ASIC
Australian Securities & Investments Commission

REPORT 411

Overview of decisions on relief applications (February to May 2014)

September 2014

About this report

This is a report for participants in the capital markets and financial services industry who are prospective applicants for relief.

This report outlines some of our decisions on relief applications during the period 1 February 2014 to 31 May 2014. It summarises examples of situations where we have exercised, or refused to exercise, our exemption and modification powers from the financial reporting, managed investment, takeovers, fundraising or financial services provisions of the *Corporations Act 2001*.

It also refers to a number of publications issued by ASIC during the period 1 February 2014 to 31 May 2014 that may be relevant to prospective applicants for relief, including class orders, consultation papers, regulatory guides and reports.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Disclaimer

This report does not constitute legal, financial or other professional advice. We encourage you to seek your own professional advice, including finding out how the *Corporations Act 2001* and other applicable laws apply to you. It is your responsibility to determine your obligations and to obtain any necessary professional advice.

Contents

Overview

1 ASIC has powers under the *Corporations Act 2001* (Corporations Act) to exempt a person or a class of persons from particular provisions and to modify the application of particular provisions to a person or class of persons. We use our discretion to vary or set aside certain requirements of the law where there is a net regulatory benefit, or where we can facilitate business or cut red tape without harming other stakeholders.

2 This report deals with the use of our exemption and modification powers under the provisions of the following chapters of the Corporations Act: Chs 2M (financial reports and audit), 5C (managed investment schemes), 6 (takeovers), 6D (fundraising) and 7 (financial services and markets).

3 ASIC has powers to give relief under the provisions of Chs 2 (licensing) and 3 (responsible lending) of the *National Consumer Credit Protection Act 2009* (National Credit Act) and from all or specified provisions of the National Credit Code, which is in Sch 1 to the National Credit Act. ASIC also has powers to give relief from the registration provisions under Sch 2 to the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Transitional Act). During the period of this report, we did not make any relevant decisions or issue any relevant publications in relation to credit relief.

4 ASIC issues no-action letters in some circumstances as discussed in Regulatory Guide 108 *No-action letters* (RG 108). A no-action letter states to a particular person that ASIC does not intend to take regulatory action over a particular state of affairs or particular conduct. This report summarises examples of situations where we have provided, or refused to provide, a no-action letter in relation to non-compliance with certain provisions of the Corporations Act.

5 The purpose of this report is to provide transparency and increase the quality of information available about decisions we make when we are asked to exercise our discretionary powers to grant relief from provisions of the Corporations Act, the National Credit Act and the Transitional Act.

6 This report covers the period beginning 1 February 2014 and ending 31 May 2014. During this period, we received 803 applications. We granted relief in relation to 650 applications and refused relief in relation to 32 applications; 57 applications were withdrawn. The remaining 64 applications were decided outside of this period.

7 This report does not provide details of every single decision made in the period. It is intended to provide examples of decisions that demonstrate how we have applied our policy in practice. We use our discretion to vary or set aside certain requirements of the law where the burden of complying with

the law significantly detracts from its overall benefit, or where we can facilitate business without harming other stakeholders.

8 In this report, we have outlined matters in which we refused to exercise our discretionary powers as well as matters in which we granted relief. Prospective applicants for relief may gain a better insight into the factors we take into account in deciding whether to exercise our discretion to grant relief.

9 The appendix to this report details the relief instruments we have executed for matters referred to in the report. Class orders are available from our website via www.asic.gov.au/co. Instruments are published in the *ASIC Gazette*, which is available via www.asic.gov.au/gazettes, or under 'Credit relief' on our website (for credit instruments). A register of waivers, including class rule waivers, granted under ASIC market integrity rules is available via www.asic.gov.au/markets under 'Market integrity rules'. For information and media releases on the matters and publications referred to in this report, see www.asic.gov.au/mr.

A AFS licensing relief

Key points

This section outlines some of our decisions on whether to grant relief under Ch 7 of the Corporations Act, including under s911A(2) and 926A(2), from the requirement to hold an Australian financial services (AFS) licence and related provisions. It also outlines the publications we issued that relate to licensing relief.

Requirement to hold an AFS licence

Relief for a mutual discretionary fund from the requirement to hold an AFS licence

10 We granted relief to the issuer and operator of a mutual discretionary fund from the requirement under s911A(1) of the Corporations Act to hold an AFS licence for the provision of a financial service by providing general advice in relation to, or dealing in, a mutual risk product.

11 We granted relief because we considered that:

- the costs of compliance represented a significant proportion of the mutual discretionary fund's income and may be considered disproportionately burdensome;
- the mutual risk product was offered only to a very select and limited group of persons;
- the mutual risk product provided a limited form of cover and did not involve risks for the broader community;
- the applicant would remain subject to certain Corporations Act obligations (by way of the conditions set out in the relief instrument), such as product disclosure and dispute resolution obligations, which would aid in consumer understanding of the mutual risk product and ensure that consumers have avenues for redress in the event of a dispute; and
- the mutual risk product addressed an apparent gap in the insurance market—cessation of the mutual discretionary fund, or increases to member contributions to the fund, may have a negative effect on the ability of some members to source appropriate and affordable alternative cover.

12 The relief applies only if the Product Disclosure Statement (PDS) for the mutual risk product includes specified disclosures, and if monetary

contributions to the mutual discretionary fund, or assets acquired with those contributions, are held or used only in specified ways.

Derivative transaction reporting

Relief for certain Phase 1 reporting entities: Extension of masking and middleware relief

13 We granted relief to certain Phase 1 reporting entities ahead of the start of Phase 1 reporting under the ASIC Derivative Transaction Rules (Reporting) 2013 on 1 October 2013.

> Note: In this report, 'derivative transaction rules (reporting)' refers to the ASIC Derivative Transaction Rules (Reporting) 2013.

14 Following discussions with the Phase 1 reporting entities and the Australian Bankers' Association (ABA), the ABA submitted an application for relief on behalf of the Phase 1 reporting entities.

15 We granted an extension of the previously granted relief in relation to:

- foreign privacy and masking—this relief was set to expire on 1 April 2014 and would have required the Phase 1 reporting entities to cease masking of counterparty identifying information from this day. This relief was extended until 1 October 2014; and
- the readiness of certain middleware providers to support reporting by the Phase 1 reporting entities of certain trades to trade repositories—this relief was required due to MarkitWire and ICE Link not being ready to support reporting at the expiry of the previous relief, and so transitional extensions of the original relief have been granted.

16 The relief includes strict conditions to ensure the Phase 1 reporting entities take accelerated steps to obtain the necessary consents and provide the relevant notifications.

17 We granted relief because strict compliance with the derivative transaction rules (reporting) would result in the Phase 1 reporting entities incurring substantial costs that we do not considered justified, due to the minimal regulatory detriment associated with having later access to the data. We did not consider that the marginal regulatory benefit of having all the information for all transactions based on the timeline under the rules outweighed the compliance costs of the implementation on the proposed timeline.

Relief for three Phase 2 reporting entities that are New Zealand subsidiaries of certain Australian ADIs

18 We granted relief to three New Zealand subsidiaries of certain Australian authorised deposit-taking institutions (ADIs) to delay the start of their reporting obligations in relation to credit and interest rate derivatives by six months. The New Zealand banks would otherwise have fallen within Phase 2 of the reporting obligations under the derivative transaction rules (reporting).

19 Relief was required to enable the New Zealand banks to complete necessary systems work to facilitate reporting. Without relief, the New Zealand banks would incur substantial costs to complete the necessary systems work to come into compliance, including losing customer business due to being unable to obtain necessary customer consents within the available timeframe.

20 As a condition of this relief, we required the New Zealand banks to prepare a compliance plan detailing how they will come into compliance with the derivative transaction rules (reporting) by 1 October 2014. We have also imposed conditions regarding foreign privacy and masking that are substantially the same as the conditions placed on the Phase 1 and 2 reporting entities. The intent is that the New Zealand banks will be in a position to start reporting on 1 October 2014 with masking issues having been fully resolved.

Relief for a Phase 2 reporting entity from certain aspects of the alternative reporting regime

21 We granted relief to a Phase 2 reporting entity to allow it to comply with the alternative reporting requirements as a swap dealer in a similar manner to swap dealers who are US persons.

22 The relief enables the applicant to avoid significant systems build and related work that would be required to develop dual reporting infrastructure prior to it being required to report under US Commodity Futures Trading Commission (CFTC) Rules.

23 As a condition of this relief, the applicant is required to provide ASIC with monthly aggregated information relating to its over-the-counter (OTC) derivatives exposures and major counterparties, and tag those trades that it is required to report under Australian rules as available to ASIC.

Other licensing relief

No-action letter for a non-cash payment facility provider in relation to the ASLF requirement

24 We provided a no-action letter to an AFS licensee who operates a non-cash payment facility connected to a charitable investment scheme. The no-action letter allows the applicant to comply with an alternative requirement to the adjusted surplus liquid funds (ASLF) requirement described in Regulatory Guide 166 *Licensing: Financial requirements* (RG 166), under which it must:

- hold at all times a minimum specified net tangible assets amount, set at an appropriate level to reflect the applicant's current financial position;
- hold an appropriate specified level of cash, or cash equivalents, to maintain an appropriate liquidity position; and
- comply with a specified tailored cash needs projection requirement.

25 The applicant must comply with a monthly certification requirement to enable ASIC to monitor the applicant's compliance with the alternative financial requirements and its ability to pay its debts as and when they fall due.

26 We provided the no-action letter because we considered that the applicant's particular operational model was not currently suited to an application of the ASLF requirements. The applicant's business and operational model will be affected by proposed changes to the policy position of both ASIC and Australian Prudential Regulation Authority (APRA) in relation to the operation of charitable investment funds. Pending the finalisation of that broader policy, the cost of changes by the applicant to comply with the usual calculation of ASLF may be disproportionate. We considered that the alternative requirements in the no-action letter supported the policy purpose of the ASLF requirement. The alternative requirements also supported the maintenance of the applicant's financial and liquidity position, based on cash and assets that are readily convertible to cash, which would support confidence in the applicant's continuing capacity to meet obligations to its investors who use the non-cash payment facility.

Relief in relation to a non-cash payment facility for distribution of royalty payments

27 We intended to grant interim licensing relief to a community organisation in relation to a trial of a class of non-cash payment facilities. The facilities would have been used for passing on royalty payments to community members.

28 Under the proposed arrangements, the community organisation would deal in the non-cash payment facilities by arranging for community members to acquire a prepaid card issued by an AFS licensee. The community organisation would also hold a beneficial interest in the underlying facility into which royalty payments were made on behalf of community members.

29 We considered that relief for a pilot program to test these arrangements was appropriate in the circumstances. Financial services were only provided in the context of the community organisation's existing relationships with, and obligations to, members. We consider the risks to members resulting from the community organisation's conduct were limited because:

- the purpose of the conduct was to make payments to community members in an easily accessible form;
- the community organisation would not receive monetary benefits in relation to decisions by members to acquire prepaid cards; and
- the community organisation was more likely to act in the members' interests, rather than in the interests of the card issuer or in its own interests.

30 The pilot program was discontinued before relief was granted.

Relief from the prohibition on an AFS licensee appointing another AFS licensee as an authorised representative

31 We granted relief from s916D(1) of the Corporations Act to enable an intermediary with an AFS licence to appoint another AFS licensee as an authorised representative for dealing in and providing general financial product advice about general insurance products. We granted the relief because we considered that it represented a relatively minor extension of the existing policy of granting relief to an intermediary with an AFS licence to appoint another AFS licensee as an authorised representative for life risk products.

32 We were satisfied that the risk of consumer confusion about who was responsible for the provision of services was minimised by the inclusion of conditions ensuring adequate disclosure. Further, the consumer was protected from the risk of loss by the inclusion of a condition to ensure that the licensee is responsible for the conduct of the authorised representative, as well as a requirement that they hold adequate professional indemnity insurance.

Publications

33 We issued the following publications in relation to AFS licensing relief during the period of this report.

Class orders

Class Order [CO 14/0234] *Transitional exemptive relief for Phase 2 Reporting Entities from elements of the ASIC Derivative Transaction Rules (Reporting) 2013*

34 [CO 14/0234] provides relief for Phase 2 reporting entities from complying with certain provisions of the derivative transaction rules (reporting).

35 On 1 April 2014, under Phase 2 of the derivative transaction rules (reporting), certain reporting entities were required to commence reporting credit and interest rate OTC derivative transactions to trade repositories.

36 Following an application for relief from the Australian Financial Markets Association on behalf of Phase 2 reporting entities, we granted transitional relief in the form of [CO 14/0234]. The relief provides the Phase 2 reporting entities with additional time to start complying with certain aspects of the reporting requirements.

37 The relief recognises that a number of Phase 2 reporting entities are experiencing practical limitations in their efforts to achieve compliance with the original timeframes set out in the derivative transaction rules (reporting). Given the relief is transitional, we considered the commercial benefit of providing the relief would outweigh any regulatory detriment resulting from the relief.

Reports

REP 390 *Review of OTC electricity derivatives market participants' risk management policies*

38 REP 390 summarises the findings of our review of the written risk management policies of AFS licensed entities that trade in OTC derivatives in the wholesale electricity market in Australia and highlights some risk management practices that we have observed.

39 The report sets out our findings that:

- no areas of significant concern were identified;
- the risk management policies appeared to be appropriate to the nature, size and complexity of the financial services business being conducted; and
- the risk management practices varied amongst AFS licensees.

B Disclosure relief

Key points

This section outlines some of the applications we have decided that relate to the requirements in Ch 6D of the Corporations Act to provide prospectuses and other disclosure documents and the Ch 7 requirements to provide PDSs and Financial Services Guides. It also outlines the publications we issued that relate to disclosure relief.

Convertible securities

Relief to allow a company to use a transaction-specific prospectus for an offer of capital notes

40 We granted relief in similar terms to Class Order [CO 00/195] *Offer of convertible securities under s713* to allow an entity offering securities (offeror) to offer capital notes by way of a transaction specific prospectus.

41 Relief was required because, in certain circumstances, the capital notes may be convertible into shares in a non-operating holding company that may replace the offeror as the ultimate holding company of the company group.

42 We granted relief in these circumstances because we were satisfied that:

- even if the offeror undergoes a restructure whereby it is replaced by a non-operating holding company as the ultimate holding company of the company group, the underlying business of the group would be the same;
- shareholders will be able to obtain sufficient information under the continuous disclosure regime; and
- the prospectus contains sufficient information about the nature and risks of the capital notes and the underlying securities.

Relief to allow a company to appoint its controlled entity as the nominated purchaser to buy back convertible preference securities

43 We granted relief to allow a company to appoint its controlled entity as the nominated purchaser to buy back convertible preference securities it had issued previously. Relief was required because the Corporations Act prohibits the issue or transfer of shares (or units of shares) in a company to an entity it controls (self-acquisition prohibition).

44 We granted relief in these particular circumstances because we were satisfied that:

- the self-acquisition would be temporary as the convertible preference securities would be cancelled immediately after they were acquired by the controlled entity;
- the convertible preference securities did not constitute a voting share for the purposes of the Corporations Act;
- there was no reason to believe that the acquisition of the convertible preference securities by the controlled entity would cause corporate failure, insider trading or market manipulation;
- the shareholders had approved the selective buyback of the convertible preference shares; and
- the effect of the buyback on the market price of quoted ordinary shares is unlikely to be significant.

Employee incentive schemes

Refused relief to facilitate an offer of conditional rights over debt instruments under an employee incentive scheme

45 We intended to refuse relief in similar terms to Class Order [CO 03/184] *Employee share schemes* to facilitate an offer of conditional rights over debt instruments, or hybrid instruments in the form of capital notes, to eligible employees under an employee incentive scheme.

46 We intended to refuse the relief as we were not satisfied that the relief requested was consistent with the policy objectives underlying [CO 03/184] as set out in Regulatory Guide 49 *Employee share schemes* (RG 49), or the proposals set out in Consultation Paper 218 *Employee incentive schemes* (CP 218) and the accompanying draft updated Regulatory Guide 49 *Employee incentive schemes*. We did not consider that offers of the conditional rights over debt instruments or capital notes would foster mutual interdependence between the company and its employees. In particular, the nature of the instruments meant that the value of the underlying instruments would not directly reflect the performance of the issuer, and holders (e.g. employees) did not have the opportunity to participate in the benefits in an equity-like manner.

47 The application was subsequently withdrawn.

Reconstructions

Relief from the disclosure and on-sale provisions for a reconstruction

48 We granted disclosure and on-sale relief to a responsible entity of a managed investment scheme in relation to a reconstruction proposal to convert the scheme to a company.

49 Under the proposal, each member of the managed investment scheme would first exchange their interests in the scheme for shares in a newly incorporated company (consolidation company). The consolidation company would then merge with a separate, existing company that had effectively operated the scheme (operating company). Prior to the reconstruction, the existing shares in the operating company were stapled to members' interests in the scheme.

50 We granted relief from the disclosure provisions of Ch 6D of the Corporations Act because we considered:

- the reconstruction would not result in a change to the underlying business of the scheme and therefore the acquisition of shares in the consolidation company and operating company would not involve an investment decision; and
- each member would effectively have the same proportion of shares in the operating company as stapled securities in the scheme prior to the reconstruction.

51 In addition, we granted secondary sales relief to enable members holding shares in the consolidation company, which were issued without disclosure, to on-sell those shares to the operating company to effect the merger without requiring further disclosure.

Rights issues

Refused relief to rely on s708AA and 708A where securities have been suspended for more than five days

52 We refused to give relief to enable a company, whose securities would have been suspended for more than five days, to conduct an accelerated non-renounceable rights issue and institutional placement with the benefit of s708AA and 708A of the Corporations Act.

53 We refused to give relief because we were not satisfied that the company's securities would be adequately priced and the market fully informed, given:

- the limited time that would have elapsed between the suspension and the proposed offer; and
- the lack of information provided to ASIC about the structure and purpose of the offer, and the proposed disclosure to shareholders about the offer.

Securities hawking

Relief to allow an incorporated cooperative to discuss shareholding opportunities with potential shareholders

54 We granted securities hawking relief to allow an incorporated cooperative to discuss shareholding opportunities at unsolicited, in-person meetings with industry participants, and to make it known to future members that they can make a written request for a copy of the company's prospectus.

55 The company was established as a cooperative but incorporated due to the lack of a consistent national regime governing cooperatives. It continues to operate on the basis of cooperative principles. To avoid breaching s736 of the Corporations Act the company adopted a structure that artificially allowed membership, which is the key benefit of share ownership in the company, without allowing (or discussing) share ownership. Discussion of membership at the initial point of entry was therefore artificial and did not have the benefit of prospectus disclosure.

56 We granted relief in these particular circumstances because we were satisfied that:

- while incorporated, the company operated on cooperative principles;
- due to the cooperative nature of the company, the securities hawking provisions had an adverse effect on the company's operation and imposed an unreasonable burden, particularly at the customer-development level of its business;
- there was no investor detriment in granting the relief, as shares in the company were issued primarily to confer benefits on members, rather than for an investment purpose; and
- relief would allow full discussion of membership and full prospectus disclosure at the time a membership decision was taken.

Product disclosure statements

Refused relief for a fund not to be treated as a 'hedge fund' for the purposes of Class Order [CO 12/749] *Relief from the Shorter PDS regime*

57 We refused to give relief to allow two unlisted managed investment schemes to not be treated as 'hedge funds' for the purposes of [CO 12/749] and our policy in Regulatory Guide 240 *Hedge funds: Improving disclosure* (RG 240). [CO 12/749] excludes 'hedge funds' from the shorter PDS regime.

58 We refused to give relief because:

- the managed investment schemes satisfied two of the five hedge fund characteristics specified in [CO 12/749] and therefore should be treated as such for the purposes of the class order;
- we were not satisfied that relief would result in a net regulatory benefit or that the regulatory detriment would be minimal and clearly outweighed by the resulting commercial benefit; and
- we were not satisfied that, if relief was granted, investor protection would not be reduced.

Other disclosure relief

Relief for ASX's AQUA-quoted interests

59 We granted relief to the responsible entity of an AQUA-quoted managed fund product from the requirement under s1017B of the Corporations Act to notify unit holders of 'any material change to a matter, or significant event that affects a matter, being a matter that would have been required to be specified in a PDS for the financial product prepared on the day before the change or event occurs'.

60 We granted relief because:

- there is some uncertainty as to whether quoted interests in the managed fund product are enhanced disclosure securities as defined in s111AFA(1) of the Corporations Act; and
- as interests in the managed fund product will be quoted for trading on the AQUA market, it is more efficient and appropriate for ongoing disclosure for the units to be made under Ch 6CA than under s1017B.

61 Relief was granted on the condition that the responsible entity complies with the Corporations Act as if it was an unlisted disclosing entity and includes a statement to this effect in any PDS issued for the product.

Publications

62 We issued the following publications in relation to disclosure relief during the period of this report.

Class orders

Superseded Class Order [SCO 14/23] *Variation of Class Order [CO 12/749]*

63 [SCO 14/23] extends the relief in Class Order [CO 12/749] *Relief from the Shorter PDS Regime* for a further 12 months, to 30 June 2015. [CO 12/749] excludes superannuation platforms, multi-funds and hedge funds from the shorter PDS regime (although superannuation platforms and multi-funds may elect to be included in the regime). We have extended the relief pending a future Australian Government decision on the application of the shorter PDS regime to superannuation platforms, multi-funds and hedge funds.

Superseded Class Order [SCO 14/25] *Revocation of Class Order [SCO 00/44]*

64 [SCO 14/25] revokes Superseded Class Order [SCO 00/44] *Electronic disclosure documents, electronic application forms and dealer personalised applications*, as the relief provided by that class order is no longer necessary. Following a review of our interpretation of the fundraising provisions in the Corporations Act, we now consider that electronic disclosure documents and electronic application forms can be distributed in accordance with the requirements of Ch 6D without the relief provided by [SCO 00/44].

65 We have also updated the guidance in Regulatory Guide 107 *Fundraising: Facilitating electronic offers of securities* (RG 107): see paragraphs 83–85.

Class Order [CO 14/26] *Personalised or Australian financial services licensee created application forms*

66 [CO 14/26] provides relief to offerors so they may issue or transfer securities in response to an application form that has been:

- personalised by an AFS licensee for an applicant; or
- created by an AFS licensee.

67 The relief overcomes any concerns about these forms not being one that is distributed by the offeror or not being copied or directly derived from such a form by the applicant.

68 We have also updated the guidance in RG 107: see paragraphs 83–85.

Superseded Class Order [SCO 14/128] *Revocation of Class Order [SCO 00/189]*

69 [SCO 14/128] revokes Superseded Class Order [SCO 00/189] *Use of original application form with s724(3) documents*, as the relief provided by that class order is no longer necessary. Under [SCO 00/189], an offeror did not have to include copies of current application forms with documents sent under s724(3) of the Corporations Act, provided that any application form that applies to the new disclosure documents is not different to the application form sent with the original disclosure documents.

70 [SCO 00/189] was introduced following the implementation of the reforms under the *Corporate Law Economic Reform Program Act 1999*, as an interim measure to remove any uncertainty about the use of 'outdated' application forms for issuing or transferring securities in certain circumstances in accordance with s723 of the Corporations Act. Following a review of our interpretation of the fundraising provisions in the Corporations Act and their application to application forms, we consider that the market no longer requires this relief.

Superseded Class Order [SCO 14/425] *Amendment of Class Order [CO 10/630]*

71 [SCO 14/425] amends Class Order [CO 10/630] *Long-term superannuation returns* to extend its maximum period of operation by a further 12 months to allow additional time for the proposed amending regulations, which will refine the long-term superannuation performance reporting requirements, to be made.

72 This means that the relief provided by [CO 10/630] from the operation of the current long-term superannuation performance reporting requirements that are proposed to be refined is extended to the earlier of:

- 19 July 2015; and
- the date any relevant amendments to regs 7.9.20AA and 7.9.75BA of the Corporations Regulations 2001 (Corporations Regulations) commence.

Superseded Class Order [SCO 14/394] *Amendment of Class Order [CO 10/321]*

73 [SCO 14/394] amends Class Order [CO 10/321] *Offers of vanilla bonds* by extending the class order's minimum subscription requirement of at least $50 million until 12 November 2014.

74 We have previously extended the expiry date of the minimum subscription requirement pending any further regulatory developments relating to retail corporate bonds. As no such developments have occurred since [CO 10/321]

was last amended, we consider it appropriate to extend the expiry date of the minimum subscription requirement for a further six months.

Class Order [CO 14/443] *Deferral of choice product dashboard and portfolio holdings disclosure regimes*

75 [CO 14/443] provides relief to defer the operation of the product dashboard requirements for Choice products and the portfolio holdings disclosure requirements. The class order was issued following an application for relief from an industry association.

76 On 5 May 2014, the Australian Government announced a deferral of the start date for the Choice product dashboard and the introduction of a portfolio holdings disclosure regime to 1 July 2015. In light of this announcement, and in the absence of regulations or amending legislation to implement this decision, we facilitated the deferral to provide industry with the necessary legal certainty by way of the relief in [CO 14/443].

77 The class order defers the commencement of the look-through provisions to 1 July 2015 to facilitate a first reporting date of 31 December 2015, and the product dashboard requirements for Choice products to 1 July 2015. This will allow further time for the regulations to be made and will provide superannuation trustees with additional time to prepare for the requirements once the regulations are made.

78 We did not provide relief to defer the fees and costs provisions, which was also sought in the industry association's application for relief, as we were not satisfied that there was a demonstrated net regulatory benefit if the deferral relief were granted, or that the commercial benefit that would flow from relief would clearly outweigh the regulatory detriment resulting from the relief. We did not consider that these provisions were ambiguous, as ASIC issued guidance in November 2013 in the form of FAQs regarding key aspects of the fees and costs provisions, including the indirect cost ratio.

79 We have also extended our facilitative approach to compliance with the fees and costs provisions to 1 July 2015 for superannuation products and managed investment products. During this period, we will take a measured approach where inadvertent breaches arise or system changes are underway, provided that industry participants are making reasonable efforts to comply: see Media Release (14-132MR) *ASIC releases information sheet on super fee and cost disclosure and defers section 29QC* (17 June 2014).

Consultation papers

CP 220 *Fundraising: Facilitating offers of CHESS Depositary Interests*

80 CP 220 sets out our proposals to facilitate offers of CHESS Depositary Interests (CDIs) over shares in a foreign company, and remove any uncertainty about how offers of CDIs are regulated under the Corporations Act, by issuing class order relief and guidance in relation to the disclosure provisions in Ch 6D and the licensing provisions in Pt 7.6 of the Corporations Act.

81 We sought feedback on these proposals from foreign companies listed on Australian exchange markets, their advisers, and other persons involved in offers of CDIs over shares in a foreign company.

82 Submissions on CP 220 were due on 25 July 2014. A report on our response to submissions has not been released at the date of this report.

Regulatory Guides

RG 107 *Fundraising: Facilitating electronic offers of securities*

83 RG 107 is a guide to facilitate the use of email and the internet to make offers of securities under Ch 6D of the Corporations Act. The guide has been updated to ensure that our guidance reflects current market practices and advances in technology.

84 The updated guidance includes:

- an explanation of our view on the way the internet and other electronic means can be used in making offers of securities;
- a ‘good practice guide’ to assist offerors, distributors, publishers and other parties involved in distributing offers; and
- continuation of relief for the use of personalised or AFS licensee created application forms (see paragraphs 66–68).

85 The updated RG 107 follows the issue of Consultation Paper 211 *Facilitating electronic offers of securities: Update to RG 107* (CP 211) in June 2013 and our report on submissions: see paragraphs 86–88.

Reports

REP 385 *Response to submissions on CP 211 Facilitating electronic offers of securities: Update to RG 107*

86 REP 385 highlights the key issues that arose out of the submissions received on CP 211 and details our responses in relation to those issues.

87 In CP 211, we sought feedback on proposals to facilitate the use of the internet and other electronic means to make offers of securities under Ch 6D of the Corporations Act. Specifically, we consulted on our proposals to:

- update RG 107 by explaining our interpretation of the fundraising provisions in Ch 6D and the application of these provisions to using and distributing electronic disclosure documents and application forms;
- revoke [CO 00/44] (now superseded [SCO 00/44]) and issue a new class order for personalised or AFS licensee created application forms (see paragraphs 66–68);
- provide good practice guidance to assist offerors, distributors and publishers in using the internet when making offers of securities; and
- incorporate our previous guidance contained in Superseded Regulatory Guide 150 *Electronic applications and dealer personalised applications* (SRG 150) into RG 107.

88 Feedback received on CP 211 helped us to finalise our guidance, which is published in the updated RG 107 (see paragraphs 83–85), and related class orders (see paragraphs 64–70).

C Managed investment relief

Key points

This section sets out some of the circumstances in which we have granted or refused relief under s601QA from the provisions of Ch 5C of the Corporations Act. We did not issue any relevant publications in relation to managed investment scheme relief during the period of this report.

Duties of responsible entity

Relief for stapled securities

89 A responsible entity of two registered managed investment schemes that were proposed to be stapled together did not apply for relief from s601FC(1)(c), (d) or (e) of the Corporations Act. Generally, a responsible entity proposing to create a stapled security would apply for relief from these provisions to allow it to take into account the interests of the stapled group in complying with its duties. Instead, the responsible entity obtained judicial advice that it would be justified in implementing the stapling. As part of the application for judicial advice the responsible entity raised the absence of obtaining relief from s601FC(1)(c), (d) or (e) of the Corporations Act.

90 The court made orders that the responsible entity was justified in implementing the transaction even though the responsible entity had not obtained relief. This was because:

- relief would not affect the general law equitable duties of the responsible entity as trustee, which would be to the security holders;
- because of the stapled nature of the security, the security holders in each component are one and the same person;
- in such circumstances, it was permissible that the responsible entity consider its duties in the context in which the trust operates (see *ASIC v Australian Property Custodian Holdings Limited No 3 [2013] FCA 1342*).

Scheme registration relief

Relief for mutual discretionary fund

91 In the matter referred to in paragraphs 10–12, we also granted conditional relief from the requirement under s601ED(1) of the Corporations Act to register the mutual discretionary fund for the reasons discussed.

D Mergers and acquisitions relief

Key points

This section outlines some of the circumstances in which we have granted or refused relief from the provisions of Chs 2J, 6, 6A and 6C under s259C, 655A, 669 and 673, respectively, of the Corporations Act. We did not issue any relevant publications in relation to mergers and acquisitions relief during the period of this report.

Proceeding to not make takeover offers

Refused no-action letter for proceeding to not make takeover offers under an announced bid

92 We refused to provide a no-action letter for a bidder proceeding to not make takeover offers under an announced bid and a consequential contravention of the requirement to dispatch offers within the requisite timeframe.

93 We had concerns about the structure and terms of the bid as announced, in particular whether it deliberately sought to treat one target shareholder differently. Considering the nature of our concerns and whether the bidder could reasonably rely on the takeover bid exception to the s606(1) prohibition, the bidder proposed to withdraw its bid.

94 After considering the circumstances of the application against the underlying policy of Ch 6 and our criteria in RG 108, we were not satisfied that it would be appropriate to issue the no-action letter. In particular, we were not satisfied that the bidder took all reasonable measures to avoid the need for a no-action letter.

Refused relief to extend the two-month period in s631

95 We refused relief to enable a bidder to extend the two-month period in s631 of the Corporations Act for making offers under its off-market takeover bid. The application for relief was made after the two-month period in s631 had already elapsed. Therefore, the bidder had already breached the Corporations Act by not making offers under its off-market takeover bid.

96 Relief was refused because the breach had already taken place. As noted in Regulatory Guide 51 *Applications for relief* (RG 51), in general we cannot give retrospective relief for breaches of provisions of the Corporations Act that have already taken place.

Supplementary statements

Relief to allow dispatch of replacement target's statement

97 We granted relief to allow a target to dispatch a single 'replacement target's statement' instead of the original target's statement and a separate supplementary target's statement. The replacement target statement would incorporate the information in the original target's statement and supplementary target's statement in one document.

98 At the time when the supplementary target's statement was lodged, the original target's statement had not yet been dispatched and the target was still within the statutory timeframe in item 12, s633(1) in which it was required to dispatch the target's statement.

99 Class Order [CO 13/528] *Changes to a bidder's statement between lodgement and dispatch* provides relief to clarify the procedure that must be adopted when dispatching original and supplementary bidder's statements in circumstances where changes are made to the bidder's statement between lodgement and dispatch. However, no equivalent relief is available for target's statements.

100 Without relief, the combined operation of item 12, s633(1), s646 and 647(3)(c) may mean that, in certain circumstances where the bid class securities are not quoted, the supplementary target's statement is required to be:

- sent to holders of bid class securities before the dispatch of the original target's statement; and
- dispatched again together with the original target's statement.

101 Relief was granted to ensure that target holders are not confused by receiving a supplementary statement before the original target's statement, and to remove any uncertainty about the procedure the target was required to adopt for the dispatch of the statements.

Foreign holder nominee approval

Refused application for approval of foreign holder nominee

102 We intended to refuse an application for approval of a nominee under s615(a) of the Corporations Act to deal with ineligible foreign shareholders' entitlements under item 10, s611 of the Corporations Act. In this case, a major shareholder's relevant interest in the company could have increased from below 20% to a point above 20%, as a result of the rights issue combined with the shareholder's participation in the sub-underwriting pool.

103 We intended to refuse the application because:

- we were not satisfied that other reasonably available options to mitigate the control impact had been explored by the company;
- we were concerned that the rights issue may be designed to avoid the requirements of Ch 6 of the Corporations Act; and
- the benefits of limiting the control effect outweighed any inconvenience to the company in seeking to amend the sub-underwriting arrangements.

104 The application was subsequently withdrawn.

E Conduct relief

Key points

This section outlines some of the circumstances where we have granted or refused relief from the conduct obligations in Chs 2D, 2G, 2M, 5C and 7 of the Corporations Act. This section also outlines the publications we issued that relate to conduct relief.

Adviser training requirements

Refused no-action letter in relation to financial product adviser training requirements

105 We refused an application for a no-action letter by an ADI in relation to adviser training requirements in Regulatory Guide 146 *Licensing: Training for financial product advisers* (RG 146).

106 We took the view that particular financial products issued by the applicant fell outside the definition of 'consumer credit insurance' (CCI) in reg 7.1.15 of the Corporations Regulations and that, as the products did not meet the definition of CCI, they should properly be categorised as life insurance (a Tier 1 product under RG 146).

107 Under the terms of the applicant's products, the insurance cover was available before the relevant loan was drawn down (and could continue in the event that the policyholder's loan agreement did not in fact commence) and for an indefinite period of time after the loan had ended. Further, the insurer's liability under the loan was determined by the principal amount at commencement of the loan, rather than the outstanding amount at any given time.

108 In particular, we confirmed our view that reg 7.1.15(1)(b) should be interpreted as meaning that the insurer's liability should be determined by the consumer's point-in-time liability under the credit agreement at the time of an insurance claim and that, in order for it to be CCI, the cover could not exist independently of the loan (i.e. commence before the loan or continue after the loan ends). We considered that this view aligned with the broad policy objectives of RG 146 and principles of consumer protection generally. According to that view, the applicant would be in breach of s912A(1)(f) of the Corporations Act. In acknowledging ASIC's views, the applicant sought a no-action letter as an interim measure pending ASIC's confirmation of its policy position in relation to CCI in RG 146 as a result of Consultation Paper 212 *Licensing: Training of financial product advisers—Update to RG 146* (CP 212).

109 We refused the application because, in light of our view that the applicant was in breach of s912A(1)(f), and present uncertainty regarding timing of an outcome on CP 212, such a decision would allow breaches to continue for an unspecified length of time and could not be justified on the basis of policy in RG 108.

Financial reporting

Relief from the requirement to prepare and lodge audited or reviewed half-year financial reports

110 We granted relief in similar terms to Class Order [CO 08/15] *Disclosing entities—half-year financial reporting relief* to a listed disclosing entity in relation to its first financial year.

111 [CO 08/15] relieves disclosing entities whose first financial year is eight months or less from the requirement to prepare and lodge a half-year financial report and director' report for that financial year. The company was unable to rely on [CO 08/15] because its first financial year was four days longer than the 'eight month or less' period contemplated in the class order.

112 The company had made an earlier application for the same relief, which we had refused. The earlier application was refused due to our concerns about the entity's recent prospectus, specifically regarding the forecasted financial information and the treatment of the transaction as a reverse acquisition. At the time, we considered that requiring the preparation and lodgement of the half-year reports would be appropriate and useful to investors and the market.

113 After consultation with ASIC, the company agreed to provide improved disclosure to the market, including its and its predecessor entities' half-year report for the previous half-year period and its quarterly sales results. Given the further disclosure provided to the market, we considered it was appropriate to grant the relief.

Publications

114 We issued the following publications in relation to conduct relief during the period of this report.

Information sheets

INFO 196 *Audit quality: The role of directors and audit committees*

115 INFO 196 provides guidance to assist directors and audit committees in their roles in ensuring the quality of the external audit of a financial report. It explains:

- why audit quality is important;
- the responsibilities of the auditor;
- the roles of directors and audit committees;
- the responsibilities of directors for auditor independence;
- who should manage the appointment of auditors;
- what matters should be considered in setting audit fees; and
- what directors and audit committees can do to promote audit quality.

Reports

REP 387 *Penalties for corporate wrongdoing*

116 REP 387 outlines the penalties in Australia for corporate wrongdoing to assess whether they are proportionate and consistent. The report compares ASIC's penalties with those in overseas jurisdictions and within the Australian context.

REP 393 *Handling of confidential information: Briefings and unannounced corporate transactions*

117 REP 393 sets out key observations and identifies some challenges that listed entities, their advisers, analysts and institutional investors face in managing their obligations relating to confidential, market-sensitive information.

118 The report outlines the findings from our review of a limited number of listed entities and their advisers to consider the practices employed in the Australian market to handle and protect confidential, market-sensitive information.

F Other relief

Key points

This section outlines decisions we have made that do not fall within any of the categories mentioned in previous sections and that may be significant to participants in the financial services and capital markets industry. It also outlines further publications we issued.

No-action letters

Refused no-action letter in relation to the remuneration of employees giving general advice

119 We refused to provide a no-action letter in relation to s963F, 963H and 963J of the Corporations Act to a licensee. Specifically, the licensee requested that ASIC not take action regarding these provisions against staff members who give general advice to clients. The licensee had lodged a no-action application because the commissions it pays to those staff members were only grandfathered until 30 June 2014, under reg 7.7A.16C of the Corporations Regulations.

120 The licensee sought a no-action position from 1 July 2014 until 1 October 2014 because, if the Australian Government's proposed amendments to the Future of Financial Advice reforms had not been made into law, the commissions would have breached the Corporations Act once the grandfathering regulation had expired. The Corporations Amendment (Streamlining of Future Financial Advice) Bill 2014 allows for certain benefits given to employees in relation to general advice to be permitted. The Bill was tabled in Parliament in March and the Australian Government had indicated that the majority of the amendments outlined in the Bill would be passed into law before 1 July 2014, through the Corporations Amendment (Streamlining of Future of Financial Advice) Regulation 2014.

121 At the date of the application and ASIC's subsequent decision the Corporations Amendment (Streamlining of Future of Financial Advice) Regulation 2014 had not been introduced into Parliament.

122 We refused to give the no-action letter as it was not an issue that was unique to the applicant but relevant across industry. We considered that law reform was the most appropriate form of resolution and we recommended the licensee raise their issues with Treasury.

123 The Australian Government's amendments were implemented through the Corporations Amendment (Streamlining of Future of Financial Advice) Regulation 2014 which commenced on 1 July 2014.

Refused no-action letter for the use of the term 'independent'

124 We refused to provide a no-action letter to a financial planner requesting that they be able to label their practice 'independent'.

125 Section 923A of the Corporations Act prohibits financial services licensees from using the words 'independent', 'impartial' and 'unbiased' unless the licensee does not receive any (including but not limited to):

- commissions (apart from commissions that are rebated in full to the person's clients);
- payments calculated on the basis of the volume of business the licensee places with an issuer; or
- other gifts that could reasonably be expected to influence the licensee.

126 The applicant provides financial advice in exchange for an annual fee paid directly by the client. Since 2009 they had not taken commissions on new business. They retained a small and declining trail on commission income from active clients with old policies and, at the time of the original application, a volume bonus from one provider. Both forms of conflicted remuneration were offset against client fees via the client's annual invoice. The applicant also retained an approved product list.

127 The applicant subsequently advised us that the volume bonus product was no longer going to be used. As such, we considered that the applicant would not require relief from s923A.

No-action letter in relation to obligations to notify ASIC of certain matters

128 We provided a no-action letter to a group of market operators and clearing and settlement (CS) facility operators in relation to their obligations under s792B(2)(c) and 821B(2)(c) of the Corporations Act to notify ASIC of certain matters.

129 The Corporations Act requires Australian market licensees and CS facility licensees to notify ASIC of a suspected significant contravention of the market or facility's operating rules or the Corporations Act. The applicant made the request on the basis that in the circumstance where such information has already been provided to ASIC from a participant or its auditor or legal representative, to avoid duplication, it should not be required to lodge the same information again.

130 We provided the no-action letter subject to the applicant having no further knowledge of the suspected significant contravention beyond what is set out in the correspondences or notification referred to above. This relief applies for an indefinite period of time subject to the conditions that the applicant:

- maintain a register of any matters falling within the scope of this relief; and
- make this register available to ASIC on request.

Other relief

Relief in relation to a facility for managing certain price fluctuations

131 We granted relief to provide that a facility that allowed users to obtain certain health services with a capped maximum price is not a financial product.

132 Consumers pay an annual fee to access the facility. In return, they are able to purchase certain medical services with a capped maximum price from health professionals that have reached agreements with the facility issuer. The capped maximum price is lower than the standard fee that the health professional would otherwise charge. The consumer may also obtain medical services for less than the capped maximum price in some circumstances.

133 We declared that the facility was not a financial product as there was uncertainty about whether the arrangements were a risk management facility. In this context, we considered that the costs of compliance with Ch 7 would be disproportionately burdensome. We also considered that there was minimal regulatory detriment associated with relief in light of the simple nature of the facility.

Publications

134 We issued the following publications during the period of this report.

Reports

REP 391 *ASIC's deregulatory initiatives*

135 REP 391 provides an overview of our commitment to cut red tape and reduce compliance costs for our regulated population through both ongoing and new deregulatory initiatives. The report invites feedback on the initiatives outlined in the report and seeks views on:

- any changes that might be made to ASIC forms;

- suggestions for regulatory change that ASIC might discuss further with Treasury and the Australian Government; and
- any changes that might be made to ASIC processes or procedures.

136 Initial feedback was sought by 18 June 2014.

REP 394 *Review of recent rule changes affecting dark liquidity*

137 REP 394 sets out the results of our review of the effect on market quality of the meaningful price improvement rule and amendments to block tier thresholds, which came into effect on 26 May 2013. The report includes, as an attachment, a report commissioned by ASIC and produced by Charles Lane Advisory.

138 Our review indicates the trends in dark liquidity that were of some concern have discontinued. Those concerns related to market quality, queue jumping and liquidity. In particular, we found that:

- fairness issues associated with below block size dark orders stepping ahead of lit orders have been addressed;
- the bid–offer spread is more equitably distributed between parties executing below block size dark trades;
- the meaningful price improvement rule and change in block tier thresholds has not affected bid–offer spreads; and
- participants can now trade smaller blocks away from lit markets where they would have traditionally faced higher market impact costs.

Appendix: ASIC relief instruments

Table 1 lists the individual relief instruments we have executed for matters that are referred to in this report and that are publicly available. The instruments are published in the *ASIC Gazette*, which is available via www.asic.gov.au/gazettes, except for credit instruments (marked with asterisks), which are published on our website under 'Credit relief'. A register of waivers, including class rule waivers, granted under ASIC market integrity rules is available via www.asic.gov.au/markets under 'Market integrity rules'.

Table 1: ASIC relief instruments

Report para no.	Entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief
10–12	Agricultural Societies Council of New South Wales Ltd ACN 150 951 670	13-1552 (in A01/14)	24/12/2013	Relief under s911A(2)(l) of the Corporations Act from the requirement to hold an AFS licence under s911A(1) in relation to a mutual risk product
13–17	Commonwealth Bank of Australia ACN 123 123 124 Australia and New Zealand Banking Group Limited ACN 005 357 522 National Australia Bank Limited ACN 004 044 937 Westpac Banking Corporation ACN 007 457 141 Macquarie Bank Limited ACN 008 583 542	14-0232 (in A13/14)	26/03/2014	Relief under s907D(2)(a) of the Corporations Act varying existing relief from aspects of the derivative transaction rules (reporting) under Instruments [13-1173], [13-1175], [13-1176], [13-1177] and [13-1178]
18–20	ANZ Bank New Zealand Limited NZBN 9429040797410 ASB Bank Limited NZBN 9429039435743 Bank of New Zealand NZBN 9429039342188	14-0233 (in A14/14) 14-0236 (in A14/14) 14-0237 (in A14/14)	28/03/2014	Relief under s907D(2)(a) of the Corporations Act from complying with Rule 2.2.1(1) of the derivative transaction rules (reporting) that apply in relation to a Phase 2 reporting entity

Report para no.	Entity name	Instrument no. (Gazette no. if applicable)	Date executed	Power exercised and nature of relief
21–23	UBS AG ARBN 088 129 613	14-0238 (in A14/14)	28/03/2014	Relief under s907D(2)(a) of the Corporations Act from complying with Rule 2.2.1(1) and Part 2.2 of the derivative transaction rules (reporting)
31–32	Auto & General Services Pty Ltd ACN 003 617 909	14-0040 (in A06/14)	06/02/2014	Relief under s926A(2)(c) and 951B(1)(c) of the Corporations Act from s916D(1) to allow an AFS licensee to appoint another AFS licensee as an authorised representative for general insurance products
40-42	Australia and New Zealand Banking Group Limited ACN 005 357 522	14-0059 (in A07/14)	11/02/2014	Relief under s741(1)(b) of the Corporations Act to allow a company to offer capital notes by way of a transaction-specific prospectus under s713 of the Corporations Act
48-51	NVFA4 (Consolidation) Limited ACN 169 197 853 National Vineyard Fund of Australia (No 4) Limited ACN 113 192 224	14-0502 (in A23/14)	29/05/2014	Relief under s741(1) of the Corporations Act from the disclosure and on-sale provisions to facilitate a reconstruction proposal to convert a managed investment scheme to a company
54–56	Capricorn Society Limited ACN 008 347 313	14-0295 (in A15/14)	10/04/2014	Relief under s741(1) of the Corporations Act to exempt an incorporated cooperative from s736(1) for the purpose of discussing membership with potential members
59–61	Betashares Capital Ltd ACN 139 566 868	14-0303 (in A16/14)	14/04/2014	Relief under s1020F(1)(a) of the Corporations Act to exempt the applicant from s1017B on the condition that the applicant complies with the Corporations Act as if it was a disclosing entity and includes a statement to this effect in any PDS issued for the product
97-101	Centric Wealth Limited ACN 100 375 237	14-0070 (in A07/14)	11/02/2014	Relief under s655A(1)(a) of the Corporations Act to allow a target of an off-market takeover bid to dispatch a single ‘replacement target’s statement’
131–133	Medibank Private Limited ACN 080 890 259	14-0056 (in A07/14)	10/2/2014	Relief under s765A(2) declaring that the health savings network facility is not a financial product