

Australian Securities and Investments Commission
Corporations Act 2001—Subsections 601QA(1), 1020F(1), 655A(1) and 673(1)—
Exemptions and Declarations

Enabling Legislation

1. The Australian Securities and Investments Commission (*ASIC*) makes this instrument under subsections 601QA(1), 1020F(1), 655A(1) and 673(1) of the *Corporations Act 2001* (the *Act*).

Title

2. This instrument is ASIC Class Order [CO 13/721].

Commencement

3. This instrument commences on the date it is registered under the *Legislative Instruments Act 2003*.

Note: An instrument is registered when it is recorded on the Federal Register of Legislative Instruments (*FRLI*) in electronic form: see *Legislative Instruments Act 2003*, section 4 (definition of *register*). The FRLI may be accessed at <http://www.frli.gov.au/>.

Exemption—Unequal treatment in withdrawal from an AQUA exchange traded fund

4. A responsible entity of an AQUA exchange traded fund does not have to comply with paragraph 601FC(1)(d) of the Act to the extent that it would prevent the responsible entity from permitting only authorised participants to withdraw from the fund.

Where the exemption applies

5. The exemption applies where all of the following are satisfied:
 - (a) there is a Product Disclosure Statement in relation to interests in the AQUA exchange traded fund that are admitted or are to be admitted to Trading Status as ETF Securities that contains statements to the effect that:
 - (i) the responsible entity will not treat members of the same class equally to the extent that it restricts withdrawal from the fund to authorised participants; and
 - (ii) except in exceptional circumstances only authorised participants may withdraw from the fund, but other members may sell their interests on the AQUA market; and
 - (iii) when interests in the AQUA exchange traded fund are suspended from trading on the AQUA market for more than 5 consecutive Trading Days, members have a right to withdraw from the fund and receive

payment for their interests in money within a reasonable time of request unless any of the following apply:

- (A) the fund is being wound-up;
 - (B) the fund is not liquid as defined in subsection 601KA(4) of the Act;
 - (C) the responsible entity suspends withdrawals in accordance with the constitution;
- (b) the constitution of the AQUA exchange traded fund does not permit a withdrawal fee per interest in the fund to be payable by a member who is not an authorised participant that is greater than the withdrawal fee per interest that would generally be payable by an authorised participant receiving redemption proceeds in cash while interests in the AQUA exchange traded fund are quoted when withdrawing the minimum parcel;
- (c) ASIC has not notified the responsible entity in writing that it is excluded from reliance on the exemption.

Note: Subparagraph 5(b) applies regardless of whether the withdrawal fees for the fund are calculated on a per interest basis or otherwise.

Exemption—Unequal treatment in provision of information to authorised participants

6. A responsible entity of an AQUA exchange traded fund does not have to comply with paragraph 601FC(1)(d) of the Act to the extent that it would prevent the responsible entity from providing information to authorised participants before other members about:
- (a) the index the fund aims to track as its investment strategy; and
 - (b) scheme property specifying:
 - (i) the number and class of securities and any other property required to acquire an interest in the fund by authorised participants on the Trading Day that first ends after the information is provided; and
 - (ii) the number and class of securities and any other property transferred on withdrawal from an interest in the fund by authorised participants on the Trading Day that first ends after the information is provided.

Where the exemption applies

7. The exemption applies where both of the following apply:
- (a) there is a Product Disclosure Statement in relation to interests in the AQUA exchange traded fund that are admitted or are to be admitted to Trading Status as ETF Securities that contains a statement to the effect that the responsible

entity will provide information about the index that the fund aims to track as its investment strategy and the number and identity of securities in the fund to authorised participants before other members;

- (b) ASIC has not notified the responsible entity in writing that it is excluded from reliance on the exemption.

Conditions

- 8. The responsible entity must:
 - (a) publicly disclose any information which has been disclosed to authorised participants as permitted by the exemption before the commencement of the Trading Day after the day on which such disclosure was made to authorised participants; and
 - (b) take reasonable steps to ensure that the following information is publicly available and updated every 15 minutes during each Trading Day:
 - (i) where the AQUA exchange traded fund has only one class of interests—the indicative net asset value per interest in the AQUA exchange traded fund; or
 - (ii) otherwise—the indicative net asset value per interest for each class of interests.

Exemption—Ongoing disclosure

- 9. A responsible entity of an AQUA exchange traded fund does not have to comply with section 1017B of the Act in relation to interests in a class of interests in the fund that are admitted to Trading Status as ETF Securities for as long as the conditions in paragraph 10 are met.

Conditions

- 10. The responsible entity must:
 - (a) comply with section 675 of the Act as if the AQUA exchange traded fund were an unlisted disclosing entity; and
 - (b) include statements in any Product Disclosure Statement for interests in the AQUA exchange traded fund to the effect that the responsible entity will comply with the continuous disclosure requirements of the Act as if the fund were an unlisted disclosing entity.

Declaration—Relevant Interest

- 11. Chapters 6 and 6C of the Act apply to all persons as if section 609 were modified or varied by inserting after subsection 609(16) (as notionally inserted by ASIC Class Order [CO 12/1209]):

“ETF Securities

- (19A) A member of a registered scheme who is an authorised participant in relation to the scheme does not have a relevant interest in securities that form part of scheme property of the scheme merely because the scheme has an acquisition and withdrawal facility, provided that:
- (a) interests in the scheme are ETF Securities that are admitted to Trading Status; and
 - (b) the current PDS contains a statement to the effect that the investment strategy for the scheme is to make investments that are expected to result in the value of an interest in the scheme changing in proportion to the value of a published index of securities, ignoring the effect of fees and other costs (including taxes) in relation to the scheme; and
 - (c) the current PDS contains a statement to the effect that at the time the investment strategy for the scheme disclosed in the current PDS was first published in a Product Disclosure Statement for interests in the scheme, there were reasonable grounds to believe that implementation of the investment strategy would not be likely to lead to scheme property including securities in a class of securities that:
 - (i) would represent more than 10% by value of scheme property; and
 - (ii) were, or would result in the responsible entity having a relevant interest in, securities in:
 - (A) a listed company; or
 - (B) an unlisted company with more than 50 members; or
 - (C) a listed body that is formed or incorporated in Australia; or
 - (D) a listed scheme.

Note: The responsible entity may have a relevant interest in securities that do not form part of scheme property because of paragraph 608(3)(b).

- (19B) If subsection (19A) applies in relation to a member and the member makes a withdrawal request under the acquisition and withdrawal facility:
- (a) subsection (19A) stops applying in relation to any securities that the member would receive if the responsible entity transferred securities to the member in accordance with the withdrawal request; and
 - (b) the member is taken to acquire a relevant interest in those securities at that time through a transaction in relation to the securities entered into by the member.

Note: If the member makes a withdrawal request only in relation to some of the member's interests in the scheme, subsection (19A) may still apply in relation to the member's remaining interests.

(19C) If:

- (a) other than because of subsection (19B), a member has a relevant interest in securities that form part of scheme property because subsection (19A) has stopped applying in relation to the scheme; and
- (b) the member makes a withdrawal request in relation to the interests in the registered scheme;

then for the purposes of section 606, at the time of the withdrawal request:

- (c) the member is taken to acquire a relevant interest in any securities that the member would receive if the responsible entity transferred securities to the member in accordance with the withdrawal request; and
- (d) the member is taken to have acquired the relevant interest through a transaction entered into by the member in relation to those securities; and
- (e) the member's voting power is taken to have increased from what it would have been before the withdrawal request if the votes attached to those securities were disregarded to what it was after the withdrawal request (taking the votes attached to those securities into account).

(19D) If, in the previous 6 months:

- (a) a member's voting power has increased because subsection (19A) stopped applying in relation to securities; and
- (b) the member has not been taken to acquire a relevant interest in the securities under subsection (19B) or (19C);

the increase in voting power is to be disregarded in determining the member's, or any other person's, voting power for the purposes of item 9 of the table in section 611.

(19E) In subsections (19A) to (19D) and in this subsection:

acquisition and withdrawal facility means, in relation to a registered scheme, a facility that the responsible entity has stated in the current PDS that it intends to offer on each Trading Day on which interests in the scheme are traded on the financial market operated by ASX Limited (ACN 008 624 691) which allows:

- (a) a person who is an authorised participant to acquire an interest in the scheme by contributing to the scheme; and
- (b) a member who is an authorised participant to request that the responsible entity satisfy a withdrawal request in relation to an interest in the scheme by transferring to the member;

consideration that predominantly comprises a parcel of securities, the composition of which in relation to an acquisition and a withdrawal is published by or on behalf of the responsible entity from time to time.

Note: The composition of the parcel of securities may be different for an acquisition and a withdrawal.

Australian resident for tax purposes means, for a particular financial year, a person who is an Australian resident for the purposes of the *Income Tax Assessment Act 1997* for the whole of that financial year.

authorised participant means, in relation to a registered scheme, a person who:

- (a) has an agreement with the responsible entity of the scheme in relation to making applications to acquire and withdraw interests in the scheme; and
- (b) has notified the responsible entity in writing that the person expects they will be an Australian resident for tax purposes for the financial year of the scheme in which the notification is made and for each subsequent financial year, and has not subsequently notified the responsible entity to the contrary; and
- (c) is either a Trading Participant or has engaged a Trading Participant to act on its behalf to acquire and dispose of interests in the scheme.

current PDS, in relation to a registered scheme, means the most recently lodged Product Disclosure Statement relating to interests in the scheme.

ETF Security, Trading Day, Trading Participant and ***Trading Status*** have the meanings given by the operating rules of ASX Limited (ACN 008 624 691) on 9 October 2013.”.

Declaration—Substantial Interest and Beneficial Tracing

12. Chapter 6C of the Act applies to all persons as if provisions of that Chapter were modified or varied:
 - (a) by inserting after section 671A:

“**671AA ETF securities**

For the purposes of this Chapter and the definition of **substantial holding** in section 9, subsection 609(19A) applies as if paragraph 609(19A)(c) were omitted.”; and

- (b) by inserting after subsection 671B(7):

“*ETF securities*

(7A) If a member of a registered scheme that has an acquisition and withdrawal facility does not have a relevant interest in securities that form part of scheme property because of subsection 609(19A) (as affected by section 671AA), then for the purposes of this section and the definition of **substantial holding** in section 9, the member is taken to have a relevant interest in the securities that would be transferred to the member if:

- (a) the member made a withdrawal request under the acquisition and withdrawal facility for all their interests in the scheme, other than any interests in relation to which the member has a relevant interest in securities that form part of scheme property because of subsection 609(19B); and

Note: Subsection 609(19B) may give a member a relevant interest in securities that form part of scheme property if the member has made a withdrawal request in relation to some or all of their interests in the scheme.

- (b) the numbers and classes of securities transferred to the member under the facility for each interest in the scheme were the same as the numbers and classes of securities most recently disclosed to the member by the responsible entity in relation to a withdrawal request for an interest under the facility.

(7B) In subsection (7A), **acquisition and withdrawal facility** has the same meaning as in subsection 609(19E).”; and

- (c) by inserting after subsection 672B(1):

“(1AA) If a member of a registered scheme does not have a relevant interest in securities that form part of scheme property because of subsection 609(19A) (as affected by section 671AA), then for the purposes of this section and section 672DA, the member is taken to have a relevant interest in securities that the member has a relevant interest in for the purposes of section 671B because of subsection 671B(7A).”.

Interpretation

13. In this instrument:

AQUA exchange traded fund means a registered scheme with interests admitted to Trading Status as an ETF security on the financial market operated by ASX under

the provisions of the operating rules of ASX relating to what is referred to in those rules as the AQUA market.

ASX means ASX Limited (ACN 008 624 691).

Australian resident for tax purposes means, for a particular financial year, a person who is an Australian resident for the purposes of the *Income Tax Assessment Act 1997* for the whole of that financial year.

authorised participant means, in relation to an AQUA exchange traded fund, a person who:

- (a) has an agreement with the responsible entity of that fund in relation to making applications to acquire and withdraw interests in the fund; and
- (b) has notified the responsible entity in writing that the person expects they will be an Australian resident for tax purposes for the financial year of the fund in which the notification is made and for each subsequent financial year, and has not subsequently notified the responsible entity to the contrary; and
- (c) is either a Trading Participant or has engaged a Trading Participant to act on its behalf to acquire and dispose of interests in the registered scheme.

ETF Security has the same meaning as in the operating rules of ASX as at the date of this instrument.

indicative net asset value per interest means:

- (a) for an AQUA exchange traded fund, the total assets of the AQUA exchange traded fund less the total liabilities of the AQUA exchange traded fund (disregarding any liability to a member of the AQUA exchange traded fund as a member), divided by the number of interests in the AQUA exchange traded fund; and
- (b) for a class of interests in an AQUA exchange traded fund, the total assets attributable to that class of interests less the total liabilities attributable to that class of interests (disregarding any liability to a member of the AQUA exchange traded fund as a member), divided by the number of interests in that class.

minimum parcel means the smallest number or value of interests in an AQUA exchange traded fund that are generally permitted to be withdrawn from the AQUA exchange traded fund by an authorised participant while interests in the AQUA exchange traded fund are quoted.

Trading Day has the same meaning as in the operating rules of ASX as at the date of this instrument.

Trading Participant has the same meaning as in the operating rules of ASX as at the date of this instrument.

Trading Status has the same meaning as in the operating rules of ASX as at the date of this instrument.

withdrawal fee per interest means, in relation an AQUA exchange traded fund, the fee that is payable in relation to a withdrawal from the fund divided by the number of interests in the fund to which the withdrawal relates.

Dated this 9th day of October 2013

Signed by Stephen Yen PSM
as a delegate of the Australian Securities and Investments Commission