



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Offers of CHESS Depository Interests) Instrument 2025/180

ASIC Corporations (Repeal) Instrument 2025/181

This is the Explanatory Statement for *ASIC Corporations (Offers of CHESS Depository Interests) Instrument 2025/180 (Principal Instrument)* and *ASIC Corporations (Repeal) Instrument 2025/181 (Repeal Instrument)*

The Explanatory Statement is approved by the Australian Securities and Investments Commission (**ASIC**).

Summary

1. The settlement system used by ASX Limited (**ASX**) for equity securities traded in Australia, the Clearing House Electronic Subregister System (**CHESS**), 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.
2. As a result, some foreign companies listed on Australian financial markets offer CHESS Depository Interests (**CDIs**) over their securities (for example, shares and options) to enable them to access Australian equity capital markets and investors. All CDIs are settled through CHESS.
3. 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. Currently, CHESS Depository Nominees Pty Limited (**CDN**) is the only depository nominee that has been appointed in relation to CDIs over foreign securities.
4. Historically, there has been uncertainty in the market as to how offers of CDIs over foreign securities are regulated under the *Corporations Act 2001 (Act)*.
5. While CDIs may be issued over different financial products, Class Order [CO 14/827] *Offers of CHESS Depository Interests* provides relief (and certainty) for offers for the issue or sale of CDIs where:
 - (a) the underlying financial products are shares of a foreign company, beneficial interests in shares of a foreign company or options to

acquire, by way of issue, shares of a foreign company (collectively referred to as *underlying securities*); and

- (b) the underlying securities are:
 - i. quoted on, or will be quoted on, certain approved Australian financial markets (ASX including under the ASX Quoted Assets (*AQUA*) rules, Sydney Stock Exchange Limited (*SSX*) or National Stock Exchange of Australia Limited (*NSXA*); and
 - ii. held by CDN as the depository nominee.
- 6. In [CO 14/827] ASIC's approach to regulating these offers of CDIs involves 'looking through' the CDI to the underlying security, so that offers of CDIs are regulated under the Act in the same way that offers of the underlying securities would be regulated.
- 7. The Legislation Act 2003 provides for the periodic expiry of legislative instruments ('sunsetting') to ensure that they are kept up to date and only remain in force for so long as they are needed.
- 8. [CO 14/827] is scheduled to expire on 1 April 2025.
- 9. The Principal Instrument provides relief, on largely the same terms as [CO 14/827].
- 10. Class Order [CO 14/1276] *Repeal of Class Order [SCO 10/321]* provides transitional relief under a former regulatory framework which is no longer required. It is also scheduled to expire on 1 April 2025.
- 11. The Repeal Instrument repeals both [CO 14/827] and [CO 14/1276].

Purpose of the instrument

- 12. Chapter 6D of the Act relates to fundraising and regulates disclosure to investors for offers for the issue or sale of securities.
- 13. Part 7.9 of the Act relates to financial product disclosure and regulates disclosure to retail clients for offers for the issue or sale of financial products (other than securities).
- 14. Historically, there were differing views in the market about:
 - (a) how CDIs were characterised under the Act (i.e. as securities, derivatives or warrants);
 - (b) which disclosure regime in the Act applied to offers of CDIs (i.e. Chapter 6D—Prospectuses, or Part 7.9—Product Disclosure Statements); and
 - (c) who 'offered' and 'issued' CDIs (i.e. the foreign company or the depository nominee).

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15. The differing views about who 'issued' CDIs, also result in uncertainty as to whether a foreign company was required to hold an AFS licence for 'dealing' in CDIs over their shares or options.
 16. Like [CO 14/827], the Principal Instrument provides relief:
 - (a) so that offers of CDIs over underlying foreign securities are regulated by Ch 6D of the Act;
 - (b) for the avoidance of doubt, exempting a foreign company from the requirement to hold an Australian financial services (AFS) licence for 'arranging' for CDN or a holder or proposed holder of CDIs to deal in CDIs over its underlying foreign securities; and
 - (c) to ensure that Ch 6D otherwise operates effectively for offers of CDIs.
 17. Changes to the Principal Instrument include:
 - (a) an updated definition of 'approved financial market' which now includes Cboe Australia Pty Ltd (*Cboe*); and
 - (b) minor revisions to the definition of 'depository interests' and the wording of the AFS licence exemption (for clarity).

Consultation

18. On 24 January 2025, ASIC published CS 15 Proposed remake of relief for offers of CHESS Depository Interests on its website. The consultation period closed on 28 February 2025.
19. On 24 January 2025, ASIC also published an accompanying news item ASIC proposes to remake relief for offers of CHESS Depository Interests.
20. ASIC contacted the relevant financial markets directly to advise them of the consultation and brought the consultation to the attention of other external stakeholders through its Corporate Finance Update.
21. ASIC received two submissions in response to the consultation. These supported the proposal to remake the relief in [CO 14/827] in the Principal Instrument.
22. One submission suggested that ASIC should use market neutral language in the Principal Instrument, so that it applies to types of, rather than individual, service providers and licensees.
23. ASIC supports competition and has updated the definition of 'approved financial market' in the Principal Instrument to include Cboe.
24. ASIC did not consult on the repeal of [CO 14/1276] because it provides transitional relief (under a former regulatory framework) which is no longer required.

Operation of the instrument

25. The Principal Instrument and Repeal Instrument commence on the day after they are registered on the Federal Register of Legislation.
26. The Principal Instrument modifies Chapter 6D of the Act so that (among other things):
 - (a) an offer of CDIs over underlying securities is regulated as an offer of securities under Chapter 6D;
 - (b) the foreign company that issues the underlying securities is taken to be the issuer of the CDIs;
 - (c) an offer for issue of CDIs is taken to be an offer for issue of the underlying securities by the foreign company; and
 - (d) an offer for sale of CDIs is taken to be an offer for sale of the underlying securities.
27. The Principal Instrument also notionally modifies several provisions to ensure that Chapter 6D operates effectively for offers of CDIs over underlying securities 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.
28. If another legislative instrument modifies Chapter 6D, section 703AA (as notionally inserted by this Instrument) will apply in relation to Chapter 6D as affected by that other legislative instrument.
29. For the avoidance of doubt, the Principal Instrument 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 underlying securities.
30. The Repeal Instrument repeals the whole of [CO 14/827] and [CO 14/1276].

Legislative instrument and primary legislation

31. The Principal Instrument provide certainty to the market about how the Act applies to offers of CDIs.

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32. The matters contained in the Principal Instrument only affect a relatively small subset of issuers. The instrument provides administrative relief in circumstances where strict compliance with the Act produces an unintended or unforeseen result. If the matters in the Principal Instrument were to be inserted into the Act, they would insert, into an already complex statutory framework, a set of specific provisions that would apply only to a relatively small group of entities. This would result in additional cost and unnecessary complexity for other users of the Act.
 33. It will be a matter for the Government and for Parliament as to whether the Act or *Corporations Regulations* 2001 (**Regulations**) may be amended in future to include the relief in the Principal Instrument.

Duration of the instrument

34. The Principal Instrument expires after 5 years. This allows sufficient time for the Government and for Parliament to determine whether to amend the Act or Regulations to include the relief.

Legislative authority

35. This Principal Instrument is made under paragraphs 741(1)(b), 926A(2)(a) and 1020F(1)(c) of the Act.
36. The Repeal Instrument is made under subsections 283GA(1) and 741(1) and paragraphs 911A(2)(l) and 1020F(1)(c) of the Act.
37. Paragraph 283GA(1)(b) provides that ASIC may declare that Chapter 2L of the Act applies to a person as if specified provisions were omitted, modified, or varied as specified in the declaration.
38. Paragraph 741(1)(b) provides that ASIC may declare that Chapter 6D of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.
39. Paragraph 911A(2)(l) provides that a person is exempt from the requirement to hold an Australian financial services license 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.
40. Paragraph 926A(2)(a) provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.6 of the Act, other than Divisions 4 and 8.
41. Paragraph 1020F(1)(c) provides that ASIC may declare that Part 7.9 of the Act applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.
42. Under subsection 33(3) of the Acts Interpretation Act 1901, where an Act confers a power to make, grant or issue any instrument (including rules,

regulations or by-laws), the power is to be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument.

43. As legislative instruments, the Principal Instrument and Repeal Instrument are disallowable under section 42 of the Legislation Act 2003.

Statement of Compatibility with Human Rights

44. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the Attachment.

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

ASIC Corporations (Offers of CHESS Depository Interests) Instrument 2025/180 (Principal Instrument)

ASIC Corporations (Repeal) Instrument 2025/181 (Repeal Instrument)

Overview

1. The Principal Instrument provides relief (on largely the same terms as Class Order [CO 14/827] *Offers of CHESS Depository Interests*):
 - (a) so that offers of CDIs over underlying securities are regulated by Ch 6D of the Act;
 - (b) for the avoidance of doubt, exempting a foreign company from the requirement to hold an Australian financial services (AFS) licence for 'arranging' for CDN or a holder or proposed holder of CDIs to deal in CDIs over its underlying securities; and
 - (c) to ensure that Ch 6D otherwise operates effectively for offers of CDIs.
2. Changes to the Principal Instrument include:
 - (a) an updated definition of 'approved financial market'; and
 - (b) minor revisions to the definition of 'depository interests' and the wording of the AFS licence exemption (for clarity).
3. Class Order [CO 14/1276] *Repeal of Class Order [SCO 10/321]* provides transitional relief under a former regulatory framework which is no longer required.
4. The Repeal Instrument repeals [CO 14/827] and [CO 14/1276], which are scheduled to expire on 1 April 2025.

Assessment of human rights implications

5. This instrument does not engage any of the applicable rights or freedoms.

Conclusion

6. This instrument 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*.