



**ASIC**

Australian Securities & Investments Commission

CONSULTATION PAPER 220

# Fundraising: Facilitating offers of CHESS Depository Interests

May 2014

## About this paper

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

It seeks feedback on our proposals to facilitate offers of CDIs over shares in a foreign company 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 2001* (Corporations Act).

Our proposed class order relief and guidance is set out in a draft class order and draft regulatory guide attached to this paper.

### 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 paper was issued in May 2014 and is based on the Corporations Act as at the date of issue.

### Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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## The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information. We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on offers of CHESD depository interests. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section E, 'Regulatory and financial impact'.

### Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 25 July 2014 to:

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 Australian Securities and Investments Commission  
 Level 5, 100 Market Street  
 Sydney NSW 2000  
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### What will happen next?

<b>Stage 1</b>	28 May 2014	Release of ASIC consultation paper, draft regulatory guide and draft class order
<b>Stage 2</b>	25 July 2014	Comments due on the consultation paper
<b>Stage 3</b>	November 2014	Regulatory guide and class order released

## A Background to the proposals

### Key points

Although CHESS depository interests (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 2001* (Corporations Act).

This has resulted in different views being adopted in the market in relation to offers of CDIs.

This consultation paper sets out our proposals to issue new class order relief and regulatory guidance to facilitate offers for issue or sale of CDIs, and to remove any uncertainty about how offers of CDIs are regulated under the Corporations Act.

### Use and understanding of CDIs in the market

- 1 Some foreign companies listed on Australian exchange markets offer CDIs over their shares to investors in Australia.
 

Note: At present, there are approximately 72 foreign companies with CDIs issued over shares quoted on ASX Limited (ASX) (including shares in foreign exchange traded funds (ETFs) quoted under ASX's AQUA rules). There is one foreign company with CDIs issued over shares quoted on the National Stock Exchange of Australia (NSXA). There are no CDIs issued over foreign shares quoted on Asia Pacific Stock Exchange (APX). CDIs are also traded on the secondary exchange market operated by Chi-X Australia Limited (Chi-X).
- 2 The settlement system used for equity securities traded in Australia, ASX Clearing House Electronic Subregister System (CHESS), 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 CHESS.
- 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 CHESS Depository Nominees Pty Limited (CDN) is the only depository nominee that has been appointed for CDIs.
- 4 There is some uncertainty as to how offers of CDIs over foreign shares are regulated under the Corporations Act (particularly because depository interests are not defined, or referred to, in the Corporations Act), which has resulted in different views being adopted in the market. 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) and who offers and issues CDIs (i.e. the foreign company or the depository nominee).

- 5 There are also differing practices in relation to the level of disclosure provided by foreign companies to investors about the key differences between holding CDIs and holding the underlying foreign shares.
- 6 As a result of the uncertainty in the market, and due to the limited nature of ASIC's existing relief in Class Order [CO 02/311] *CHESS Depository Nominees Pty Ltd – CDIs*, foreign companies have had to apply to ASIC for individual relief for offers of CDIs over their shares.
- 7 We recently undertook some informal consultation with the market, which has highlighted the need for updated and more comprehensive class order relief and regulatory guidance in relation to offers of CDIs over foreign shares. Some respondents specifically requested, and all respondents were generally supportive of, ASIC issuing class order relief to provide the market with certainty about offers of CDIs. We are grateful to the individuals who provided feedback and discussed specific issues with us during the process.

## Our proposed guidance and relief

- 8 In response to concerns addressed in paragraphs 4–7, we propose to issue class order relief and guidance:
  - (a) explaining our general approach to regulating offers of CDIs over foreign shares and our interpretation of how the fundraising provisions in Ch 6D apply to offers of CDIs—to remove any uncertainty about how offers of CDIs are regulated (see paragraphs 9–10);
  - (b) providing relief to facilitate offers 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 (see proposals B1, B2 and B3);
  - (c) providing guidance on what information about the key differences between holding CDIs and holding the underlying foreign share we would generally expect to be disclosed in any Ch 6D disclosure documents, other offer documents and company communications with CDI holders—to assist foreign companies to comply with their obligations under Ch 6D and to make effective disclosure to retail investors (see proposal C1); and
  - (d) revoking our relief in [CO 02/311] and Class Order [CO 02/316] *CHESS Depository Nominees Pty Ltd – FDIs* and amending our relief in Class Order [CO 02/312] *Part 7.11, Division 4 financial products for ASTC* (see proposals D1, D2 and D3).

## B Proposed class order relief

### Key points

This section discusses our general approach to regulating offers of CDIs.

This section also sets out our proposals to issue class order 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 (see proposal B1);
- for offers for issue of CDIs, the foreign company that offers and issues the underlying shares is taken to be the entity who offers and issues the CDIs (see proposal B1); and
- a foreign company (other than a foreign investment company) that issues the underlying shares is not required to hold an Australian financial services (AFS) licence for arranging for CDN or a CDI holder (or a proposed CDI holder) to deal in CDIs over its shares (see proposal B3).

This section also discusses our proposals to limit our class order relief to offers of CDIs over foreign shares quoted on ASX (including under ASX's AQUA rules), NSXA or APX, and where CDN is acting as the depository nominee (see proposal B2).

### Our approach to regulating offers of CDIs

- 9 Our general 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.
- 10 Our view is that:
- (a) offers of CDIs over foreign shares should be regulated by Ch 6D (and not Pt 7.9) of the Corporations Act;
  - (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; 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 foreign shares), then Ch 6D disclosure should be provided by the foreign company.

## Our proposed relief to Chapter 6D

### Proposal

**B1** We propose to issue class order relief, as set out in the attached draft class order (Attachment 2 to this consultation paper), for the avoidance of doubt, so that:

- (a) an offer of CDIs over shares in a foreign company is regulated as an offer of securities under Ch 6D of the Corporations Act;
- (b) for offers for issue of CDIs, the foreign company who offers and issues the underlying shares is taken to be the entity that offers and issues the CDIs;
- (c) an offer for the issue of CDIs over foreign shares is taken to be an offer for issue of the underlying shares; and
- (d) an offer for the sale of CDIs over foreign shares is taken to be an offer for sale of the underlying shares.

Our proposed class order also provides relief so that Ch 6D operates effectively for offers of CDIs, including so that:

- (e) 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;
- (f) 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
- (g) 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.

Our proposed class order also requires the foreign company to explain the differences between holding CDIs and holding the underlying foreign shares in any Ch 6D disclosure document.

Table 1 and Section B of the attached draft regulatory guide (Attachment 1 to this consultation paper) provide further explanation of our proposed class order relief.

#### *Your feedback*

- B1Q1 Do you agree with the general approach in our proposed class order relief? If not, why not?
- B1Q2 Do you agree that an offer of CDIs over shares in a foreign company should be regulated as an offer of securities under Ch 6D of the Corporations Act? If not, why not?
- B1Q3 Do you agree that for offers for the issue of CDIs, the foreign company that offers and issues the underlying shares should be taken to be the entity that offers and issues the CDIs? If not, why not?



- B1Q4 Do you agree that offers for the issue or sale of CDIs should be treated as an offer for the issue or sale of the underlying shares? If not, why not?
- B1Q5 Do you agree that our proposed relief should include a requirement for the foreign company to explain the differences between holding CDIs and holding the underlying shares in any Ch 6D disclosure document used for an offer to issue CDIs? If not, why not?
- B1Q6 Are there any practical difficulties in complying with the statutory timing requirements in s708A(6) for giving a cleansing notice for a sale of CDIs (as a result of our proposal to treat an offer for sale of CDIs as an offer for sale of the underlying share)? If so, please provide details and suggest alternatives.
- B1Q7 Are there any other practical difficulties, increased business costs or cost savings that arise from our proposed class order relief? If so, please provide details.

## Rationale

- 11 We understand that there may be differing views in the market as to whether CDIs are characterised as securities, derivatives or warrants under the Corporations Act—and, therefore, which disclosure regime applies to offers of CDIs: see RG 000.21–RG 000.24 in Attachment 1.
- 12 Similarly, we understand there are differing views in the market about who offers and issues CDIs (i.e. the foreign company or the depository nominee): see RG 000.25–RG 000.29 in Attachment 1.

Note: 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 investors under Ch 7 of the Corporations Act: see the Revised Explanatory Memorandum to the Commonwealth Government Securities Legislation Amendment (Retail Trading) Bill 2012.

- 13 To remove the uncertainty in the market, we propose to issue class order relief as set out in Attachment 2: see proposal B1(a)–B1(d). This is consistent with our general approach of ‘looking through’ the CDI to the underlying foreign share, so that offers of CDIs are regulated in the same way that offers of the underlying shares would be regulated.
- 14 The proposed relief also reflects our view that a CDI over a share of a foreign company is an equitable or beneficial interest in the share and, therefore, is a ‘security’ within the meaning of s761A of the Corporations Act (and is not a derivative and, therefore, is not a warrant) and that the foreign company (not the depository nominee) is the entity that offers and issues the CDIs.

## The scope of our proposed relief

### Proposal

**B2** Our proposed class order relief applies to 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.

We will consider granting individual relief to facilitate:

- (a) the use of a depository nominee other than CDN; and
- (b) offers of CDIs over interests in foreign managed investment schemes (see proposal D1).

#### *Your feedback*

**B2Q1** Do you agree that our proposed relief should be limited to CDIs where CDN is acting as the depository nominee? If not, why not?

**B2Q2** Do you agree that our proposed relief should cover CDIs over foreign shares quoted on ASX (including under ASX's AQUA rules), NSXA and APX? If not, why not? Are there any other exchange markets that our relief should extend to? If so, please provide details.

**B2Q3** Do you agree with the circumstances we propose to consider applications for individual relief? If not, are there any other circumstances in which ASIC should consider giving individual relief? Please provide details.

### Rationale

15 Our proposed class order relief applies to offers for issue and sale 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.

Note: Our relief also extends to CDIs over foreign shares quoted on secondary exchange markets (such as Chi-X), if the underlying share is also quoted on one of the exchange markets specified above.

16 We have limited our proposed class order relief to the circumstances in paragraph 15(a)–15(c) 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: See RG 000.30–RG 000.40 in Attachment 1.

- 17 In addition, we understand that CDN is the only depository nominee that has been appointed in relation to CDIs over foreign shares quoted on ASX and NSXA. As a result, although a foreign company may appoint another depository nominee, we do not consider it necessary to extend our relief to other depository nominees at this point in time.
- 18 However, we will consider granting individual relief for offers of CDIs over foreign shares to facilitate:
- (a) the use of a depository nominee, other than CDN, where that depository nominee is an AFS licensee holder and is governed by market rules that provide adequate protections to CDI holders (see RG 000.58–RG 000.60 in Attachment 1); and
  - (b) offers of CDIs over interests in foreign managed investment schemes (see proposal D1).

## Our proposed licensing relief

### Proposal

- B3** We propose to issue class order relief, as set out in the attached draft class order (Attachment 2 to this consultation paper), for the avoidance of doubt, so that a foreign company (other than a foreign investment company) that issues the shares underlying the CDIs is not required 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.

#### *Your feedback*

- B3Q1 Do you agree with our proposed licensing relief? If not, why not?
- B3Q2 What impact, if any, would our proposed class order relief have on your business costs or cost savings?

### Rationale

- 19 We understand that there may be 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 and/or the depository nominee is required to hold an AFS licence for a financial service that consists of dealing in CDIs over foreign shares: see RG 000.48–RG 000.52 in Attachment 1.

- 20 Given our view that the foreign company (and not the depository nominee) is the issuer of CDIs, and that the CDIs are the foreign company's securities, we consider that:
- (a) the foreign company would be able to rely on the self-dealing exemption in s766C(4) of the Corporations Act for issuing, or otherwise dealing in, CDIs over its shares (provided they are 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 CDIs.

21 Alternatively, if the view is taken that CDIs are issued by the depository nominee and are the depository nominee's securities, then:

- (a) the depository nominee would be able to rely on the self-dealing exemption in s766C(4) for an issue of CDIs; and
- (b) the view might be taken that they need 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
  - (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.

22 Given the uncertainty about who issues CDIs and whether CDIs are the depository nominee's or the foreign company's securities, we propose to issue class order relief, for the avoidance of doubt, exempting a 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, where that company would otherwise be entitled to rely on the self-dealing exemption.

Note: Under s766C, acquiring, issuing and disposing of a financial product, and arranging for a person to engage in that conduct, each constitute '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: see 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: see s766C(5). For this reason, we have not extended licensing relief to foreign investment companies.

## C Proposed new guidance

### Key points

We propose to issue class order relief, for the avoidance of doubt, requiring 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: see proposal B1.

This section discusses our proposal to issue guidance detailing the information we would generally expect to be disclosed in Ch 6D disclosure documents about the key differences between holding CDIs and holding the underlying foreign shares, to assist foreign companies to comply with our class order relief and the disclosure requirements in Ch 6D: see proposal C1.

It also sets out our proposal to issue guidance on disclosure about CDIs in other 'prospectus-like' documents and company communications with CDI holders: see proposal C1.

## Our guidance on disclosure for offers of CDIs

### Proposal

c1 We propose to issue guidance:

- (a) detailing the information we would generally expect to be disclosed in any Ch 6D disclosure documents about the key differences between holding CDIs and holding the underlying foreign shares, to assist foreign companies to satisfy the requirement of our proposed class order relief and the disclosure requirements in Ch 6D (see Section C and Table 2 in Attachment 1); and
- (b) to assist foreign companies to provide effective disclosure to CDI holders in other 'prospectus-like' documents (e.g. offer documents used for rights issues) and other company communications that relate to the rights and entitlements of CDI holders (e.g. notices of meeting, dividend announcements and information about CDIs on a company's own website) (see Section C in Attachment 1).

### *Your feedback*

C1Q1 Do you agree with our proposed guidance in Section C of the draft regulatory guide in relation to Ch 6D disclosure documents? If not, why not?

C1Q2 Do you agree with our proposed guidance in Section C of the draft regulatory guide in relation to other offer documents and other company communications? If not, why not?

C1Q3 Are there any other 'key differences' between holding CDIs and holding the underlying foreign shares that we have not included in Table 2 of our proposed guidance? If so, please provide details.

C1Q4 Do you think that our proposed guidance is likely to result in additional compliance costs or practical difficulties for foreign companies? If so, please provide details.

## Rationale

- 23 While holders of CDIs generally have the same rights and entitlements as holders of the underlying foreign share, there may be some minor differences.
- 24 This is particularly the case where CDIs are issued using a conversion ratio where each CDI represents a multiple or a fraction of the underlying share or where the depository nominee's holding of shares is treated as a single holding rather than as a number of smaller separate holdings corresponding to the individual interests of CDI holders.
- 25 In such circumstances, marginal differences may exist between the resulting entitlements of CDI holders and the entitlements they would have accrued if they held the underlying shares directly. For example, CDI holders will not benefit to the same extent from the rounding-up of fractional entitlements (i.e. their entitlements will be less than what they would have been if they held the underlying shares).
- 26 Given the differences between holding CDIs and holding the underlying foreign shares, we think it is important that foreign companies making offers of CDIs clearly and prominently inform investors about the key differences between holding CDIs and holding the underlying shares.
- 27 For offers of CDIs using a Ch 6D disclosure document (e.g. a prospectus, transaction-specific prospectus or offer information statement), our proposed class order relief requires a foreign company to explain the differences between holding CDIs and holding the underlying foreign shares in any Ch 6D disclosure document.
- 28 We consider information about the differences between holding CDIs and holding the underlying shares is information that is required to be disclosed under the requirements in the Corporations Act. 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 in relation to CDIs (and not just the underlying shares): see RG 000.67–RG 000.73 in Attachment 1.
- 29 Table 2 in Attachment 1 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.

- 30 For other offer documents (e.g. offer documents for rights issues, employee incentive schemes or share purchase plans) and company communications (e.g. notices of meeting, dividend announcements and information about CDIs on a company's website), we encourage foreign companies to provide information about the key differences where it may assist CDI holders in assessing the impact of a particular offer, corporate action or transaction on their rights or entitlements: see RG 000.74–RG 000.76 in Attachment 1.
- 31 Any disclosure about the differences between holding CDIs and holding the underlying shares should be tailored to the specific offer, corporate action or transaction, and should not result in disclosures becoming unnecessarily lengthy or difficult for investors to read and understand: see RG 000.77–RG 000.79 in Attachment 1.

## D Proposed changes to existing class order relief

### Key points

This section sets out our proposals to:

- revoke the existing class order relief contained in [CO 02/311] (see proposal D1);
- revoke the existing class order relief contained in [CO 02/316] (see proposal D2); and
- amend the description of CDIs in Class Order [CO 02/312] (see proposal D3).

## Revocation of disclosure relief for CDIs

### Proposal

- D1 We propose to revoke [CO 02/311], which provides relief to CDN from the disclosure requirements in:
- (a) Chapter 6D—for an offer for the issue of CDIs in respect of foreign securities; and
  - (b) Part 7.9—for an offer for the issue of CDIs over interests in foreign managed investment schemes.

We consider that this relief is not necessary.

### Your feedback

- D1Q1 Do you agree with our proposal to revoke [CO 02/311]? If not, why not?
- D1Q2 Are there any practical difficulties or compliance issues that arise from our proposal to revoke [CO 02/311]? If so, do you think that transitional arrangements are required? If so, please provide details.
- D1Q3 Is our proposal to revoke [CO 02/311] likely to impact your business costs? If so, please provide details.
- D1Q4 Are you aware of any proposals to use CDIs over interests in foreign managed investment schemes in the future? If so, do you think that individual or class order relief for CDIs over interests in managed investment schemes is required? If so, what relief is required (e.g. relief similar to that proposed for CDIs over foreign shares, such as relief deeming the issuer of the interests in the foreign managed investment scheme to be the issuer of the CDIs: see proposal B1)?



## Rationale

- 32 We currently provide relief in relation to CDIs in [CO 02/311]. However, this relief is quite limited and there are concerns that it does not reflect our current view, and the views in the market, about how CDIs are regulated under the Corporations Act.
- 33 In particular, the relief in [CO 02/311] is based on the view that CDN (as the depository nominee), and not the foreign company, 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; and
  - (b) for the purpose of Ch 7, issues the CDIs within the meaning of s761E(4) of the Corporations Act.
- Note: [CO 02/311] takes the view that CDN is the entity that has the capacity to issue and transfer the CDIs and is responsible for the obligations owed in relation to the CDIs: see the meaning of ‘offeror’ in s700(3) and the meaning of ‘issuer’ in s761E(4) of the Corporations Act.
- 34 We have recently reviewed our interpretation of the fundraising provisions in Ch 6D and the licensing regime in Ch 7, and the application of these provisions to offers of CDIs. Following our review, we consider that the foreign company that offers and issues the foreign shares underlying the CDIs is also the entity that offers and issues the CDIs: see RG 000.27 in Attachment 1.
- 35 In light of the information in paragraphs 32–34, we consider that the existing relief in [CO 02/311], to the extent it applies to offers of CDIs over foreign shares, should be replaced with updated and more comprehensive class order relief to clarify how such offers are regulated under the Corporations Act.
- 36 Our proposed new class order relief (see proposal B1) will clarify, for the avoidance of doubt, that it is the foreign company, not the depository nominee, that must provide any required disclosure under Ch 6D of the Corporations Act for an offer of CDIs over foreign shares. As a result, we consider that the relief for CDN in [CO 02/311] from the disclosure requirements in Ch 6D is no longer necessary.
- 37 In addition, we understand that CDIs over interests in foreign managed investment schemes are not currently being used in the market. The only presently-listed foreign ETFs are investment companies, where the financial product underlying the CDI is a share issued by a foreign company (and not an interest in a foreign managed investment scheme).
- 38 As a result, we consider that relief for CDN in [CO 02/311] from the disclosure requirements in Pt 7.9, for the issue of CDIs over interests in foreign managed investment schemes, is not necessary. We consider that, should the need arise in the future for CDIs to be issued over interests in

foreign managed investment schemes, any disclosure or other relief should be considered by ASIC on an individual basis.

- 39 When considering applications for individual relief for offers of CDIs over interests in foreign managed investment schemes, we will likely take the same approach as we propose to take for regulating offers of CDIs over foreign shares (i.e. we will ‘look through’ the CDI to the underlying interest in the foreign managed investment scheme): see paragraph 9. For example, we may give relief so that offers of CDIs over interests in foreign managed investment schemes are regulated in the same way as offers of the underlying interests would be regulated, and so that CDN is not responsible for providing disclosure to investors for offers of CDIs over interests in foreign managed investment schemes.

## Revocation of relief for foreign depository interests

### Proposal

- D2 We propose to revoke our class order relief in [CO 02/316], which provides relief to CDN from the disclosure requirements in:
- (a) Chapter 6D—for an offer for the issue of foreign depository interests (FDIs) over foreign securities; and
  - (b) Part 7.9—for an offer for the issue of FDIs over interests in foreign managed investment schemes.

We consider that this relief is no longer necessary.

#### *Your feedback*

D2Q1 Do you agree with our proposal to revoke [CO 02/316]? If not, why not?

D2Q2 Are you aware of any proposals to use FDIs in the future? If so, is there any relief you consider necessary? If so, please provide details.

### Rationale

- 40 An FDI is a beneficial interest in a financial product of a foreign body that is only traded on an overseas exchange market. Although an FDI is not traded on an Australian exchange market, such as ASX, the underlying financial product is held by an Australian depository nominee (i.e. on behalf of an Australian investor).
- 41 Similar to CDIs, FDIs were developed as a method of transferring and holding foreign financial products in CHESS.

- 42 We understand that FDIs are not currently being used in the market. We also understand that the FDI structure has only ever been used in relation to one specific financial product issued in Australia (i.e. ASX World Link).
- 43 In light of the information in paragraphs 40–42, we consider the relief provided to CDN for offers of FDIs in [CO 02/316] is no longer necessary.

## Amendment to class order to confirm CDIs are ‘Division 4 financial products’

### Proposal

D3 We propose to amend [CO 02/312] (as varied by Class Order [CO 09/27] *Variation of Class Orders [CO 02/312] and [CO 05/26]*), which declares certain classes of financial products, including CDIs over foreign shares and CDIs over interests in foreign managed investment schemes, to be Div 4 financial products in relation to the clearing and settlement facility operated by ASX Settlement.

Specifically, we propose to amend the description of CDIs contained in paragraph 4 of [CO 02/312] to ensure:

- (a) it is consistent with the definition of CDIs used in our proposed new class order relief, which reflects our view that CDN is not the issuer of CDIs; and
- (b) that the relief in [CO 02/312] applies to CDIs as intended.

#### *Your feedback*

D3Q1 Do you agree with our proposed amendment to [CO 02/312]? If not, why not?

D3Q2 Are there any practical difficulties or compliance issues that arise from our proposed amendment? If so, please provide details.

### Rationale

- 44 Our relief in [CO 02/312] (as amended by [CO 09/27]) specifies certain financial products, including CDIs over foreign shares and interests in foreign managed investment schemes, to be ‘Division 4 financial products’ in relation to the clearing and settlement facility operated by ASX Settlement.
- 45 This relief enables CDIs to be transferred through CHESS under the regulations made for the purposes of Div 4 of Pt 7.11 of the Corporations Act, with the benefit of the statutory warranties and indemnities contained in those regulations. The relief in [CO 02/312] extends the National Guarantee Fund provisions contained in Div 4 of Pt 7.5 of the Corporations Act (and related regulations) to electronic transfers of CDIs by an ASX participant in CHESS.

- 46 Paragraph 4 of [CO 02/312] contains a description of CDIs that is based on the view that CDN, as the depository nominee, is the issuer of the CDIs for the purposes of Ch 7 of the Corporations Act.
- 47 We propose to amend the description of CDIs in [CO 02/312] to bring it in line with our view that CDN is not the issuer of CDIs: see RG 000.27 in Attachment 1. This will remove any uncertainty as to whether CDIs over foreign shares and foreign managed investment scheme interests are 'Division 4 financial products'.

## E Regulatory and financial impact

- 48 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think the proposals will strike an appropriate balance between:
- (a) facilitating offers of CDIs over foreign shares by removing uncertainty about how these offers are regulated under the Corporations Act;
  - (b) assisting foreign companies to efficiently comply with the disclosure requirements for Ch 6D disclosure documents; and
  - (c) assisting foreign companies to make effective disclosure to retail investors in other offer documents and company communications.
- 49 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:
- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
  - (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
  - (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).
- 50 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.
- 51 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:
- (a) the likely compliance costs;
  - (b) the likely effect on competition; and
  - (c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

## 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 (CHESS Depository 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 depository nominee for the purpose of enabling the foreign financial product to be traded on ASX
CDN (CHESS Depository Nominees Pty Limited)	A wholly-owned subsidiary of ASX Limited, that was created to fulfil the functions of a depository nominee
CHESS	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
Corporations Act	<i>Corporations Act 2001</i> , including any regulations made for the purposes of the Act
Corporations Regulations	Corporations Regulations 2001

Term	Meaning in this document
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
FDI (Foreign Depository Interest)	A unit of beneficial ownership in international financial products that are listed on an overseas exchange market only (and not in Australia)
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

## List of proposals and questions

Proposal	Your feedback
<p>B1 We propose to issue class order relief, as set out in the attached draft class order (Attachment 2 to this consultation paper), for the avoidance of doubt, so that:</p> <ul style="list-style-type: none"> <li>(a) an offer of CDIs over shares in a foreign company is regulated as an offer of securities under Ch 6D of the Corporations Act;</li> <li>(b) for offers for issue of CDIs, the foreign company who offers and issues the underlying shares is taken to be the entity that offers and issues the CDIs;</li> <li>(c) an offer for the issue of CDIs over foreign shares is taken to be an offer for issue of the underlying shares; and</li> <li>(d) an offer for the sale of CDIs over foreign shares is taken to be an offer for sale of the underlying shares.</li> </ul> <p>Our proposed class order also provides relief so that Ch 6D operates effectively for offers of CDIs, including so that:</p> <ul style="list-style-type: none"> <li>(e) 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;</li> <li>(f) 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</li> <li>(g) 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.</li> </ul> <p>Our proposed class order also requires the foreign company to explain the differences between holding CDIs and holding the underlying foreign shares in any Ch 6D disclosure document.</p> <p>Table 1 and Section B of the attached draft regulatory guide (Attachment 1 to this consultation paper) provide further explanation of our proposed class order relief.</p>	<p>B1Q1 Do you agree with the general approach in our proposed class order relief? If not, why not?</p> <p>B1Q2 Do you agree that an offer of CDIs over shares in a foreign company should be regulated as an offer of securities under Ch 6D of the Corporations Act? If not, why not?</p> <p>B1Q3 Do you agree that for offers for the issue of CDIs, the foreign company that offers and issues the underlying shares should be taken to be the entity that offers and issues the CDIs? If not, why not?</p> <p>B1Q4 Do you agree that offers for the issue or sale of CDIs should be treated as an offer for the issue or sale of the underlying shares? If not, why not?</p> <p>B1Q5 Do you agree that our proposed relief should include a requirement for the foreign company to explain the differences between holding CDIs and holding the underlying shares in any Ch 6D disclosure document used for an offer to issue CDIs? If not, why not?</p> <p>B1Q6 Are there any practical difficulties in complying with the statutory timing requirements in s708A(6) for giving a cleansing notice for a sale of CDIs (as a result of our proposal to treat an offer for sale of CDIs as an offer for sale of the underlying share)? If so, please provide details and suggest alternatives.</p> <p>B1Q7 Are there any other practical difficulties, increased business costs or cost savings that arise from our proposed class order relief? If so, please provide details.</p>



Proposal	Your feedback
<p>B2 Our proposed class order relief applies to 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.</p> <p>We will consider granting individual relief to facilitate:</p> <ul style="list-style-type: none"> <li>(a) the use of a depository nominee other than CDN; and</li> <li>(b) offers of CDIs over interests in foreign managed investment schemes (see proposal D1).</li> </ul>	<p>B2Q1 Do you agree that our proposed relief should be limited to CDIs where CDN is acting as the depository nominee? If not, why not?</p> <p>B2Q2 Do you agree that our proposed relief should cover CDIs over foreign shares quoted on ASX (including under ASX's AQUA rules), NSXA and APX? If not, why not? Are there any other exchange markets that our relief should extend to? If so, please provide details.</p> <p>B2Q3 Do you agree with the circumstances we propose to consider applications for individual relief? If not, are there any other circumstances in which ASIC should consider giving individual relief? Please provide details.</p>
<p>B3 We propose to issue class order relief, as set out in the attached draft class order (Attachment 2 to this consultation paper), for the avoidance of doubt, so that a foreign company (other than a foreign investment company) that issues the shares underlying the CDIs is not required 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.</p>	<p>B3Q1 Do you agree with our proposed licensing relief? If not, why not?</p> <p>B3Q2 What impact, if any, would our proposed class order relief have on your business costs or cost savings?</p>
<p>C1 We propose to issue guidance:</p> <ul style="list-style-type: none"> <li>(a) detailing the information we would generally expect to be disclosed in any Ch 6D disclosure documents about the key differences between holding CDIs and holding the underlying foreign shares, to assist foreign companies to satisfy the requirement of our proposed class order relief and the disclosure requirements in Ch 6D (see Section C and Table 2 in Attachment 1); and</li> <li>(b) to assist foreign companies to provide effective disclosure to CDI holders in other 'prospectus-like' documents (e.g. offer documents used for rights issues) and other company communications that relate to the rights and entitlements of CDI holders (e.g. notices of meeting, dividend announcements and information about CDIs on a company's own website) (see Section C in Attachment 1).</li> </ul>	<p>C1Q1 Do you agree with our proposed guidance in Section C of the draft regulatory guide in relation to Ch 6D disclosure documents? If not, why not?</p> <p>C1Q2 Do you agree with our proposed guidance in Section C of the draft regulatory guide in relation to other offer documents and other company communications? If not, why not?</p> <p>C1Q3 Are there any other 'key differences' between holding CDIs and holding the underlying foreign shares that we have not included in Table 2 of our proposed guidance? If so, please provide details.</p> <p>C1Q4 Do you think that our proposed guidance is likely to result in additional compliance costs or practical difficulties for foreign companies? If so, please provide details.</p>

Proposal	Your feedback
<p>D1 We propose to revoke [CO 02/311], which provides relief to CDN from the disclosure requirements in:</p> <ul style="list-style-type: none"> <li>(a) Chapter 6D—for an offer for the issue of CDIs in respect of foreign securities; and</li> <li>(b) Part 7.9—for an offer for the issue of CDIs over interests in foreign managed investment schemes.</li> </ul> <p>We consider that this relief is not necessary.</p>	<p>D1Q1 Do you agree with our proposal to revoke [CO 02/311]? If not, why not?</p> <p>D1Q2 Are there any practical difficulties or compliance issues that arise from our proposal to revoke [CO 02/311]? If so, do you think that transitional arrangements are required? If so, please provide details.</p> <p>D1Q3 Is our proposal to revoke [CO 02/311] likely to impact your business costs? If so, please provide details.</p> <p>D1Q4 Are you aware of any proposals to use CDIs over interests in foreign managed investment schemes in the future? If so, do you think that individual or class order relief for CDIs over interests in managed investment schemes is required? If so, what relief is required (e.g. relief similar to that proposed for CDIs over foreign shares, such as relief deeming the issuer of the interests in the foreign managed investment scheme to be the issuer of the CDIs: see proposal B1)?</p>
<p>D2 We propose to revoke our class order relief in [CO 02/316], which provides relief to CDN from the disclosure requirements in:</p> <ul style="list-style-type: none"> <li>(a) Chapter 6D—for an offer for the issue of foreign depository interests (FDIs) over foreign securities; and</li> <li>(b) Part 7.9—for an offer for the issue of FDIs over interests in foreign managed investment schemes.</li> </ul> <p>We consider that this relief is no longer necessary.</p>	<p>D2Q1 Do you agree with our proposal to revoke [CO 02/316]? If not, why not?</p> <p>D2Q2 Are you aware of any proposals to use FDIs in the future? If so, is there any relief you consider necessary? If so, please provide details.</p>
<p>D3 We propose to amend [CO 02/312] (as varied by Class Order [CO 09/27] Variation of Class Orders [CO 02/312] and [CO 05/26]), which declares certain classes of financial products, including CDIs over foreign shares and CDIs over interests in foreign managed investment schemes, to be Div 4 financial products in relation to the clearing and settlement facility operated by ASX Settlement.</p> <p>Specifically, we propose to amend the description of CDIs contained in paragraph 4 of [CO 02/312] to ensure:</p> <ul style="list-style-type: none"> <li>(a) it is consistent with the definition of CDIs used in our proposed new class order relief, which reflects our view that CDN is not the issuer of CDIs; and</li> <li>(b) that the relief in [CO 02/312] applies to CDIs as intended.</li> </ul>	<p>D3Q1 Do you agree with our proposed amendment to [CO 02/312]? If not, why not?</p> <p>D3Q2 Are there any practical difficulties or compliance issues that arise from our proposed amendment? If so, please provide details.</p>