

Attachment 1 to CP 220: Draft regulatory guide



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 000

Fundraising: Facilitating offers of CHESSE Depository Interests

May 2014

About this guide

This is a guide for foreign companies listed on Australian exchange markets, their advisers, and other persons involved in offers of CHESSE depository interests (CDIs) over shares in a foreign company.

It explains:

- how our relief in Class Order [CO 14/XX] *Offers of CHESSE Depository Interests* modifies the disclosure provisions in Ch 6D, and gives relief from the licensing provisions in Pt 7.6, of the *Corporations Act 2001* (Corporations Act) to facilitate offers of CDIs over foreign shares;
- when we will consider granting individual relief to facilitate offers of CDIs; and
- how to provide effective disclosure for offers of CDIs.

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.

Document history

This draft guide was issued in May 2014 and is based on legislation and regulations as at the date of issue.

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Key points

Some foreign companies listed on Australian exchange markets offer CHESSE depository interests (CDIs) over their shares to investors in Australia. This guide provides guidance for foreign companies listed on Australian exchange markets, their advisers, and other persons involved in offers of CDIs over shares in a foreign company. It explains:

- how our relief in Class Order [CO 14/XX] *Offers of CHESSE Depository Interests* modifies the disclosure provisions in Ch 6D, and gives relief from the licensing provisions in Pt 7.6, of the *Corporations Act 2001* (Corporations Act) to facilitate offers of CDIs over foreign shares quoted on certain Australian exchange markets (see Section B);
- when we will consider granting individual relief for offers of CDIs (see Section B); and
- how to provide effective disclosure for offers of CDIs (see Section C).

In this section, we explain what CDIs are and how they are currently used in the market. We also describe our general approach to facilitating offers of CDIs over shares in a foreign company.

What are CDIs and how are they used?

RG 000.1 Some foreign companies listed on Australian exchange markets offer CDIs over their shares to enable them to access Australian equity capital markets and investors.

Note: CDIs may be issued over foreign shares quoted on ASX Limited (ASX) (including under ASX's AQUA rules), the National Stock Exchange of Australia (NSXA) and the Asia-Pacific Stock Exchange (APX). CDIs may also be traded on the secondary exchange market operated by Chi-X Australia Limited (Chi-X).

RG 000.2 The settlement system used for equity securities traded in Australia, ASX Clearing House Electronic Subregister System (CHESSE), cannot be used for the transfer of securities where the issuing company is domiciled in a country whose laws do not recognise uncertificated holdings or electronic transfer of title. As a result, CDIs were developed as a method of transferring and holding foreign shares in CHESSE. All CDIs are currently settled using CHESSE.

RG 000.3 A CDI is a unit of beneficial ownership in a financial product of a foreign body, where the underlying financial product is registered in the name of a depository nominee. Currently CHESSE Depository Nominees Pty Limited (CDN) is the only depository nominee that has been appointed in relation to CDIs over foreign shares.

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Note: CDIs are similar to American Depository Interests in the United States and CREST Depository Interests in the United Kingdom.

RG 000.4 While CDIs may be issued over different types of financial products, this regulatory guide is for CDIs where the underlying financial product is a share in a foreign company.

RG 000.5 The ASX Settlement Operating Rules, together with the listing rules and other rules of the relevant exchange markets (ASX, NSXA and APX), set out the obligations and responsibilities of the depository nominee and the foreign company, and the rights of CDI holders.

Note: The ASX Settlement Operating Rules apply to CDIs over foreign shares quoted on each of these exchange markets and settled using CHESS.

RG 000.6 Most importantly, the ASX Settlement Operating Rules require the foreign company to ensure that all economic benefits and rights associated with the underlying shares (such as dividends, the right to participate in corporate actions and the right to vote) flow through to CDI holders as if they were the legal owners of the underlying shares.

Our approach to facilitating offers of CDIs

RG 000.7 We recognise the benefits that CDIs provide to foreign companies, by giving them access to Australian exchange markets, and to investors, by giving them better access to investment opportunities in foreign companies.

RG 000.8 We aim to facilitate offers of CDIs over shares in a foreign company that are quoted on an Australian exchange market, provided the disclosure requirements under the Corporations Act for offers of shares are complied with.

RG 000.9 While CDIs have been a feature of Australian exchange markets since the mid-1990s, there is uncertainty as to how offers of CDIs over foreign shares are regulated under the Corporations Act, particularly given that depository interests are not defined, or referred to, in the Corporations Act. This has resulted in different views being adopted in the market.

RG 000.10 In particular, there are differing views in the market about how CDIs are characterised (i.e. as securities, derivatives or warrants), which disclosure regime applies to offers of CDIs (i.e. Ch 6D or Pt 7.9 of the Corporations Act) and who offers and issues CDIs (i.e. the foreign company or the depository nominee).

RG 000.11 Our approach to regulating offers of CDIs involves ‘looking through’ the CDI to the underlying foreign share, so that offers of CDIs are regulated under the Corporations Act in the same way that offers of the underlying shares would be regulated.

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Our relief for offers of CDIs

Class order relief

- RG 000.12 We have given class order relief in [CO 14/XX] for offers for the issue or sale of CDIs, where the underlying security is a share in a foreign company quoted on ASX (including under ASX's AQUA rules), NSXA or APX, and where CDN is the depository nominee.
- RG 000.13 The purpose of our relief is to remove any uncertainty about how offers of CDIs over foreign shares are regulated under the Corporations Act. Our class order relief will also help to ensure that such offers take place efficiently and that investors receive adequate disclosure about the nature of CDIs.
- RG 000.14 Table 1 and Section B of this guide set out in detail the requirements of our class order relief in [CO 14/XX].

Table 1: Overview of our relief in [CO 14/XX] for offers of CDIs

Topic	Description	Reference
What does our relief do?	[CO 14/XX] provides relief so that an offer of CDIs over foreign shares is regulated as an offer of securities under the disclosure provisions in Ch 6D of the Corporations Act.	Section B RG 000.21– RG 000.24
Who offers and issues the CDIs?	[CO 14/XX] provides relief so that the foreign company that offers and issues the shares underlying the CDIs is taken to be the offeror and issuer of the CDIs.	Section B RG 000.25– RG 000.29
What types of CDIs are covered by our relief?	[CO 14/XX] applies to offers of CDIs where the underlying security is: <ul style="list-style-type: none"> a share in a foreign company, including a share in a foreign exchange traded fund (ETF); quoted on ASX (including under ASX's AQUA rules), NSXA or APX; and held by CDN, as the depository nominee. 	Section B RG 000.30– RG 000.40
What types of offers does our relief cover?	[CO 14/XX] applies to: <ul style="list-style-type: none"> offers for the issue of CDIs by a foreign company (which are treated as offers for the issue of the underlying shares); and offers for the sale of CDIs by a CDI holder (which are treated as an on-sale of the underlying shares). 	Section B RG 000.41– RG 000.47
What licensing relief is provided?	[CO 14/XX] provides relief, for the avoidance of doubt, exempting a foreign company (other than a foreign investment company) from the requirement to hold an AFS licence for 'arranging' for CDN or a CDI holder (or a proposed CDI holder) to deal in CDIs over its shares.	Section B RG 000.48– RG 000.52

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Topic	Description	Reference
What other relief is provided?	<p>[CO 14/XX] provides relief so that Ch 6D operates effectively for offers of CDIs, so that:</p> <ul style="list-style-type: none"> • a foreign company with CDIs issued over all or some of its shares is able to rely on s708AA and 708(13), respectively, for rights issues, dividend reinvestment plans and bonus share plans; • references to the provisions of Ch 2M are to be read as references to s601CK or the financial reporting laws in the foreign company's place of origin; and • references to orders under s340 or 341 are to be read as references to declarations under s601CK(7) or exemptions (however described) under the financial reporting laws in the foreign company's place of origin. 	<p>Section B</p> <p>RG 000.53– RG 000.56</p>
What information should be disclosed?	<p>[CO 14/XX] requires a foreign company to explain the differences between holding CDIs and holding the underlying foreign shares in any Ch 6D disclosure document used for an offer to issue CDIs.</p>	<p>Section C</p> <p>RG 000.67– RG 000.73</p>

Individual Relief

- RG 000.15 We will consider granting individual relief to facilitate the use of a depository nominee other than CDN: see RG 000.57–RG 000.60.
- RG 000.16 We will also consider granting individual relief where there is doubt about whether a particular offer of CDIs falls within our class order relief, or to facilitate offers of CDIs over interests in foreign managed investment schemes: see RG 000.61–RG 000.62.

Our guidance on disclosure to investors about CDIs

- RG 000.17 Section C of this guide gives guidance to assist foreign companies to provide effective disclosure for offers of CDIs and, more broadly, in other communications with CDI holders.
- RG 000.18 Section C also provides guidance to assist foreign companies to comply with the requirement of our class order relief in [CO 14/XX] to explain the differences between holding CDIs and holding the underlying foreign shares in any Ch 6D disclosure document for an offer to issue CDIs. In particular, what information about the key differences between holding CDIs and holding the underlying foreign shares we would generally expect to be disclosed in any Ch 6D disclosure documents.

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B Our relief for offers of CDIs

Key points

In this section we:

- explain our general approach to regulating offers of CDIs over foreign shares and our interpretation of how the Corporations Act applies to these offers;
- discuss how our class order relief in [CO 14/XX] modifies the disclosure provisions in Ch 6D, and gives relief from the licensing provisions in Pt 7.6, of the Corporations Act to facilitate offers of CDIs over foreign shares; and
- set out some of the circumstances in which we may consider granting individual relief to facilitate offers of CDIs that do not meet the requirements of [CO 14/XX].

Our general approach to regulating offers of CDIs

RG 000.19 Our general approach to regulating offers of CDIs involves ‘looking through’ the CDI to the underlying share, so that offers of CDIs are regulated under the Corporations Act in the same way that offers of the underlying shares would be regulated.

RG 000.20 We consider that:

- (a) offers of CDIs over foreign shares should be regulated by Ch 6D of the Corporations Act—given that offers of a foreign company’s shares are regulated by Ch 6D, offers of CDIs (representing equitable interests in those shares) should be subject to the same disclosure regime as the underlying shares;
- (b) where disclosure is not required for an offer of the underlying shares, disclosure should also not be required for an offer of CDIs over those shares—that is, if an offer of the underlying shares is exempt from disclosure under Ch 6D (e.g. because of s708, 708AA or 708A), then any offer of CDIs should also be exempt; and
- (c) where Ch 6D disclosure is required for an offer of CDIs (i.e. because it would be required for an offer of the underlying shares) then the disclosure should be provided by the foreign company and not the depository nominee.

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Our class order relief

What does our relief do?

- RG 000.21 [CO 14/XX] gives relief, for the avoidance of doubt, so that an offer of CDIs over shares in a foreign company is regulated as an offer of securities under Ch 6D of the Corporations Act.
- RG 000.22 Our class order achieves this by modifying Ch 6D of the Corporations Act so that:
- (a) CDIs are treated as securities (and not as other financial products to which Div 2 of Pt 7.9 of the Corporations Act applies);
 - (b) an offer for issue of CDIs is taken to be an offer for issue of the underlying shares by the foreign company; and
 - (c) an offer for sale of CDIs is taken to be an offer for sale of the underlying shares.
- RG 000.23 This reflects our view that a CDI over a share of a foreign company is an equitable or beneficial interest in the share, and so, is a ‘security’ within the meaning of s761A of the Corporations Act (and is not a derivative within the meaning of s761D and, therefore, is not a warrant within the meaning of reg 1.0.02(1) of the Corporations Regulations 2001 (Corporations Regulations)).
- Note: Although a CDI in relation to a foreign share is a ‘security’ within the meaning of s761A, it is also a financial product for the broader purposes of Ch 7 of the Corporations Act (e.g. for the licensing provisions in Pt 7.6): see s764A(1)(a).
- RG 000.24 However, we understand that there may be differing views in the market as to whether CDIs over foreign shares are characterised as securities, derivatives or warrants under the Corporations Act—causing uncertainty as to which disclosure regime applies. Our class order relief removes this uncertainty.

Who offers and issues CDIs?

- RG 000.25 [CO 14/XX] gives relief, for the avoidance of doubt, so that where disclosure is required under Ch 6D of the Corporations Act for an offer to issue CDIs over foreign shares, it is the foreign company (and not the depository nominee) who is required to provide disclosure.
- RG 000.26 Our class order achieves this by modifying the Corporations Act in relation to offers for issue of CDIs, so that the foreign company that offers and issues the shares underlying the CDIs is taken to be the offeror and issuer of the CDIs.
- RG 000.27 This relief reflects our view that it is the foreign company, not the depository nominee, who is the entity that:
- (a) for the purpose of Ch 6D, offers and issues the CDIs within the meaning of s700(3) of the Corporations Act (i.e. it is the foreign

company who has the capacity, or who agrees, to issue or transfer the securities if the offer is accepted); and

- (b) for the purpose of Ch 7, issues the CDIs within the meaning of s761E(4) of the Corporations Act (i.e. it is the foreign company who is responsible for the obligations owed in relation to the CDI, specifically, the obligations owed under the ASX Settlement Operating Rules).

RG 000.28 We recognise that there are differing views in the market about whether the foreign company or the depository nominee offers and issues CDIs.

Note 1: In 2012, the then Government considered that the depository nominee, in the context of depository interests issued over Commonwealth Government Securities, would likely be the entity responsible for providing disclosure to retail clients under Ch 7 of the Corporations Act: see the Revised Explanatory Memorandum to the Commonwealth Government Securities Legislation Amendment (Retail Trading) Bill 2012.

Note 2: ASIC also previously held the view that the depository nominee (not the foreign company) is the entity that offers and issues CDIs (and therefore, is the entity that is required to provide disclosure to investors): see Class Order [CO 02/311] *CHESS Depository Nominees Pty Ltd – CDIs* (now revoked) and Class Order [CO 02/312] *Part 7.11, Division 4 financial products for ASTC* (as amended by Class Order [CO 09/27] *Variation of Class Orders [CO 02/312] and [CO 05/26] and [CO 14/XX]*).

RG 000.29 Our class order relief removes any uncertainty as to who the offeror and the issuer is for an offer to issue CDIs over foreign shares.

Note: [CO 14/XX] also modifies s1017F so that a foreign company is taken to be the issuer of CDIs for the purposes of that section and is therefore required to confirm transactions under which retail clients acquire CDIs.

What types of CDIs are covered by our relief?

RG 000.30 Our relief in [CO 14/XX] facilitates offers of CDIs, where the underlying security is:

- (a) a share in a foreign company, including a share in a foreign company described as an ETF;
- (b) quoted on ASX (including under ASX's AQUA rules), NSXA or APX; and
- (c) held by CDN, as the depository nominee.

RG 000.31 Our relief in [CO 14/XX] extends to CDIs over foreign shares that are quoted and traded on secondary exchange markets (such as Chi-X), provided the underlying share is also quoted on one of the specified exchange markets: see RG 000.30(b).

CDIs over foreign shares

RG 000.32 Our relief applies specifically to CDIs over shares in a foreign company. The purpose of [CO 14/XX] is to ensure that all equity fundraising by foreign

companies (whether in the form of an offer of shares or CDIs over those shares) is regulated in the same way—that is, as an offer of securities under Ch 6D of the Corporations Act.

RG 000.33 Our relief also applies to CDIs where, although the underlying financial product is described as a share in a foreign ETF, the underlying product is actually a share in a foreign company (and not an interest in a foreign managed investment scheme).

RG 000.34 Foreign financial products that are called ETFs may be quoted on ASX (including under ASX's AQUA rules) where the financial product traded is a security, a derivative or an interest in a managed investment scheme. Our relief in [CO 14/XX] only covers CDIs over foreign ETFs where the underlying product is traded as a share in a foreign company.

Note: Report 282 *Regulation of exchange traded funds* (REP 282) provides further discussion on foreign ETFs, including foreign ETFs trading their financial products as securities.

CDIs where the underlying share is quoted on ASX, NSXA or APX

RG 000.35 Our relief applies to CDIs of foreign companies listed on ASX, NSXA or APX (as either an 'exempt foreign listing' or a standard listing), where the underlying foreign share is quoted and admitted to trading. Our relief also applies to CDIs where the underlying foreign share is quoted under ASX's AQUA rules.

Note 1: These CDIs are commonly referred to in the market—and in the ASX Settlement Operating Rules—as CHESSE units of foreign securities (CUFS) or depository interests (DIs). CUFS are issued over foreign equity securities where the legal title of the foreign securities is held in the name of an Australian depository nominee. DIs are issued over foreign equity securities where the foreign securities are held in another settlement and depository system in addition to the Australian depository nominee and, as such, have two tiers of beneficial ownership.

Note 2: Our relief in [CO 14/XX] extends to CDIs over foreign shares that are quoted and traded on secondary exchange markets (such as Chi-X), provided the underlying share is also quoted on one of the specified exchange markets.

RG 000.36 This is because we are satisfied that the ASX Settlement Operating Rules, together with the listing rules and other rules of each of these exchange markets, provide a sufficiently robust market framework for the trading, settlement and governance of CDIs, including:

- (a) the obligations and responsibilities of the depository nominee and the foreign company; and
- (b) the protection of the rights and entitlements of CDI holders.

Note: Foreign companies listed on NSXA or APX may apply through their approved listing market operator (e.g. NSXA or APX) to have their foreign shares, or CDIs over their foreign shares, approved under the ASX Settlement Operating Rules for CHESSE settlement purposes: see ASX Settlement Operating Rule 13.2.1. In these

circumstances, foreign companies listed on NSXA and APX are bound by the ASX Settlement Operating Rules. Section 13 of the ASX Settlement Operating Rules would apply to CDIs over foreign shares quoted on those exchange markets: see ASX Settlement Operating Rule 1.2.3.

RG 000.37 In particular, the ASX Settlement Operating Rules:

- (a) require the foreign company to ensure that all economic benefits and rights associated with the underlying shares (including dividends, the right to participate in rights issues and other corporate actions and the right to vote) flow through to CDI holders as if they were the legal owners of the underlying shares;
- (b) require the depository nominee to vote only in accordance with the written instructions of CDI holders; and
- (c) prohibit the depository nominee from accepting a takeover offer unless it is instructed to do so by the CDI holder.

Note: Section 13 of the ASX Settlement Operating Rules sets out the rules governing CDIs, including CUFS and DIs (specifically, Rules 13.1–13.13). All CDIs (including those traded on NSXA and Chi-X) are currently settled using CHESSE. See also CDN's *Understanding CHESSE Depository Interests* and ASX Guidance Note 5 *CHESSE Depository Interests (CDIs)* (GN 5) for further information about CDIs and the rights of CDI holders.

CDIs where CDN is the depository nominee

RG 000.38 Our class order relief applies to offers of CDIs where CDN is acting as the depository nominee in relation to the CDIs. This is because CDN is currently the only depository nominee that has been appointed in relation to CDIs over foreign shares quoted on ASX or NSXA (and settled using CHESSE).

Note: See RG 000.57—RG 000.60 for a discussion of the circumstances in which we will consider granting individual relief to facilitate the use of other depository nominees.

RG 000.39 CDN is a wholly-owned subsidiary of ASX that was created to fulfil the functions of a depository nominee, and is:

- (a) the holder of an AFS licence authorising it to provide custodial or depository services to wholesale and retail clients; and
- (b) an approved participant in the clearing and settlement facility operated by ASX Settlement.

RG 000.40 CDN receives no fees from investors for acting as the depository nominee for CDIs.

What types of offers does our relief cover?

RG 000.41 Our relief in [CO 14/XX] applies to offers for issue of CDIs by a foreign company, and offers for sale of CDIs by a CDI holder.

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Offers for issue of CDIs

RG 000.42 In relation to offers for issue of CDIs, our class order relief extends to offers where disclosure:

- (a) is required under Ch 6D of the Corporations Act (including initial public offerings and secondary offerings under a prospectus, offer information statement or other Ch 6D disclosure document);
- (b) is not required because of a disclosure exception in Ch 6D of the Corporations Act (including rights issues conducted in accordance with s708AA and offers under an exception in s708 e.g. offers under a dividend reinvestment plan or bonus share plan, placements to sophisticated or professional investors or offers under a Ch 6 takeover bid or a scheme of arrangement under Pt 5.1); and
- (c) is not required because of ASIC class order relief (including share purchase plans, employee incentive schemes, foreign takeover bids and foreign schemes of arrangement).

Note: [CO 14/XX] applies to all legislative instruments made under s741. For example, Class Order [CO 03/184] *Employee share schemes*, Class Order [CO 07/9] *Prospectus relief for foreign schemes of arrangement and PDS relief for Pt 5.1 schemes and foreign schemes of arrangement*, Class Order [CO 09/68] *Prospectus and PDS relief for foreign scrip takeovers* and Class Order [CO 09/425] *Share and interest purchase plans*.

RG 000.43 Our class order relief has the effect that offers for the issue of CDIs are regulated in the same way as offers for the issue of the underlying foreign shares (under the Corporations Act or any relevant class orders). For example:

- (a) an initial public offering of CDIs over foreign shares would require a prospectus satisfying s710 of the Corporations Act;
- (b) secondary offerings of CDIs where the underlying foreign share is a 'continuously quoted security' within the meaning of s9, would require a prospectus satisfying s713 of the Corporations Act;
- (c) offers of CDIs under a rights issue where the underlying foreign share is a 'quoted security' within the meaning of s9, would require a cleansing notice to be given to the market under s708AA of the Corporations Act; and
- (d) offers of CDIs under a share purchase plan would require a cleansing notice to be given to the market and an offer document to be given to shareholders that discloses certain matters, as prescribed in [CO 09/425].

Note: See the definition of 'continuously quoted securities' in s9 to determine whether CDIs are issued over continuously quoted securities. A prospectus may be required for an offer for sale of CDIs where the underlying foreign shares are not continuously quoted securities.

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Offers for sale of CDIs

RG 000.44 Our class order relief has the effect that an offer for sale of CDIs is regulated as an offer for sale of the underlying foreign shares (either under the Corporations Act or any relevant class orders).

Note: Our relief has the effect that any cleansing notice given under s708A must be given to the relevant exchange market within five days of the underlying foreign shares being issued: s708A(6)(a).

RG 000.45 For example, sale offers of CDIs where the underlying foreign shares are ‘quoted securities’ within the meaning of s9, would require a cleansing notice to be provided to the relevant exchange market in accordance with s708A where the underlying shares were issued without disclosure under Ch 6D and the foreign company did not issue the shares with the purpose of them being on-sold.

Note 1: [CO 14/XX] gives relief, for the avoidance of doubt, so that a foreign company is not taken to have issued the underlying shares with the purpose of them being on-sold merely because it issued the underlying shares to CDN.

Note 2: Class Order [CO 04/671] *Disclosure for on-sale of securities and other financial products* provides relief from the disclosure requirements in Ch 6D so that a cleansing notice may be given for the on-sale of securities that were issued under specific types of offers, including employee share schemes, share purchase plans, dividend reinvestment plans, bonus share plans and securities issued as consideration for takeover bids and schemes of arrangement (including foreign bids and foreign schemes).

RG 000.46 Our class order relief extends to circumstances where the underlying foreign shares were issued (either in or outside Australia) without disclosure under Ch 6D and are subsequently converted into CDIs and sold on an Australian exchange market—where the foreign company did not issue the foreign shares with the purpose of them being on-sold in Australia.

Note: In these circumstances, a cleansing notice may be required for the on-sale of the underlying shares (in the form of the CDIs) within 12 months of issue of the shares.

RG 000.47 Where a foreign company issues the underlying foreign shares without Ch 6D disclosure (e.g. where they are issued outside Australia or to an intermediary for whom disclosure is not required) and with the purpose of being on-sold (e.g. on an Australian exchange market, after being converted into CDIs), a prospectus would be required as the cleansing notice provisions in s708A would not apply.

Note: The on-sale provisions in s707(3)–(4) of the Corporations Act are anti-avoidance provisions that are designed to minimise the opportunity for issuers of securities to avoid giving disclosure to retail investors. Regulatory Guide 173 *Disclosure for on-sale of securities and other financial products* (RG 173) provides further guidance on the on-sale provisions and the circumstances in which we provide relief from the disclosure requirements in Ch 6D of the Corporations Act for the on-sale of securities.

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What licensing relief is provided?

RG 000.48 [CO 14/XX] also provides licensing relief, for the avoidance of doubt, to a foreign company (other than a foreign investment company) that issues the shares underlying the CDIs. Our class order achieves this by exempting the foreign company from the requirement to hold an AFS licence for a financial service that constitutes ‘arranging’ for CDN or a CDI holder (or a proposed CDI holder) to deal in CDIs over its shares.

RG 000.49 Given our view that the foreign company, not the depository nominee, is the issuer of CDIs and that the CDIs are the foreign company’s securities, we consider that:

- (a) a foreign company does not require an AFS licence for a financial service that consists of dealing in its own securities (i.e. issuing CDIs over its foreign shares), because it can rely on the self-dealing exemption in s766C(4) of the Corporations Act (provided it is not an investment company(see s766C(5))); and
- (b) an AFS licence authorising the depository nominee to provide custodial or depository services is sufficient to cover the depository nominee’s functions in relation to the CDIs.

Note 1: Under s766C of the Corporations Act, acquiring, issuing and disposing of a financial product, and arranging for a person to engage in that conduct, constitutes ‘dealing’ in a financial product (among other things). However, such conduct is taken not to be dealing if it is in relation to a person’s own securities: s766C(4). This is known as the ‘self-dealing exemption’. The self-dealing exemption does not extend to companies that carry on a business of investment in securities: s766C(5). As such, we have not extended licensing relief in our class order to foreign investment companies.

Note 2: As CDN is currently the holder of an AFS licence, which authorises it to operate custodial or depository services, licensing relief is not necessary for the provision of services by CDN in relation to CDIs in accordance with the ASX Settlement Operating Rules.

RG 000.50 However, we recognise that there are differing views in the market as to whether the depository nominee or the foreign company issues CDIs and, as a result, whether the foreign company is required to hold an AFS licence for a financial service that constitutes ‘dealing’ in CDIs.

RG 000.51 If, contrary to our view in RG 000.49, the position is taken that CDIs are issued by the depository nominee and the CDIs are the depository nominee’s securities, then:

- (a) the depository nominee would be able to rely on the self-dealing exemption in s766C(4) of the Corporations Act for an issue of CDIs; and
- (b) the view might be taken that the foreign company needs an AFS licence for arranging for:
 - (i) the depository nominee to deal in CDIs over its shares (i.e. by issuing CDIs over its shares); or

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- (ii) a CDI holder (or prospective CDI holder) to deal in CDIs over its shares (i.e. by acquiring or disposing of CDIs over its shares).

Note: This is because the foreign company plays an extensive role in relation to the issue of CDIs, the conversion of CDIs to the underlying shares (and vice versa) and other obligations in relation to CDIs: see Section 13 of the ASX Settlement Operating Rules.

- RG 000.52 Given the uncertainty in the market about who issues CDIs and whether CDIs are the depository nominee's or the foreign company's securities, our class order provides licensing relief for a foreign company (other than a foreign investment company) that issues the shares underlying the CDIs for arranging for others to deal in CDIs over its shares.

What other relief is provided?

- RG 000.53 [CO 14/XX] also gives relief to ensure that Ch 6D operates effectively for offers of CDIs over shares in a foreign company. This relief is necessary because the provisions in Ch 6D were not drafted to provide for offers of CDIs.

- RG 000.54 For example, references in Ch 6D (and legislative instruments made under s741) to compliance with the financial reporting provisions in Ch 2M are to be read as references to s601CK. Section 601CK requires registered foreign companies to lodge financial statements with ASIC, prepared in accordance with the law in its country of origin. In addition, references to orders under s340 or 341 are to be read as references to declarations under s601CK(7) or exemptions (however described) under the financial reporting laws in the foreign company's place of origin. The affected provisions include:

- (a) the rights issue exception in s708AA;
- (b) the cleansing notice provisions in s708A; and
- (c) the special prospectus rules for continuously quoted securities in s713.

Note: [CO 14/XX] substitutes references to Ch 2M with references to s601CK of the Corporations Act, as notionally amended by Class Order [CO 02/1432] *Registered foreign companies — financial reporting requirements*.

- RG 000.55 In addition, [CO 14/XX] gives relief so that a foreign company with CDIs issued over all or some of its shares is able to rely on s708AA and 708(13), respectively, for rights issues, dividends reinvestment plans and bonus share plans. It does this by treating the holder of the CDIs (and not CDN) as the holder of the underlying foreign shares.

Note: The relief in [CO 14/XX] is important when determining the entitlements of each CDI holder and holder of the underlying shares, particularly where each CDI represents a multiple or fraction of the underlying share.

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What general requirements apply to our relief?

- RG 000.56 Our relief in [CO 14/XX] requires a foreign company to explain the differences between holding CDIs and holding the underlying foreign shares in any Ch 6D disclosure document for an offer to issue CDIs over foreign shares. This information is required to be disclosed under the requirements in Ch 6D of the Corporations Act: see Section C.

Individual relief

- RG 000.57 We will consider granting individual relief to facilitate:
- (a) the use of a depository nominee, other than CDN, where the depository nominee is an AFS licence holder and is governed by market rules that provide adequate protections to CDI holders; and
 - (b) offers of CDIs that do not fall within our class order relief (e.g. offers of CDIs over interests in foreign managed investment schemes).

Other depository nominees

- RG 000.58 CDN is the only depository nominee that has, to date, been appointed in relation to CDIs over foreign shares. However, a foreign company may appoint another depository nominee. For this reason, we will consider granting individual relief to facilitate the use of a depository nominee other than CDN.
- RG 000.59 In deciding whether to grant relief, we will consider the extent to which the proposed depository nominee is governed by the ASX Settlement Operating Rules, or other market rules that:
- (a) impose equivalent obligations and responsibilities on the depository nominee (e.g. obligations relating to voting in accordance with the instructions of CDI holders and prohibitions on accepting a takeover bid without instructions from the CDI holders); and
 - (b) provide equivalent protections of the rights and entitlements of CDI holders.

Note: Section 13 of the ASX Settlement Operating Rules sets out the rules governing CDIs, including the obligations and responsibilities of the depository nominee: see, specifically, Rules 13.1–13.13.

- RG 000.60 Any proposed depository nominee must be the holder of an AFS licence, which authorises the depository nominee to provide custodial or depository services to wholesale and retail clients.

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Other types of offers

- RG 000.61 We will consider granting individual relief where there is doubt as to whether a particular offer of CDIs falls within our class order relief. For example, offers for issue of CDIs in a rights issue that does not strictly fall within our modified definition in s9A of the Corporations Act, or offers for issue or sale of CDIs under a reconstruction.

Note: See Regulatory Guide 188 *Disclosure in reconstructions* (RG 188) and Class Order [CO 07/10] *Technical disclosure relief for reconstructions and capital reductions* for further guidance on the nature of disclosure relief we have given in the context of reconstructions.

- RG 000.62 We will also consider granting individual relief to facilitate offers of CDIs over interests in foreign managed investment schemes.

Note: CDIs over interests in foreign managed investment schemes are not currently being used in the market and, as a result, the relief in [CO 02/311] for interests in foreign managed investment schemes has been revoked on the basis that it is not necessary.

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C Disclosure to investors about CDIs

Key points

[CO 14/XX] requires a foreign company to explain the differences between holding CDIs and holding the underlying foreign shares in any Ch 6D disclosure document used for an offer to issue CDIs over foreign shares.

In this section, we provide guidance to assist foreign companies to comply with this requirement of our class order relief, and to provide effective disclosure for offers of CDIs and other communications with CDI holders.

Why disclosure about CDIs is important

RG 000.63 Disclosure of the key differences between holding CDIs and holding the underlying foreign shares is important because although holders of CDIs generally have the same rights and entitlements as holders of the underlying foreign share, there may be some minor differences.

RG 000.64 In relation to corporate actions, such as rights issues and capital reductions, CDI holders will generally receive equal treatment to that of holders of the underlying shares. For example, Rules 13.1–13.13 of the ASX Settlement Operating Rules require the foreign company to ensure that all economic benefits (including dividends, the right to participate in rights issues or other corporate actions and the right to vote) flow through to CDI holders as if they were the holders of the underlying shares.

RG 000.65 However, in some cases, minor differences may exist between the entitlements of CDI holders and the entitlements they would have accrued if they held the underlying shares directly. These differences exist where:

- (a) the depository nominee's holding of shares is, in some jurisdictions, treated as a single holding rather than as a number of smaller separate holdings corresponding to the individual interests of CDI holders; or
- (b) CDIs are issued on a conversion ratio where each CDI represents a multiple or a fraction of the underlying share.

Note: CDIs are usually structured so that the conversion ratio of CDIs to the underlying foreign shares is one-to-one. However, CDIs may be (and are less frequently) issued using a ratio where each CDI represents a multiple or fraction of the underlying share.

RG 000.66 In such circumstances, CDI holders will not benefit to the same extent from the rounding-up of fractional entitlements in a rights issue, share consolidation or other corporate action (i.e. their entitlements will be less than if they held the underlying shares directly).

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Note: The ASX Settlement Operating Rules require foreign companies to minimise such differences where legally permissible.

What information should be disclosed?

Chapter 6D disclosure documents

RG 000.67 The fundraising provisions in the Corporations Act are intended to ensure that investors can make informed investment decisions on the basis of a disclosure document containing all information required to be disclosed under Ch 6D.

Note: A prospectus for an offer of securities must include the information that is required under the general disclosure test (s710) and the specific disclosure requirements (s711) and must be worded in a 'clear, concise and effective' manner: s715A. The content requirements for transaction-specific prospectuses and offer information statements are contained in s713 and 715, respectively.

RG 000.68 The relief in [CO 14/XX] requires a foreign company to explain the differences between holding CDIs and holding the underlying foreign shares in any Ch 6D disclosure document (e.g. a prospectus, a transaction-specific prospectus or an offer information statement) for an offer to issue CDIs over foreign shares.

RG 000.69 Information about the key differences between holding CDIs and holding the underlying foreign shares is information that:

- (a) investors would reasonably require to make an informed assessment of the rights and liabilities attaching to the CDIs being offered and, therefore, is information that is required to be disclosed in a prospectus (s710), including a transaction-specific prospectus (s713(2)); and
- (b) is relevant to the nature of the securities being offered and, therefore, is information that is required to be disclosed in an offer information statement (s715(1)(a)).

RG 000.70 We consider information about the differences between holding CDIs and holding the underlying shares is information that is required to be disclosed under Ch 6D. We have included a requirement to this effect in our class order relief to avoid any doubt that the disclosure tests in s710, 713 and 715 of the Corporations Act must be satisfied for CDIs (and not just the underlying shares), and to ensure that all material and relevant information is provided to retail investors.

Note 1: The class order relief in [CO 14/XX] treats an offer for the issue of CDIs as an offer for the issue of the underlying shares (to enable an offer of CDIs to be regulated in the same way as an offer of the underlying shares). However, we still consider it appropriate for the disclosure requirements in Ch 6D to be satisfied in relation to CDIs.

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Note 2: Foreign companies will also need to consider how to explain the rights and liabilities attaching to the underlying shares in any Ch 6D disclosure document for an offer of CDIs. Regulatory Guide 228 *Prospectuses: Effective disclosure for retail investors* (RG 228) sets out our broader guidance about how to prepare prospectuses that satisfy the content requirements in s710. In particular, RG 228 gives guidance to foreign companies in relation to providing disclosure about how the differences in the laws in the foreign jurisdiction and Australia may affect investor rights: see RG 228.73(d).

RG 000.71 Table 2 sets out what we consider to be the key differences between holding CDIs and holding the underlying foreign shares, and what information we would generally expect to be disclosed in any Ch 6D disclosure documents.

Table 2: Information about the key differences between holding CDIs and holding the underlying foreign shares

Topic	What information to include
Nature of CDIs	Explain what a CDI is—that is, a unit of beneficial ownership in a share of a foreign company, where the underlying share is registered in the name of a depositary nominee, for the purpose of enabling the foreign share to be traded on the relevant exchange market.
Specific features of CDIs	<p>Explain any specific features of the CDI and the impact that these features have on the rights and entitlements of CDI holders.</p> <p>For example, where the conversion ratio of CDIs to the underlying shares is not one-to-one, CDI holders will not benefit to the same extent from the rounding-up of fractional entitlements in a rights issue or other corporate action (i.e. their entitlements will be less than what they would have been if they held the underlying shares directly).</p>
Identity and role of the depositary nominee	<p>Explain what a depositary nominee does (i.e. the depositary nominee holds title to the foreign shares on behalf of CDI holders). Where more complex depositary nominee arrangements are used (e.g. where there are two depositary nominees—an Australia depositary nominee and a foreign depositary nominee—resulting in two tiers of beneficial ownership), use a diagram to illustrate the ownership arrangements.</p> <p>Identify who has been appointed as depositary nominee (including their AFS licence number and authorisation details). Specify whether they are an approved general participant of ASX Settlement.</p> <p>Disclose what fees (if any) the depositary nominee receives for acting as the depositary for the CDIs.</p>
How to convert CDIs into shares	Explain the process, and provide instructions, on how CDI holders may convert their CDIs into the underlying shares (i.e. through the foreign company’s share registry or their broker, as applicable). Include contact details for the foreign company’s share registry.
Voting rights	<p>Explain how CDI holders may exercise voting rights (i.e. by directing the depositary nominee to cast, or authorise or arrange the casting of, proxy votes in accordance with the written directions of the CDI holder only).</p> <p>Explain that, unless the laws of the jurisdiction in which the foreign issuer is established permit it, CDI holders cannot vote personally and that if a CDI holder wishes to vote personally they must first convert their CDIs into the underlying shares.</p>

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Topic	What information to include
Dividends or other distributions	Explain the entitlements of CDI holders to dividends and other capital distributions. In particular, explanation should be provided of the distribution amount per CDI and the AUD equivalent as at the ex-dividend date (particularly where the ratio of CDIs to the underlying shares is not one-to-one).
Corporate actions	<p>Explain that for corporate actions (including rights issues, bonus issues and capital reductions) CDI holders will generally receive equal entitlements to that of holders of the underlying foreign shares.</p> <p>Explain whether marginal differences may exist between the resulting entitlements of CDI holders and the entitlements they would have accrued if they held the shares directly. For example, where the ratio of CDIs to foreign shares is not one-to-one, explain that CDI holders will not benefit to the same extent from the rounding-up of fractional entitlements (i.e. their entitlements will be less than that what they would have been if they had held the underlying shares directly).</p>
Takeovers	Explain that the depository nominee may only accept a takeover offer where CDI holders instruct it to do so and that the depository nominee must ensure that the offeror processes the takeover acceptance.

RG 000.72 Foreign companies should consider how they can word and present information about CDIs in their Ch 6D disclosure documents in a ‘clear, concise and effective’ manner.

Note: RG 228 provide guidance on how to word prospectuses and other Ch 6D disclosure documents in a ‘clear, concise and effective’ manner.

RG 000.73 When we review a disclosure document for an offer of CDIs lodged with ASIC under Ch 6D of the Corporations Act, we will review the disclosure in accordance with our guidance in Table 2 of this guide.

Other offer documents

RG 000.74 For other ‘prospectus-like’ offer documents (e.g. offer documents for rights issues, employee incentive schemes or share purchase plans), we encourage foreign companies to consider what level of information about the differences between holding CDIs and holding the underlying foreign shares—having regard to our guidance in Table 2—their CDI holders may reasonably require to understand the impact of a particular offer on their rights or entitlements, and whether to participate in the particular offer.

RG 000.75 For example, investors may find it useful if an offer document for a rights issue explains that CDI holders will not benefit to the same extent from the rounding-up of fractional entitlements where the ratio of CDIs to foreign shares is not one-to-one (i.e. their entitlements will be less than what they would have been if they had held the underlying shares directly).

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Other company communications

- RG 000.76 For other types of company communications with CDI holders, including market announcements (e.g. dividend or other corporate action announcements), notices of meeting and communications on the foreign company's website, we encourage foreign companies to consider what level of information about the differences between holding CDIs and holding the underlying foreign shares—having regard to our guidance in Table 2—their CDI holders may reasonably require to understand the impact of a particular corporate action or transaction on their rights or entitlements. For example, investors may find an explanation of the following information useful:
- (a) the dividend amount per CDI and the AUD equivalent as at the ex-dividend date (particularly where the ratio of CDIs to the underlying shares is not one-to-one) in a dividend announcement; and
 - (b) how CDI holders may exercise voting rights in a notice of meeting (i.e. by directing the depository nominee to cast, or authorise or arrange the casting of, proxy votes in accordance with the written directions of the CDI holder only).

How to provide effective disclosure about CDIs

- RG 000.77 Disclosure about the key differences between holding CDIs and holding the underlying foreign shares should not mean that Ch 6D disclosure documents, other offer documents or company communications (e.g. market announcements) become unnecessarily lengthy or difficult for investors to read and understand.
- RG 000.78 Any explanation of the key differences between CDIs and the underlying shares should be tailored to the specific offer, corporate action or transaction, rather than being general in nature. Particularly where the ratio of CDIs to the underlying shares is not one-to-one.
- RG 000.79 In addition to including more specific and tailored information about CDIs in a Ch 6D disclosure document, offer document or company communication, foreign companies may provide a reference or link to a document where relevant information about CDIs can be readily accessed without charge (e.g. on the company's website).

Note 1: CDN's *Understanding CHESS Depository Interests* and GN 5 provide useful information for CDI holders on the differences between holding CDIs and holding the underlying financial product. We encourage foreign companies to provide a reference or link to these documents in their Ch 6D disclosure documents, other offer documents, cleansing notices provided to the market (under s708AA and 708A) and in their communications with CDI holders.

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Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A of the Corporations Act.
ASIC	Australian Securities and Investments Commission
ASX	ASX Limited or the exchange market operated by ASX Limited
ASX Operating Rules	ASX Limited's new operating rules, which replace the pre-existing ASX Market Rules
ASX Settlement	ASX Settlement Pty Limited (formerly known as ASX Settlement and Transfer Corporation Pty Limited)
APX	Asia Pacific Exchange Limited or the exchange market operated by Asia Pacific Exchange Limited
AQUA rules	The rules contained in Schedule 10A of the ASX Operating Rules, which describe and set out specifications for AQUA products and the trading of those products on ASX
CDI (CHES Depositary Interest)	A unit of beneficial ownership in a financial product of a foreign body, where the underlying financial product is registered in the name of a depositary nominee for the purpose of enabling the foreign financial product to be traded on ASX
CDN (CHES Depositary Nominees Pty Limited)	A wholly-owned subsidiary of ASX Limited, that was created to fulfil the functions of a depositary nominee
CHES	Clearing House Electronic Subregister System
Chi-X	Chi-X Australia Pty Ltd or the exchange market operated by Chi-X Australia Pty Ltd
Ch 6D (for example)	A chapter of the Corporations Act (in this example numbered 6D), unless otherwise specified
[CO 14/XX] (for example)	An ASIC class order (in this example numbered CO 14/XX)
Corporations Act	<i>Corporations Act 2001</i> , including any regulations made for the purposes of the Act

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Term	Meaning in this document
Corporations Regulations	Corporations Regulations 2001
CUFS (CHESS units of foreign securities)	Depository interests which are issued in respect of foreign equity securities
depository interest	Depository interests which are issued in respect of foreign equity securities and where the securities are held in another settlement and depository system
depository nominee	An entity to whom the underlying shares of a foreign company are issued or transferred for the purpose of facilitating the issue of CDIs in accordance with the operating rules of a prescribed clearing and settlement facility
disclosure document	A prospectus, profile statement or offer information statement
ETF	Exchange traded fund
foreign company	As defined in s9 of the Corporations Act
issuer	As defined in s761E(4) of the Corporations Act
NSXA	National Stock Exchange of Australia Limited or the exchange market operated by National Stock Exchange of Australia Limited
offeror	Any entity making an offer of securities under Ch 6D of the Corporations Act, including any entity issuing or transferring securities under Ch 6D. Note: Offering securities includes inviting applications for the issue of securities and inviting offers to purchase the securities: s700(2).
PDS	Product Disclosure Statement
Product Disclosure Statement	A document that must be given to a retail client for the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act Note: See s761A of the Corporations Act for the exact definition.
Pt 7.9 (for example)	A part of the Corporations Act (in this example numbered 7.9), unless otherwise specified
s708 (for example)	A section of the Corporations Act (in this example numbered 708), unless otherwise specified

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Related information

Headnotes

AFS licence, ASX, ASX settlement operating rules, CHESSE depository interests, CDIs, CHESSE depository nominees, CDN, CHESSE units of foreign securities, CUFS, cleansing notice, depository interests, depository nominee, derivatives, disclosure, disclosure document, exchange traded funds, financial products, foreign company, foreign securities, issuer, licensing, offeror, prospectus, securities, warrants

Class orders

[CO 02/311] *CHESSE Depository Nominees Pty Ltd – CDIs*

[CO 02/312] *Part 7.11, Division 4 financial products for ASTC*

[CO 02/1432] *Registered foreign companies — financial reporting requirements*

[CO 03/184] *Employee share schemes*

[CO 04/671] *Disclosure for on-sale of securities and other financial products*

[CO 05/26] *Constitutional provisions about the consideration to acquire interests*

[CO 07/9] *Prospectus relief for foreign schemes of arrangement and PDS relief for Pt 5.1 schemes and foreign schemes of arrangement*

[CO 07/10] *Technical disclosure relief for reconstructions and capital reductions*

[SCO 09/27] *Variation of Class Orders [CO 02/312] and [CO 05/26]*

[CO 09/68] *Prospectus and PDS relief for foreign scrip takeovers*

[CO 09/425] *Share and interest purchase plans*

[CO 14/XX] *Disclosure relief for offers of CHESSE Depository Interests*

Regulatory Guides

RG 173 *Disclosure for on-sale of securities and other financial products*

RG 188 *Disclosure in reconstructions*

RG 228 *Prospectuses: Effective disclosure for retail investors*

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Legislation

Corporations Act, Chs 6D, 7, Pts 6D.2, 6D.3, 7.6, 7.8, 7.9, 7.10, s601CK, 700, 706, 707, 708AA, 708A, 741(1), 761D, 766B, 766C, 766E, 911A

Consultation papers and reports

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

REP 282 *Regulation of exchange traded funds*

Other documents

ASX Guidance Note 5 *CHESS Depositary Interests (CDIs)*

ASX Settlement Operating Rules

CDN, *Understanding CHESS Depositary Interests*, CHESS Depositary Nominees Pty Ltd, financial services guide, 2012

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