**ASIC CLASS ORDERS [CO 14/25] AND [CO 14/26]**

**EXPLANATORY STATEMENT**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (***ASIC***) makes Class Order [CO 14/25] and Class Order [CO 14/26] under subsection 741(1) of the *Corporations Act 2001* (the ***Act***).

Subsection 741(1) provides that ASIC may declare that Chapter 6D 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, including the provision of disclosure documents and application forms to them. Class Order [CO 00/44] *Electronic disclosure documents, electronic application forms and dealer personalised applications* provided conditional relief from obligations under Chapter 6D to persons offering to issue or transfer securities (***offerors***) to enable:

1. offerors to distribute electronic disclosure documents and electronic application forms (rather than paper disclosure documents and paper application forms); and
2. financial services licensees to partially complete or ‘personalise’ application forms created by offerors, before sending the form to a client, and to also create their own application form, rather than distributing a form prepared by the offeror.

***Revocation of relief to permit electronic disclosure documents and application forms***

ASIC has historically provided class order relief to permit the distribution of electronic disclosure documents and electronic application forms in relation to the provisions of the old Corporations Law, as they stood before the implementation of the *Corporate Law Economic Reform Program Act 1999* (***CLERP Act***). ASIC continued the relief in Class Order [CO 00/44], for the avoidance of doubt, to help ensure the continued use of electronic disclosure documents, even though the amendments under the CLERP Act were intended to facilitate the distribution of electronic disclosure documents.

ASIC has recently reviewed its interpretation of the fundraising provisions in Chapter 6D and their application to electronic disclosure documents and application forms. Following that review, ASIC considers that electronic disclosure documents and electronic application forms can be distributed in accordance with the requirements of Chapter 6D without the relief provided by Class Order [CO 00/44]. The market now routinely uses electronic disclosure documents and electronic application forms under Chapter 6D and is comfortable with the ability to distribute these documents. ASIC considers that the market no longer requires comfort relief under Class Order [CO 00/44].

Consequently, Class Order [CO 00/44] was repealed by Class Order [CO 14/25].

***Relief to permit licensee created or personalised application forms***

Under subsection 723(1) of the Act, if an offer of securities needs a disclosure document, the securities may only be issued or transferred in response to an application form. The subsection also prohibits securities from being issued or transferred unless the offeror has reasonable grounds to believe that:

(a) the application form was included in, or accompanied by, the disclosure document when the form was distributed by the offeror; or

(b) the application form was copied, or directly derived, by the person making the application from a form referred to in paragraph (a).

Some financial services licensees may partly complete or ‘personalise’ application forms that have been distributed by offerors before sending the application form to a client. Some financial services licensees may also create and distribute their own application forms for offers of securities. A form created by a financial services licensee may differ from the application form distributed by the offeror.

Where a financial services licensee creates their own application form, or personalises an application form distributed by the offeror for a client, the offeror may not have reasonable grounds for the purposes of subsection 723(1) because:

1. the application form created by the financial services licensee will not have been copied, or directly derived, by the applicant from an application form included in or accompanying the disclosure document distributed by the offeror;
2. the personalised application form or licensee-created application form is not the form that was distributed by the offeror; and
3. the personalised application form will also not be a form that was copied or directly derived by the person making the application from a form distributed by the offeror (unless the person making the application has authorised the financial services licensee to copy or derive the application form).

In ASIC’s view, using personalised or financial services licensee created application forms for offers of securities does not necessarily compromise investor protection. It can:

(a) promote efficiency and may therefore lead to costs savings which could flow through to investors and industry;

(b) assist in reducing the number of errors made in completing and processing multiple handwritten forms;

(c) assist in reducing the time currently taken to complete and process handwritten forms; and

(d) facilitate electronic acceptances.

**2. Purpose of the class orders**

The purpose of Class Order [CO 14/26] is to give relief to offerors so that they may issue or transfer securities in response to an application form that has been:

(a) personalised by a financial services licensee for an applicant. This relief overcomes any concerns about the personalised application form not being one that is distributed by the offeror or not being copied or directly derived from such a form by the applicant; and

(b) created by a financial services licensee. This relief overcomes any concerns about an application form created by a financial services licensee not being one that is distributed by the offeror or not being copied or directly derived from such a form by the applicant.

The purpose of Class Order [CO 14/25] is to repeal Class Order [CO 00/44], on the basis that the relief for distributing electronic disclosure documents and electronic application forms is no longer necessary.

**3. Operation of the class order**

Class Order [CO 14/26] notionally modifies subsection 723(1) to enable offerors to issue or transfer securities in response to an application form if the form was distributed by a financial services licensee to the applicant where the form:

1. had originally been distributed to the licensee by the offeror and was then partly completed by the licensee before being provided to the applicant;
2. was copied or directly derived by the licensee from a form distributed by the offeror (whether or not the form was partly completed by the licensee before being distributed);
3. was created by the licensee (whether or not the form was partly completed by the licensee before being distributed).

The modified provisions provide that the securities may only be issued or transferred if the offeror has reasonable grounds to believe that:

1. when the applicant received the application form, the applicant was given access, at the same time and by the same means, to the disclosure document (including any replacement document or supplementary document); and
2. the application form included:
3. the following information about the offer and the disclosure document - the identity of the offeror, the nature of the securities being offered (e.g. ordinary shares or options), the price of the securities, the date of the disclosure document and the expiry date of the disclosure document; and
4. a prominent statement alerting applicants that there is a disclosure document for the offer and advising them to read the disclosure document before applying for securities.

The class order operates in respect of application forms in both paper and electronic form.

Class Order [CO 14/25] repeals Class Order [CO 00/44].

**4. Consultation**

ASIC undertook consultation before making these Class Orders by issuing Consultation Paper (***CP***) 211 *Facilitating electronic offers of securities: Update to RG 107.* ASIC received 4 submissions in response to CP 211 all of which were supportive of these Class Orders. Details of the submissions received are contained in REP 385 *Response to submissions on CP 211 Facilitating electronic offers of securities: Update to RG 107* which is available on ASIC's website [www.asic.gov.au](http://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 14/25] and [CO 14/26]**

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 14/26](the ***Class Order***) relates to the fundraising provisions in Chapter 6D of the *Corporations Act 2001* (the ***Act***) and provides relief to facilitate the use and distribution of application forms that have been created or personalised (including partly completed) by financial services licensees for offers of securities.

Under subsection 723(1) of the Act, if an offer of securities needs a disclosure document, the securities may only be issued or transferred in response to an application form. The subsection also prohibits securities from being issued or transferred unless the person issuing or transferring them (***offeror***) has reasonable grounds to believe that:

(a) the application form was included in, or accompanied by, the disclosure document when the form was distributed by the offeror; or

(b) the application form was copied, or directly derived, by the person making the application from a form referred to in paragraph (a).

Some financial services licensees may partly complete or ‘personalise’ application forms that have been distributed by offerors before sending the application form to a client. Some financial services licensees may also create and distribute their own application forms for offers of securities. A form created by a financial services licensee may differ from the application form distributed by the offeror.

In these instances, the use of personalised or licensee-created application forms may mean that the offeror is not able to comply with the requirements in subsection 723(1). The Class Order notionally modifies subsection 723(1) to enable offerors to issue or transfer securities in response to an application form if the form was distributed by a financial services licensee to an applicant and was personalised or created by the financial services licensee.

The relief provided by the Class Order is largely a continuation of the relief provided by part of ASIC's (now repealed) Class Order [CO 00/44] *Electronic disclosure documents, electronic application forms and dealer personalised applications*. The relief in Class Order [CO 00/44] enabled:

1. persons offering securities to distribute electronic disclosure documents and electronic application forms (rather than paper disclosure documents and paper application forms); and
2. financial services licensees to partially complete or personalise application forms created by offerors, before sending the form to a client, and to also create their own application form, rather than distributing a form prepared by the offeror.

ASIC has recently reviewed its interpretation of the fundraising provisions and their application to electronic disclosure documents and application forms. Following that review, ASIC considers that electronic disclosure documents and electronic application forms can be distributed in accordance with the requirements of Chapter 6D without the relief provided by Class Order [CO 00/44].

Consequently, Class Order [CO 00/44] was repealed by Class Order [CO 14/25].

However, ASIC considers it necessary to continue relief to permit the continued use of financial services licensee created or personalised application forms. As such, ASIC has issued Class Order [CO 14/26].

**Human rights implications**

Class Orders [CO 14/25] and [CO 14/26] do not engage any of the applicable rights or freedoms.

**Conclusion**

Each of Class Orders [CO 14/25] and [CO 14/26] is compatible with human rights as it does not raise any human rights issues.