

ASIC CLASS ORDER [CO 13/854]

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 13/854] under paragraphs 655A(1)(b), 673(1)(b), 741(1)(a) and 1020F(1)(a) of the *Corporations Act 2001* (the Act).

Paragraph 655A(1)(b) of the Act provides that ASIC may declare that Chapter 6 of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

Paragraph 673(1)(b) of the Act provides that ASIC may declare that Chapter 6C of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

Paragraph 741(1)(a) of the Act provides that ASIC may exempt a person from a provision of Chapter 6D of the Act.

Paragraph 1020F(1)(a) of the Act provides that ASIC may exempt a person or a class of persons from all or specified provisions of Part 7.9 of the Act.

1. Background

ASIC Class Order [CO 04/523] *Investor directed portfolio service takeovers relief* modifies section 609 of the Act so that the operator, and certain persons involved in the operation, of an investor directed portfolio service (IDPS) do not have a relevant interest in securities held through the IDPS. However, the relief will not apply to the operator (and potentially other persons) if the operator has not complied with the requirements of ASIC Class Order [CO 02/294] *Investor Directed Portfolio Services*.

ASIC Class Order [CO 09/425] *Share and interest purchase plans* provides conditional relief from certain provisions in:

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

Relief under [CO 09/425] is subject to conditions including a \$15,000 limit on the value of securities that can be issued to an investor under a purchase plan without a prospectus or PDS in a rolling 12 month period. However, in some cases custodians

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or nominees can invest more than \$15,000 if they are acting on behalf of their clients and each client does not invest more than \$15,000. The term “custodian” in [CO 09/425] includes persons whose Australian financial services licence requires them to comply with [CO 02/294].

ASIC Class Order [CO 13/763] *Investor Directed Portfolio Services* provides various relief in relation to the operation of IDPSs. Similar relief was previously provided by Class Order [CO 02/294]. [CO 02/294] was revoked by [CO 13/763], but may continue to apply to existing operators of IDPSs until 30 June 2014 under transitional provisions. Amendments to [CO 04/523] and the definition of “custodian” in [CO 09/425] are necessary to deal with the revocation of [CO 02/294] and the fact that it may continue to apply to certain persons until 30 June 2014.

A number of other ASIC class orders notionally modify Chapters 6 and 6C of the Act (including by notionally inserting new provisions) for other purposes. These include:

- (i) ASIC Class Order [CO 00/455] *Collective action by institutional investors*;
- (ii) ASIC Class Order [CO 11/272] *Substantial holding disclosure: securities lending and prime brokering*; and
- (iii) ASIC Class Order [CO 12/1209] *Relevant interests, ASIC and ASIC Chairperson*.

2. Purpose of the class order

Class Order [CO 13/854] updates [CO 04/523] and [CO 09/425] to reflect the introduction of [CO 13/763], including by amending:

- (i) the definitions of “IDPS” and “operator” in [CO 04/523];
- (ii) the application of the relief under [CO 04/523]; and
- (iii) the definition of “custodian” in [CO 09/425].

Class Order [CO 13/854] also makes a number of minor and technical changes relating to the numbering and presentation of the provisions notionally amended and inserted into Chapters 6 and 6C by [CO 04/523], [CO 00/455], [CO 11/272] and [CO 12/1209] to clarify their concurrent operation. These changes do not affect the substantive operation of the class orders.

3. Operation of the class order

Class Order [CO 13/854] amends [CO 04/523] and [CO 09/425] so that:

- (i) the definitions for “IDPS” and “operator” in [CO 04-523] reflect the definitions for those terms in [CO 13/763];

- (ii) a person will not be able to rely on the relief in [CO 04/523] if ASIC has given a notice in writing to the person to the effect that the relief does not apply to the person and has not withdrawn that notice;
- (iii) an operator of an IDPS that continues to rely on [CO 02/294] under transitional provisions will not be able to rely on the relief in [CO 04/523] if the operator has not complied with or taken reasonable steps to comply with [CO 02/294]; and
- (iv) the limb of the definition of “custodian” in [CO 09/425] that covers the operation of an IDPS reflects the definition of IDPS in [CO 13/763].

Class Order [CO 13/854] also updates the numbering and layout of a number of provisions notionally inserted by [CO 04/523], [CO 00/455], [CO 11/272] and [CO 12/1209].

4. Documents incorporated by reference

Class Order [CO 13/854] incorporates by reference [CO 13/763]. This document is available on ASIC’s website at www.asic.gov.au and is registered on the Federal Register of Legislative Instruments.

5. Consultation

ASIC did not conduct any public consultation for the purposes of Class Order [CO 13/854] because the class order merely:

- (i) effects consequential changes required as a result of the changes to ASIC’s policy on platforms (including IDPSs) which was the subject of public consultation in March 2012; and
- (ii) makes other changes that are of a minor or machinery nature.

In March 2012, ASIC published a consultation paper setting out our proposals and supporting rationale for reviewing our regulatory approach to platforms: see *Consultation Paper 176 Review of ASIC policy on platforms: Update to RG 148*. The consultation process closed on 20 April 2012. A summary of key submissions made in response to the consultation paper and further targeted consultation, together with our consideration of those responses, can be found in Report 351 *Response to submissions on CP 176 Review of ASIC policy on platforms: Update to RG 148*.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

ASIC Class Order [CO 13/854]

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*.

Overview of the class order

This class order amends Class Orders [CO 04/523] and [CO 09/425] to deal with the fact that:

- (i) relief previously provided by Class Order [CO 02/294] in relation to the operation of certain investment platforms known as Investor Directed Portfolio Services (IDPSs) was replaced by new relief in Class Order [CO 13/763]; and
- (ii) the former relief may continue to apply to certain persons until 30 June 2014 under transitional provisions.

In particular, Class Order [CO 13/854] amends [CO 04/523] and [CO 09/425] so that:

- (i) certain definitions in [CO 04/523] (which provides takeovers relief in relation to IDPSs) and in [CO 09/425] (which provides disclosure relief in relation to share and interest purchase plans) reflect definitions used in [CO 13/763];
- (ii) a person will not be able to rely on the takeovers relief in [CO 04/523] if ASIC has given a notice in writing to the person to the effect that the relief does not apply to the person and has not withdrawn that notice; and
- (iii) an operator of an IDPS that continues to rely on [CO 02/294] under transitional provisions will not be able to rely on the relief in [CO 04/523] if the operator has not complied with or take reasonable steps to comply with [CO 02/294].

This class order also updates the numbering and layout of a number of provisions notionally inserted into Chapters 6 and 6C of the *Corporations Act 2001* by Class Orders [CO 04/523], [CO 00/455], [CO 11/272] and [CO 12/1209].

Human rights implications

This class order does not engage any of the applicable rights or freedoms.

Conclusion

This class order is compatible with human rights as it does not raise any human rights issues.

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