

ASIC CLASS ORDERS [CO 14/827], [CO 14/828] AND [CO 14/829]

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (*ASIC*) makes Class Order [CO 14/827] under paragraphs 741(1)(b), 911A(2)(l) and 1020F(1)(c) of the *Corporations Act 2001* (the *Act*). ASIC makes Class Order [CO 14/828] under subsections 741(1) and 1020F(1) of the Act and Class Order [CO 14/829] under subsection 1075A(1) of the Act.

Paragraphs 741(1)(b) and 1020F(1)(c) provide that ASIC may declare that Chapter 6D and Part 7.9 of the Act, respectively, apply 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 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*.

Subsection 1075A(1) provides that ASIC may declare that Part 7.11 of the Act applies as if specified provisions were omitted, modified or varied as specified in the declaration.

1. Background

Chapter 6D of the Act relates to fundraising and regulates disclosure to investors for offers for the issue or sale of securities. Part 7.9 relates to financial product disclosure and regulates disclosure to retail clients for offers for the issue or sale of financial products (other than securities).

Some foreign companies listed on Australian financial markets offer CHESSE Depository Interests (*CDIs*) over their shares or options to enable them to access Australian equity capital markets and investors. This is because the settlement system used for equity securities traded in Australia, ASX Clearing House Electronic Subregister System (*CHESSE*), cannot be used for the transfer of securities where the issuing company is domiciled in a country whose laws do not recognise uncertificated holdings or electronic transfer of title. As a result, CDIs were developed as a method of transferring and holding foreign securities in CHESSE.

A CDI is a unit of beneficial ownership in a financial product of a foreign body, where the underlying financial product is registered in the name of a depository nominee, for the purpose of enabling the foreign financial product to be traded on an Australian financial market. Currently CHESSE Depository Nominees Pty Limited (*CDN*) is the only depository nominee that has been appointed in relation to CDIs over foreign shares or options.

There is uncertainty in the market as to how offers of CDIs over foreign shares and options are regulated under the Act, particularly given that depository interests are not defined or referred to in the Act. This has resulted in differing views being adopted in the market about how CDIs are characterised under the Act (i.e. as securities, derivatives or warrants), which disclosure regime applies to offers of CDIs (i.e. Chapter 6D—Prospectuses, or Part 7.9—Product Disclosure Statements) and who ‘offers’ and ‘issues’ CDIs (i.e. the foreign company or the depository nominee).

Given the differing views about who 'issues' CDIs, there is also uncertainty as to whether a foreign company is required to hold an Australian Financial Services (*AFS*) licence for 'dealing' in CDIs over their shares or options.

Historical disclosure relief for CDN for offers of CDIs and FDIs

ASIC historically provided relief in Class Order [CO 02/311] *CHESS Depository Nominees Pty Ltd – CDIs* to CDN, as the depository nominee, from the disclosure requirements in Parts 6D.2 and 6D.3 of the Act—for an offer for the issue of CDIs in respect of foreign securities, and Part 7.9—for an offer for the issue of CDIs over interests in foreign managed investment schemes.

Similarly, ASIC provided relief in Class Order [CO 02/316] *CHESS Depository Nominees Pty Ltd – FDIs* to CDN, as the depository nominee, from the disclosure requirements in Parts 6D.2 and 6D.3—for an offer for the issue of Foreign Depository Interests (*FDIs*) in respect of foreign securities, and Part 7.9—for an offer for the issue of FDIs over interests in foreign managed investment schemes.

The relief in Class Order [CO 02/311] and Class Order [CO 02/316] was premised on the view that CDN, as the depository nominee, is the person that 'offers' and 'issues' the CDIs and is, therefore, required to give disclosure for offers of CDIs under Chapter 6D and Part 7.9 of the Act.

ASIC has recently reviewed its interpretation of the fundraising provisions in Chapter 6D and financial services provisions in Chapter 7, and the application of these provisions to offers of CDIs over shares and options of a foreign company. Following that review, ASIC considers that the foreign company that offers and issues the shares or options underlying the CDIs is the person who offers and issues the CDIs and is, therefore, required to provide disclosure to investors for offers of CDIs.

Relief to facilitate offers of CDIs under Chapter 6D of the Act

In light of its review of offers of CDIs, ASIC has issued Class Order [CO 14/827] to provide relief so that offers of CDIs over foreign shares or options are regulated in the same way that offers of the underlying shares or options are regulated. That is, as an offer of securities under Chapter 6D of the Act.

Class Order [CO 14/827] clarifies that it is the foreign company, and not the depository nominee, who is required to give disclosure under Chapter 6D of the Act for an offer of CDIs over foreign shares or options.

Class Order [CO 14/827] also provides licensing relief, for the avoidance of doubt, for a foreign company 'arranging' for CDN or a holder or proposed holder of CDIs to deal in CDIs over its shares or options.

Revocation of disclosure relief for CDN for offers of CDIs and FDIs

As a result of the relief in Class Order [CO 14/827], ASIC considers that the relief in Class Order [CO 02/311] exempting CDN from the disclosure requirements in Chapter 6D of the Act for offers of CDIs over foreign securities, is no longer necessary.

In addition, ASIC considers that the relief in Class Order [CO 02/311] exempting CDN from the disclosure requirements in Part 7.9 for the issue of CDIs over foreign managed investment

scheme interests is no longer necessary, given there is currently limited use of CDIs over interests in foreign managed investment schemes in the market and any relief for offers of these CDIs would be novel and should be considered by ASIC on an individual basis.

Given that FDIs are no longer being used in the market, ASIC considers that the relief in Class Order [CO 02/316] is no longer necessary.

Amendment to relief for CDIs for Part 7.11 purposes

Part 7.11 of the Act enables certain financial products to be transferred through CHESS with the benefit of the statutory warranties and indemnities provided for in the National Guarantee Fund (*NGF*) provisions contained in Division 4 of Part 7.5 of the Act, and the related compensation arrangements contained in Part 7.5 of the *Corporations Regulations 2001* (the *Regulations*).

Class Order [CO 02/312] *Part 7.11, Division 4 financial products for ASTC* (as varied by [CO 09/27]) specifies certain financial products, including CDIs over foreign securities and interests in foreign managed investment schemes, to be ‘Division 4 financial products’ in relation to the clearing and settlement facility operated by ASX Settlement, CHESS.

The relief in Class Order [CO 02/312] extends the NGF provisions contained in Division 4 of Part 7.5 of the Act (and related regulations) to electronic transfers of CDIs by an ASX participant in CHESS. The relief also enables CDIs to be transferred through CHESS under the regulations made for the purposes of Division 4 of Part 7.11 of the Act, with the benefit of the statutory warranties and indemnities contained in those regulations.

Paragraph 4 of [CO 02/312] contains a description of CDIs that is based on the view that CDN, as the depository nominee, is the issuer of the CDIs for the purposes of Chapter 7 of the Act. ASIC has recently reviewed its interpretation of the application of Chapter 7 of the Act to offers and issues of CDIs. Following that review, ASIC considers that CDN is not the offeror or issuer of CDIs for Chapter 7 purposes.

As a result, Class Order [CO 14/829] varies the description of CDIs in Class Order [CO 02/312] to bring it in line with our view that CDN is not the issuer of CDIs. This will remove any uncertainty as to whether CDIs over foreign securities and interests in foreign managed investment schemes are ‘Division 4 financial products’.

2. Purpose of the class orders

The purpose of Class Order [CO 14/827] is to:

- (a) remove any uncertainty about how offers of CDIs over foreign shares and options are regulated under the Act;
- (b) facilitate offers of CDIs over foreign shares and options, and to assist foreign companies to make such offers in an efficient market; and
- (c) promote better understanding for retail investors about CDIs, to assist them to make confident and informed investment decisions.

The purpose of Class Order [CO 14/828] is to repeal Class Order [CO 02/311] and Class Order [CO 02/316], on the basis that the relief in those instruments is no longer necessary.

The purpose of Class Order [CO 14/829] is to amend Class Order [CO 02/312] so that the description of CDIs is consistent with that in Class Order [CO 14/827] and with ASIC's view that the foreign company, not the depository nominee, is the person who offers and issues CDIs.

3. Operation of the class orders

Class Order [CO 14/827] modifies Chapter 6D of the Act so that (among other things):

- (a) an offer of CDIs over foreign shares or options is regulated as an offer of securities under Chapter 6D of the Act;
- (b) an offer for issue of CDIs is taken to be an offer for issue of the underlying shares or options by the foreign company; and
- (c) an offer for sale of CDIs is taken to be an offer for sale of the underlying shares or options.

The relief in Class Order [CO 14/827] applies to offers of CDIs where the underlying security is a share of a foreign company, a beneficial interest in a share of a foreign company, or an option to acquire, by way of issue, a share of a foreign company, where the underlying share, interest or option is:

- (a) quoted on, or will be quoted on, certain approved Australian financial markets (ASX including under ASX's AQUA rules, NSXA, APX or SIM VSE); and
- (b) held by CDN, as the depository nominee.

For the avoidance of doubt, Class Order [CO 14/827] also exempts a foreign company (other than a foreign investment company covered by subsection 766C(5) of the Act) from the requirement to hold an AFS licence for a financial service that consists of 'arranging' for CDN or a holder or a proposed holder of CDIs to deal in CDIs over its shares, interests or options.

[CO 14/827] also notionally modifies a number of provisions to ensure that Chapter 6D operates effectively for offers of CDIs over shares or options in a foreign company. For example:

- (a) references to the provisions of Chapter 2M are to be read as references to section 601CK (where s601CK applies) or, otherwise, the financial reporting laws in the foreign company's place of origin; and
- (b) references to orders under sections 340 or 341 are to be read as references to declarations under section 601CK(7) or exemptions (however described) under the financial reporting laws in the foreign company's place of origin.

Class Order [CO 14/828] repeals Class Order [CO 02/311] and Class Order [CO 02/316].

Class Order [CO 14/829] amends the description of CDIs in paragraph 4 of [CO 02/312].

4. Consultation

ASIC undertook consultation before making these class orders by issuing Consultation Paper 220 *Fundraising: Facilitating offers of CHESS Depository Interests (CP 220)*. ASIC received 7 submissions in response to CP 220, all of which were supportive of these Class Orders. Details of the submissions received are contained in REP 414 *Response to submissions on CP 220 Fundraising: Facilitating offers of CHESS Depository Interests* which is available on ASIC's website www.asic.gov.au.

Statement of Compatibility with Human Rights

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

ASIC Class Orders [CO 14/827], [CO 14/828] and [CO 14/829]

These class orders are 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 orders

Class Order [CO 14/827] relates to the fundraising provisions in Chapter 6D of the *Corporations Act 2001* (the *Act*) and provides relief for offers of CHESS Depository Interests (*CDIs*) over shares or options in a foreign company so that (among other things):

- (a) an offer of CDIs over foreign shares or options is regulated as an offer of securities under Chapter 6D of the Act;
- (b) an offer for issue of CDIs is taken to be an offer for issue of the underlying shares or options by the foreign company; and
- (c) an offer for sale of CDIs is taken to be an offer for sale of the underlying shares or options.

Class Order [CO 14/827] also provides relief, for the avoidance of doubt, exempting a foreign company (other than a foreign investment company covered by subsection 766C(5) of the Act) from the requirement to hold an Australian Financial Services licence for ‘arranging’ for CHESS Depository Nominees Pty Limited (*CDN*) or a holder or a proposed holder of CDIs to deal in CDIs over its shares or options.

The purpose of Class Order [CO 14/827] is to remove any uncertainty in the market about how offers of CDIs over foreign shares and options are regulated under the Act, to clarify that it is the foreign company, and not the depository nominee, who is required to give disclosure for an offer of CDIs over foreign shares or options, and to ensure that offers of CDIs take place in an efficient and informed market.

Revocation of disclosure relief for CDN for CDIs and FDIs

Class Order [CO 02/311] *CHESS Depository Nominees Pty Ltd – CDIs* provided relief to CDN, as the depository nominee, from the disclosure requirements in Parts 6D.2 and 6D.3 of the Act—for an offer for the issue of CDIs in respect of foreign securities, and Part 7.9—for an offer for the issue of CDIs over interests in foreign managed investment schemes.

Similarly, Class Order [CO 02/316] *CHESS Depository Nominees Pty Ltd – FDIs* to CDN provided relief to CDN, as the depository nominee, from the disclosure requirements in Parts 6D.2 and 6D.3—for an offer for the issue of Foreign Depository Interests (*FDIs*) in respect of foreign securities, and Part 7.9—for an offer for the issue of FDIs over interests in foreign managed investment schemes.

The relief in Class Order [CO 02/311] and Class Order [CO 02/316] was premised on the view that CDN, as the depository nominee, is the person that ‘offers’ and ‘issues’ the CDIs and is, therefore, required to give disclosure for offers of CDIs under Chapter 6D and Part 7.9 of the Act.

ASIC has recently reviewed its interpretation of the fundraising provisions in Chapter 6D and financial services provisions in Chapter 7, and the application of these provisions to offers of CDIs over shares and options in a foreign company. Following that review, we consider that the foreign company that offers and issues the shares or options underlying the CDIs is the person who offers and issues the CDIs and is, therefore, required to provide disclosure to investors for offers of CDIs.

As a result of the relief in Class Order [CO 14/827], ASIC considers that the relief in Class Order [CO 02/311] exempting CDN from the disclosure requirements in Chapter 6D of the Act for offers of CDIs over foreign securities, is no longer necessary.

In addition, ASIC considers that relief in Class Order [CO 02/311] exempting CDN from the disclosure requirements in Part 7.9 for the issue of CDIs over foreign managed investment scheme interests is no longer necessary, given that there is currently limited use of CDIs over interests in foreign managed investment schemes in the market and any relief for offers of these CDIs would be novel and should be considered by ASIC on an individual basis.

Further, ASIC considers that the relief in Class Order [CO 02/316] is no longer necessary, given our understanding that FDIs are no longer being used in the market.

Consequently, Class Order [CO 02/311] and Class Order [CO 02/316] were repealed by Class Order [CO 14/828].

Amendment to relief for CDIs for Part 7.11 purposes

Class Order [CO 14/829] amends the description of CDIs in paragraph 4 of [CO 02/312] *Part 7.11, Division 4 financial products for ASTC* to bring it into line with ASIC's view that CDN, as the depository nominee, is not the offeror or issuer of CDIs. This is consistent with the relief in Class Order [CO 14/827].

The relief in [CO 02/312] specifies certain financial products, including CDIs over foreign securities and interests in foreign managed investment schemes, to be 'Part 7.11, Division 4 financial products' in relation to the clearing and settlement facility operated by ASX Settlement.

The relief in Class Order [CO 02/312] extends the National Guarantee Fund provisions contained in Division 4 of Part 7.5 of the Act (and related regulations) to electronic transfers of CDIs by an ASX participant in CHESS. The relief also enables CDIs to be transferred through CHESS under the regulations made for the purposes of Division 4 of Part 7.11 of the Act, with the benefit of the statutory warranties and indemnities contained in those regulations.

Human rights implications

Class Orders [CO 14/827], [CO 14/828] and [CO 14/829] do not engage any of the applicable rights or freedoms.

Conclusion

Each of Class Orders [CO 14/827], [CO 14/828] and [CO 14/829] are compatible with human rights as it does not raise any human rights issues.