

# ASIC CLASS ORDER [CO 12/1266]

## EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (**ASIC**) makes Class Order [CO 12/1266] under paragraph 911A(2)(l) of the *Corporations Act 2001 (the Act)*.

Paragraph 911A(2)(l) provides that a person is exempt from the requirement to hold an Australian financial services (**AFS**) 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*.

### 1. Background

ASIC Regulatory Guide 176 *Licensing: Discretionary powers – wholesale foreign financial services providers (RG 176)* outlines when ASIC will grant conditional relief from the requirement to hold an AFS licence to foreign financial services providers (**FFSPs**) who:

- (a) provide services in Australia only to wholesale clients; and
- (b) are regulated by overseas regulatory authorities.

ASIC has granted class order relief for the purposes of RG 176 to FFSPs regulated by:

- the UK Financial Services Authority ([CO 03/1099] *UK FSA regulated financial service providers*);
- the US Securities and Exchange Commission ([CO 03/1100] *US SEC regulated financial service providers*);
- the US Federal Reserve and Office of Comptroller of Currency ([CO 03/1101] *US Federal Reserve and OCC regulated financial service providers*);
- the Monetary Authority of Singapore ([CO 03/1102] *Singapore MAS regulated financial service providers*);
- the Securities and Futures Commission of Hong Kong ([CO 03/1103] *Hong Kong SFC regulated financial service providers*);
- the US Commodity Futures Trading Commission ([CO 04/829] *US CFTC regulated financial service providers*); and

- the Bundesanstalt für Finanzdienstleistungsaufsicht of Germany (BaFin) ([CO 04/1313] *German BaFin regulated financial service providers*).

In June 2012 ASIC updated RG 176. ASIC also made Class Order [CO 12/572] to vary existing class orders made for the purposes of RG 176, reflecting key changes to RG 176.

One of the refinements to RG 176 and the relevant class orders was an amended notification requirement. Under the requirement exempt FFSPs are required to notify ASIC of significant enforcement or disciplinary actions or investigations as soon as practicable after the exempt FFSP becomes aware of them. [**CLO**: *The sentence in parentheses suggests that ASIC intended that outcome. We didn't. It was an unintended consequence that we did not foresee at the time of making the amendments in June*]. Previously FFSPs were only required to notify ASIC of significant enforcement or disciplinary actions (not investigations).

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

The purpose of the class order is to address an unintended consequence that arose as a result of the amendment to the class orders in June 2012. The unintended consequence is that the condition that requires an exempt FFSP to notify ASIC of significant investigations of the body by an overseas regulatory authority may cause the exempt FFSP being investigated to contravene a foreign law by notifying ASIC of such an investigation.

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

The class order has the effect that an exempt FFSP must notify ASIC of significant investigations unless, after having taken reasonable steps to enable notification to be given to ASIC, the exempt FFSP is prohibited by law from giving such notification but only to the extent of the prohibition.

Reasonable steps might involve measures such as informing the overseas regulatory authority that the FFSP is subject to the condition of the class order, and requesting the overseas regulatory authority to consent to the notification to ASIC.

The extent to which a foreign law may prohibit such notification to ASIC may vary from jurisdiction to jurisdiction. For example, it may be that a foreign law prohibits the notification to ASIC of details of the investigation but does not prohibit the notification to ASIC of the fact that there is such an investigation.

## **4. Statement of Compatibility with Human Rights**

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

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* because it does not engage any of the applicable rights or freedoms.

## 5. Consultation

Before making the updates to RG 176, a joint ASIC and Department of Treasury consultation paper was released for consultation in June 2008: *Consultation Paper 98 Cross-border recognition: Facilitating access to overseas markets and financial services (CP 98)*. The update to RG 176 and related material included refinements to content and requirements following feedback received from respondents to CP 98 and ongoing industry consultation. There was targeted consultation with industry associations on the draft updated RG 176.

The Office of Best Practice Regulation confirmed that a Regulation Impact Statement was not necessary.