis. RG 176 provides guidance on what constitutes a ‘significant’ investigation, enforcement or disciplinary action in this context. This change potentially relieves the reporting burden on exempt FFSPs and helps ensure that ASIC is aware of significant compliance issues relating to exempt FFSPs close to the time when they attract the interest of an overseas regulatory authority.

The requirement around notifications of significant matters (which now include significant investigation, enforcement or disciplinary actions amongst other significant changes) has been refined from being needed ‘as soon as practicable’ to ‘as soon as practicable and in any event within 15 business days after the body became aware or should reasonably have become aware’ of those matters. This refinement to continuing notifications assists the timeliness with which ASIC obtains information about, for example, any changes to authorisation of an exempt FFSP in its home jurisdiction or actions commenced against it, which may affect the FFSP’s provision of financial services in Australia and the relief it is relying on.

Lastly, a new condition has been introduced requiring exempt FFSPs to directly provide us with information about any financial services provided by them in Australia if we give them a written notice directing them to. This will help facilitate a more efficient process for ASIC to obtain information about an exempt FFSP’s activities in Australia, based on our operational experience with administering this form of relief.

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

This class order has the effect that:

- (a) an exempt FFSP ensures it has appointed a local agent before it purports to rely on relief, unless it has already registered as a foreign company;
- (b) an exempt FFSP must lodge notifications of significant matters outlined in Schedule C of the relevant class order as soon as practicable and in any event within 15 business days after it becomes aware or should reasonably have become aware of those matters;
- (c) an exempt FFSP is no longer required to lodge with ASIC biannual notifications of significant regulatory changes to its home regulatory regime or each enforcement or disciplinary action taken against it by an overseas regulatory authority;
- (d) only significant investigation, enforcement or disciplinary actions taken by any overseas regulatory authority against an exempt FFSP in relation to financial services:
  - (i) will need to be notified to ASIC on a continuing basis, in line with other continuing notification requirements in RG 176;
  - (ii) do not need to be concluded before they are required to be notified to ASIC; and
- (e) an exempt FFSP will need to comply with any written notice from ASIC directing it to provide information about any financial services provided by it in Australia.

### **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 the *Human Rights (Parliamentary Scrutiny) Act 2011* because it does not engage any of the applicable rights or freedoms.

### **5. Consultation**

Before making this class order, a joint ASIC and Department of Treasury consultation paper was released for consultation in June 2008: *Consultation Paper 98 Cross-border recognition: Facilitating access to overseas markets and financial services (CP 98)*. The update to RG 176 and related material includes refinements to content and requirements following feedback received from respondents to CP 98 and ongoing industry consultation.

The Office of Best Practice Regulation confirmed that a Regulation Impact Statement was not necessary.