

ASIC CLASS ORDER [CO 12/573]

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes Class Order [CO 12/573] under paragraphs 601QA(1)(a), 741(1)(a), 741(1)(b), 911A(2)(1), 1020F(1)(a) and 1020F(1)(c) of the *Corporations Act 2001* (**the Act**).

Paragraph 601QA(1)(a) provides that ASIC may exempt a class of persons from the provisions of Chapter 5C of 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 741(1)(b) provides that ASIC may declare that Chapter 6D applies to a class of persons as if specified provisions were omitted, modified or varied as specified in the declaration.

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 and published in the Gazette.

Paragraph 1020F(1)(a) provides that ASIC may exempt a class of persons from the provisions of Part 7.9 of the Act, and paragraph 1020F(1)(c) provides that ASIC may declare that Part 7.9 applies in relation to a class of persons as if provisions of that Part were omitted, modified or varied as specified in the declaration.

1. Background

ASIC Regulatory Guide 178 *Foreign collective investment schemes* (**RG 178**) outlines when ASIC will generally provide conditional relief from managed investment scheme registration, fundraising requirements, the AFS licensing requirements for certain financial services, and some of the financial product disclosure requirements to operators of foreign collective investment schemes (**FCIS**) where the following pre-conditions are met:

- (a) the regulatory regime in the jurisdiction (the **home jurisdiction**) from which the FCIS operator originates and in which it is regulated is sufficiently equivalent to the Australian regulatory regime for registered managed investment schemes and financial product disclosure;
- (b) ASIC has effective cooperation arrangements with the regulator of the FCIS in the FCIS's home jurisdiction; and

- (c) adequate rights and remedies are practically available to investors resident in Australia if the FCIS operator breaches the relevant provisions of the regulatory regime in its home jurisdiction.

ASIC has granted class order relief under RG 178 to FCIS operators primarily regulated in the following overseas jurisdictions:

- The USA, New Zealand or Jersey – see [CO 04/526] *Foreign collective investment schemes*;
- Singapore – see [CO 07/753] *Singaporean collective investment schemes*; and
- Hong Kong – see [CO 08/506] *Hong Kong collective investment schemes*.

2. Purpose of the class order

The purpose of [CO 12/573] is to amend the abovementioned principal RG 178 class orders to effect recent changes made to RG 178, designed to:

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

The requirement around notifications of significant matters (which now include significant investigation, enforcement or disciplinary actions amongst other significant changes – see below) 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 ongoing notifications assists the timeliness with which ASIC obtains information about, for example, any changes to authorisation of an exempt FCIS operator in its home jurisdiction or actions commenced against it, which may affect its provision of financial services in Australia and the relief it is relying on.

We have removed the requirement for exempt FCIS operators to report to ASIC any significant regulatory changes in their home regulatory regime on an ongoing basis, as this is information that ASIC can obtain by other means now. This reduces the reporting burden on exempt FCIS operators.

We have altered the requirement for exempt FCIS operators to report to ASIC on an ongoing basis the details of each enforcement or disciplinary action taken by an overseas regulatory authority against the exempt FCIS operator. Instead, we now only require notifications of significant investigation, enforcement or disciplinary actions. RG 178 provides guidance on what constitutes a ‘significant’ investigation, enforcement or disciplinary action in this context. This change potentially relieves the reporting burden on exempt FCIS operators and helps ensure that ASIC is aware of significant compliance issues relating to them close to the time when they attract the interest of an overseas regulatory authority.

Lastly, a new condition has been introduced requiring exempt FCIS operators 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 FCIS operators' 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 FCIS operator must lodge notifications of 'significant' matters outlined in 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;
- (b) an exempt FCIS operator is no longer required to lodge with ASIC ongoing notifications of significant regulatory changes to its home regulatory regime or each enforcement or disciplinary action taken against it by an overseas regulatory authority;
- (c) only significant, 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 178;
 - (ii) do not need to be concluded before they are required to be notified to ASIC; and
- (d) an exempt FCIS operator 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 178 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.