

## [CO 04/1526]

### Securitisation special purpose vehicles

*Issued 23/12/2004*

*Effective 11/1/2005: ASIC Gazette 01/05*

*Class Order [CO 04/1526] grants conditional relief from the requirement to hold an Australian financial services licence for certain securitisation special purpose vehicles.*

*[CO 04/1526] revokes the interim relief provided under [CO 03/1098] from 1 July 2005.*

Australian Securities and Investments Commission  
Corporations Act 2001 — Paragraph 911A(2)(1) — Exemption and  
Revocation

1. The Australian Securities and Investments Commission (*ASIC*) grants this exemption and effects this revocation under paragraph 911A(2)(1) of the *Corporations Act 2001* (the *Act*).

#### Services covered by exemption

2. A securitisation entity does not have to hold an Australian financial services licence for the provision of any of the following financial services in the course of a securitisation business:
  - (a) The service is issuing a securitisation product where all of the following apply:
    - (i) both of the following apply:
      - (A) the securitisation product relates to a securitisation transaction for managing some or all of the economic risk associated with assets acquired directly or indirectly by the securitisation entity from a person (the *sponsor*); and
      - (B) each other securitisation product issued by the securitisation entity relates to that securitisation transaction or another securitisation transaction for managing some or all of the economic risk associated with assets acquired directly or indirectly by the securitisation entity from that sponsor;
    - (ii) the issue is to a person who either:

- (A) holds an Australian financial services licence;  
or
  - (B) is exempt from holding an Australian financial services licence under this instrument or Class Orders [03/1099], [03/1100], [03/1101], [03/1102], [03/1103], [04/829] or [04/1313] or any exemption under paragraph 911A(2)(h) or (l) that includes reference to the exempted person complying with regulatory requirements of a foreign jurisdiction;
- (iii) either of the following applies:
- (A) at the time of issuing the product the securitisation entity has taken all reasonable steps to ensure that:
    - (I) the securitisation product; and
    - (II) any other securitisation product previously issued by the securitisation entity after the date of this instrument while the entity did not hold a financial services licence,  
  
are not subsequently acquired by a person as a retail client; or
  - (B) 10 business days have not elapsed since the securitisation entity became or should reasonably have become aware of matters that give it reason to believe that it has failed, other than in an immaterial respect, to comply with subparagraph (A) without full particulars of the failure having been provided to ASIC in writing (to the extent that the entity knows those particulars or would have known them if it had undertaken reasonable enquiries) and ASIC having notified the entity in writing that the entity may continue to rely on this instrument.
- (b) The service consists only of dealing in derivatives or foreign exchange contracts (or both) and all of the following apply:
- (i) the service does not involve making a market for derivatives or foreign exchange contracts;
  - (ii) the dealing is entered into for the purpose of managing a financial risk that arises in the securitisation business;

- (iii) the counterparty for the dealing is a wholesale client.
- (c) The service is providing a custodial or depository service in relation to financial products held by the securitisation entity as trustee for the holders of the securitisation products and either of the following applies:
- (i) the securitisation entity has not issued any of the securitisation products to a person as a retail client and has from the later of 1 July 2005 and when the entity first issues a securitisation product, taken all reasonable steps to ensure that the securitisation products are not acquired by a person as a retail client; or
  - (ii) 10 business days have not elapsed since the securitisation entity became or should reasonably have become aware of matters that give it reason to believe that it has failed, other than in an immaterial respect, to comply with subparagraph (i) without full particulars of the failure having been provided to ASIC in writing (to the extent that the entity knows those particulars or would have known them if it had undertaken reasonable enquiries) and ASIC having notified the entity in writing that the entity may continue to rely on this instrument.
- (d) The service:
- (i) is dealing on behalf of the holders of the securitisation products in financial products held by the securitisation entity as trustee for those holders of the securitisation products;
  - (ii) is not dealing by issuing or acquiring derivatives or foreign exchange contracts;
- and either of the following applies:
- (iii) the securitisation entity has not issued any of the securitisation products to a person as a retail client and has from the later of 1 July 2005 and when the entity first issues a securitisation product, taken all reasonable steps to ensure that the securitisation products are not acquired by a person as a retail client; or
  - (iv) 10 business days have not elapsed since the securitisation entity became or should reasonably have become aware of matters that give it reason to believe that it has failed, other than in an immaterial respect, to comply with subparagraph (iii) without

full particulars of the failure having been provided to ASIC in writing (to the extent that the entity knows those particulars or would have known them if it had undertaken reasonable enquiries) and ASIC having notified the entity in writing that the entity may continue to rely on this instrument.

### Further requirements for relying on the exemption

3. The exemption does not apply to the financial services referred to in subparagraphs 2(a), (b) and (d) unless either of the following requirements is satisfied:
  - (a) A financial services licensee:
    - (i) has a licence which is subject to a condition to the effect that the licensee must, in relation to a person (the *nominee*) who is a securitisation entity notified in writing to ASIC as a person in relation to whom the condition applies:
      - (A) as far as possible, comply with the Act as if the nominee were a representative of the licensee in relation to any financial service of the kind referred to in subparagraphs 2(a), (b) or (d); and
      - (B) have a deed poll in place under which there are enforceable, unlimited and irrevocable covenants in favour of each person to whom a financial service is provided from time to time by the nominee of the kind referred to in subparagraphs 2(a), (b) or (d) for any liability (other than an exempt liability) arising from acts or omissions of the nominee relating to the relevant financial service while the condition applies in relation to the nominee, as if the nominee were a representative of the licensee; and
    - (ii) has notified ASIC in writing that the condition referred to in subparagraph (i) applies in relation to the securitisation entity and not notified ASIC in writing that the condition no longer applies in relation to the securitisation entity; or
  - (b) The securitisation entity:
    - (i) provides the relevant financial service on and in accordance with financial product advice from a financial services licensee authorised to provide such advice in relation to the financial product to which the financial service relates; and

- (ii) has entered into a written agreement with the financial services licensee, under which:
    - (A) the securitisation entity receives the financial product advice described in subparagraph (i); and
    - (B) the financial services licensee has not by contract or otherwise excluded or limited (or purported to exclude or limit) its liability for any loss or damage resulting from any negligence by that licensee in providing the financial product advice to the securitisation entity.
4. This exemption does not apply to a securitisation entity from a date if ASIC notifies the entity in writing that after that date the entity may no longer rely on this instrument and that notice has not been withdrawn by ASIC in writing.

### Interpretation

5. In this instrument:

*custodial or depository service* has the meaning given by section 766E of the Act;

*debt instrument* means a chose in action that includes an undertaking by a person to repay money deposited with or lent to the person;

*exempt liability* of a securitisation entity means:

- (a) a liability arising from the following where it relates to a financial service covered by subparagraphs 2(a), (b) or (d):
  - (i) non-compliance with any undertaking to repay as a debt money deposited with, or lent to the securitisation entity, or any interest payable on such money under a debt instrument issued by the securitisation entity;
  - (ii) any act or omission for which a securitisation entity that issues securitisation products as trustee may be indemnified from the trust property of the trust;
- (b) a liability under any derivative or foreign exchange contract issued or acquired by the securitisation entity in the circumstances covered by subparagraph 2(b);
- (c) a liability (not covered by subparagraph (a)(ii)) arising from any act or omission relating to the financial services

covered by subparagraph 2(d) for which a securitisation entity that holds financial products as trustee may be indemnified from the trust property of the trust;

***financial product advice*** has the meaning given by section 766B of the Act;

***foreign exchange contract*** has the meaning given by section 761A of the Act;

***making a market*** has the meaning given by section 766D of the Act;

***representative*** has the meaning given by section 910A of the Act;

***retail client*** has the meaning given by section 761G of the Act;

***securitisation business*** means a business mentioned in paragraph (a) of the definition of securitisation entity;

***securitisation entity*** means a body corporate that satisfies all of the following requirements:

- (a) it carries on a business that consists of managing by way of a securitisation transaction some or all of the economic risk associated with assets, liabilities or investments (whether the body assumes the risk from another person or creates the risk itself); and
- (b) it is an insolvency-remote special purpose entity according to criteria of an internationally recognised rating agency that are applicable to the entity's circumstances (regardless of whether the agency has determined that the body meets those criteria); and
- (c) it raises all or substantially all of its funds by issuing securitisation products on terms that the funds raised would be applied in the business referred to in paragraph (a);

*Note:* Paragraphs (a) and (b) of this definition are based on paragraphs 820–39(3)(a) and (c) and subsection 820–39(4) of the *Income Tax Assessment Act 1997*. An explanation of the operation of those provisions is set out at paragraphs 1.8 to 1.12 of the Explanatory Memorandum to the *Taxation Laws Amendment Bill (No 5) 2003*.

***securitisation product*** means:

- (a) a debt instrument; or
- (b) an interest in a managed investment scheme; and

*wholesale client* has the meaning given by section 761G of the Act.

### **Revocation**

6. Class Order [CO 03/1098] is revoked with effect from 1 July 2005.

### **Commencement**

7. This instrument takes effect on gazettal.

Dated this 23rd day of December 2004

Signed by Brendan Byrne  
as a delegate of the Australian Securities and Investments  
Commission