

# ASIC CLASS ORDER [CO 09/69]

## 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 09/69] *Variation of Class Orders [CO 03/606] and [CO 04/671]* under paragraph 911A(2)(l) and subsections 741(1) and 1020F(1) of the *Corporations Act 2001* (the Act).

Paragraph 911A(2)(l) provides that ASIC may exempt a person from the requirement to hold an Australian financial services licence for the provision of a financial service in specified circumstances.

Subsection 741(1) 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.

Subsection 1020F(1) 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.

### **1. Background**

#### **General advice provided in relation to certain foreign regulated control transactions**

Part 7.6 of the Act deals with licensing of providers of financial services. Under section 911A, a person who carries on a financial services business in Australia must hold an Australian financial services licence unless exempt.

Class Order [CO 03/606] *Financial product advice – exempt documents* exempts persons from the requirement to hold an Australian financial services licence in relation to financial product advice that is:

- (a) general advice; and
- (b) contained in a document of a kind specified, including a bidder's statement, a supplementary bidder's statement, a target's statement or a supplementary target's statement.

General advice contained in an offer document or a document responding to an offer document under a foreign regulated control transaction is not covered by [CO 03/606]. Without relief, a person who distributes such a document containing general advice in Australia would need an Australian financial services licence.

## Secondary sales of securities received under foreign scrip takeovers

Chapter 6D regulates the making of offers for the issue or sale of securities. It provides a disclosure and liability regime so as to ensure adequate investor protection in circumstances where an investor may not know all the information needed to make a decision whether to accept an offer of securities.

In addition to requiring disclosure for the issue of securities, the provisions set out where an offer for the sale of securities needs disclosure to investors. The following sale offers need disclosure under Chapter 6D (unless an exemption applies):

- (a) an offer of a body's securities for sale by the body's controller where the securities are either not quoted or not offered for sale in the ordinary course of trading on a relevant financial market;
- (b) an offer of a body's securities for sale within 12 months after their issue without disclosure where either the body issued the securities, or the person to whom they were issued acquired them, with the purpose of the securities being on-sold; and
- (c) an offer of a body's securities for sale within 12 months after their sale without disclosure by the body's controller where the securities were at the time of sale by the controller either not quoted or not offered for sale in the ordinary course of trading on a relevant financial market and either the controller sold the securities, or the person to whom they were sold acquired them, with the purpose of the securities being on-sold.

A *foreign scrip takeover* is a foreign regulated takeover where securities or interests in a managed investment scheme form all or part of the consideration offered under the takeover.

The offer of securities as consideration for an offer under a takeover bid that is accompanied by a bidder's statement (*Chapter 6 Bid*) is exempt from the prospectus requirement under subsection 708(18) of the Act. Class Order [CO 04/671] *Disclosure for on-sale of securities and other financial products* gives disclosure relief for secondary sales of securities where the securities were issued without disclosure because of subsection 708(18) to facilitate the on-sale of securities received under a Chapter 6 Bid.

[CO 09/68] *Prospectus and PDS relief for foreign scrip takeovers* gives conditional disclosure relief for offers of securities as consideration under foreign scrip takeovers regulated by or under a law in force in certain foreign countries where no more than 10% of the bid class securities are held by Australian residents. The relief is provided because these are primarily foreign business transactions that are subject to comparable regulation in another jurisdiction. Similarly to securities received under a Chapter 6 Bid, secondary sales of securities received under a foreign scrip takeover would be inhibited by the requirement to prepare a prospectus.

## **Secondary sales of interests in managed investment schemes received under foreign scrip takeovers**

Part 7.9 regulates the issue, sale and purchase of financial products (except securities). It provides a disclosure and liability regime so as to ensure adequate protection in circumstances where a person who is a retail client may not know all the information needed to make a decision whether to acquire a financial product.

The provisions set out where the sale of a financial product needs disclosure, generally in the form of a Product Disclosure Statement (*PDS*). A PDS may need to be given (unless an exemption applies):

- (a) by a person who gives personal advice recommending a particular financial product; and
- (b) by a person who sells a financial product in certain situations.

[CO 09/68] gives relief from the requirement to provide a PDS for interests in a managed investment scheme offered under a foreign scrip takeover because the offers are likely to be accompanied by adequate disclosure. However, secondary sales of interests in a managed investment scheme received under a foreign scrip takeover would be inhibited by the requirement under Part 7.9 to prepare a PDS.

## **2. Purpose of the class order**

The purpose of [CO 09/69] is to provide relief from:

- (a) the requirement to hold an Australian financial services licence in relation to financial product advice that is general advice and contained in a document prepared pursuant to a control transaction that is regulated in the jurisdiction of an approved foreign market; and
- (b) the prospectus and PDS disclosure requirements to persons who make offers to sell securities or interests in managed investment schemes received under a foreign scrip takeover where the initial offers under the foreign scrip takeover did not need disclosure because of [CO 09/68].

## **3. Operation of the class order**

[CO 09/69] varies [CO 03/606] by adding as a class of exempt documents an offer document or a document prepared in response to an offer document about a control transaction regulated under the laws of one of the following:

- (a) Canada;
- (b) France;
- (c) Germany;
- (d) Hong Kong;

- (e) Italy;
- (f) Japan;
- (g) Malaysia;
- (h) The Netherlands;
- (i) New Zealand;
- (j) Singapore;
- (k) South Africa;
- (l) Switzerland;
- (m) United Kingdom; and
- (n) United States of America,

where the document has been prepared because it is required by law.

[CO 09/69] also varies [CO 04/671] to give disclosure relief for the on-sale of securities or financial products where the securities or products were issued without disclosure to investors under Part 6D.2 or without a PDS for the product being prepared because the issuer relied upon Class Order [CO 09/68].

#### **4. Consultation**

The declarations in [CO 09/69] were the subject of public consultation in Consultation Paper 79 *Disclosure relief for foreign scrip takeovers* (CP 79), which foreshadowed this relief and was published on our website (at [www.asic.gov.au](http://www.asic.gov.au)). Submissions received were supportive of the proposed relief in CP 79.