**ASIC CLASS ORDER [CO 12/1267]**

**EXPLANATORY STATEMENT**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (***ASIC***) makes Class

Order [CO 12/1267] under paragraphs 601QA(1)(a), 741(1)(a), 741(1)(b), 911A(2)(l), 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)(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 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:

1. 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;
2. ASIC has effective cooperation arrangements with the regulator of the FCIS in the FCIS’s home jurisdiction; and
3. 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 for the purposes of 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*.

In June 2012 ASIC updated RG 178. ASIC also made Class Order [CO 12/573] to vary existing class orders made for the purposes of RG 178, reflecting key changes to RG 178.

One of the refinements to RG 178 and the relevant class orders was an amended notification requirement. Under the requirement exempt FCIS operators are required to notify ASIC of significant enforcement or disciplinary actions or investigations as soon as practicable after the exempt FCIS operator becomes aware of them. Previously FCIS operators were only required to notify ASIC of significant enforcement or disciplinary actions (not investigations).

**2. Purpose of the class order**

The purpose of the class order is to address an unintended consequence that arose as a result of the amendment to the class orders in June 2012. The unintended consequence is that the condition that requires an exempt FCIS operator to notify ASIC of significant investigations of the body by an overseas regulatory authority may cause the exempt FCIS operator being investigated to contravene a foreign law by notifying ASIC of such an investigation.

**3. Operation of the class order**

The class order has the effect that an exempt FCIS operator must notify ASIC of significant investigations unless, after having taken reasonable steps to enable notification to be given to ASIC, the exempt FCIS operator is prohibited by law from giving such notification but only to the extent of the prohibition.

Reasonable steps might involve measures such as informing the overseas regulatory authority that the FCIS operator is subject to the condition of the class order, and requesting the overseas regulatory authority to consent to the notification to ASIC.

The extent to which a foreign law may prohibit such notification to ASIC may vary from jurisdiction to jurisdiction. For example, it may be that a foreign law prohibits the notification to ASIC of details of the investigation but does not prohibit the notification to ASIC of the fact that there is such an investigation.

**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 the updates to RG 178, 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 included refinements to content and requirements following feedback received from respondents to CP 98 and ongoing industry consultation. There was targeted consultation with industry associations on the draft updated RG 178.

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