



ASIC

Australian Securities & Investments Commission

REPORT 414

Response to submissions on CP 220 Fundraising: Facilitating offers of CHES Depository Interests

October 2014

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 220 *Fundraising: Facilitating offers of CHES Depository Interests* (CP 220) and details our responses in relation to those issues.

About ASIC regulatory documents

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

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

Regulatory guides: give guidance to regulated entities by:

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

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

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

Disclaimer

This report does not constitute legal 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 report 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/Consultation process

- 1 In Consultation Paper 220 *Fundraising: Facilitating offers of CHESSE Depository Interests* (CP 220), we consulted on our proposals to facilitate offers of CHESSE Depository Interests (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).
- 2 Specifically, we consulted on proposals to issue class order relief:
 - (a) modifying Ch 6D for offers of CDIs over shares in a foreign company quoted on ASX Limited (ASX) (including under ASX's AQUA rules), National Stock Exchange of Australia (NSXA) or Asia Pacific Stock Exchange (APX), where CHESSE Depository Nominees Pty Limited (CDN) is the depository nominee; and
 - (b) exempting a foreign company from the requirement to hold an Australian financial services (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.
- 3 In addition, we consulted on proposals to issue guidance explaining:
 - (a) 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; and
 - (b) 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, other offer documents and company communications with CDI holders.
- 4 We also consulted on proposals to:
 - (a) revoke our relief in Class Order [CO 02/311] *CHESSE Depository Nominees Pty Ltd – CDIs*;
 - (b) revoke our relief in Class Order [CO 02/316] *CHESSE Depository Nominees Pty Ltd – FDIs*; and
 - (c) amend Class Order [CO 02/312] *Part 7.11, Division 4 financial products for ASTC*.
- 5 This report highlights the key issues that arose out of the submissions received on CP 220 and our responses to those issues. This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 220. We have limited this report to the key issues.
- 6 For a list of the non-confidential respondents to CP 220, see the appendix. Copies of these submissions are available on the ASIC website at www.asic.gov.au/cp under CP 220.

Responses to consultation

- 7 We received seven responses to CP 220. We are grateful to respondents for taking the time to send us their comments. We are also grateful to the individuals who provided feedback and discussed specific issues with us before and during the consultation process.
- 8 All respondents were very supportive of our proposal to issue class order relief and guidance to facilitate offers of CDIs over shares in a foreign company and to remove any uncertainty in the market about how offers of CDIs over foreign shares are regulated under the Corporations Act.
- 9 The main issues raised by respondents related to the scope of our proposed class order relief for offers of CDIs, in particular, whether our relief should cover:
- (a) CDIs over foreign shares quoted on SIM Venture Securities Exchange (SIM VSE);
 - (b) CDIs where a depository nominee, other than CDN, has been appointed;
 - (c) CDIs over options and CDIs over foreign managed investment scheme interests; and
 - (d) in relation to our licensing relief, all foreign entities issuing CDIs, all depository nominees and all types of ‘dealing’ in CDIs.
- 10 Some respondents raised comments about the need to clarify certain aspects of our class order relief and guidance for offers of CDIs. In response to feedback received, we have amended our guidance in Regulatory Guide *Fundraising: Facilitating offers of CHESS Depository* (RG 253) to address these comments where necessary. For example, we have included additional guidance clarifying that:
- (a) because our relief for offers of CDIs in Class Order [CO 14/827] *Disclosure relief for offers of CHESS Depository Interests* applies to all legislative instruments made under s741 of the Corporations Act, Class Order [CO 04/671] *Disclosure for on-sale of securities and other financial products* provides disclosure relief for offers for the sale of CDIs over foreign shares issued under the types of offers specified in that class order, including CDIs that are issued as consideration under a scheme of arrangement or takeover bid; and
 - (b) foreign companies are not prevented from relying on s713 of the Corporations Act (transaction-specific prospectuses for ‘continuously-quoted securities’) for secondary offerings of CDIs, solely because ASX has granted a waiver from the requirement to quote all of the foreign company’s shares (and to instead quote only the foreign shares underlying the issued CDIs).
- 11 Other issues outside the scope of our proposed class order relief and guidance were also raised.

B The scope of our relief for offers of CDIs

Key points

This section outlines the issues raised by respondents—and our response to those issues—in relation to the scope of our proposed class order relief for offers of CDIs.

It covers the financial markets, depository nominees and types of CDIs covered by our disclosure relief and the licensing exemption: see Section C.

Financial markets

- 12 In CP 220 (Proposal B2), we proposed to issue class order relief for offers of CDIs, where the underlying security is a share in a foreign company that is admitted to quotation on ASX (including under ASX's AQUA rules), NSXA or APX.
- 13 One respondent submitted that our proposed class order relief should also cover CDIs over foreign shares quoted on SIM VSE, on the basis that CDIs over foreign shares quoted on SIM VSE are subject to a sufficiently robust market framework equivalent to that of the other licensed financial markets.

Note: There are currently no CDIs issued over foreign shares quoted on SIM VSE.

ASIC's response

As a result of the feedback received, we have extended our relief in [CO 14/827] to CDIs over foreign shares quoted on SIM VSE.

This is because we are satisfied that the ASX Settlement Operating Rules, together with the listing rules and other market rules of SIM VSE, provide a sufficiently robust market framework for the trading and settlement of CDIs over foreign shares quoted on SIM VSE by:

- setting out the obligations and responsibilities of the depository nominee and the foreign company; and
- providing for the protection of the rights and entitlements of CDI holders.

The ASX Settlement Operating Rules apply to CDIs over foreign shares quoted on SIM VSE, where a foreign company has applied through SIM VSE to have their foreign shares, or CDIs over their foreign shares, approved under the ASX Settlement Operating Rules for CHESS settlement purposes: see ASX Settlement Operating Rule 1.2.3.

We have amended RG 253 to include additional guidance that we will consider granting individual relief to facilitate offers of CDIs

over foreign shares and options quoted on other Australian financial markets.

We may also consider expanding the scope of our relief in [CO 14/827] to other Australian financial markets in the future, should the need arise.

Depository nominees

- 14 In CP 220 (Proposal B2), we proposed to issue class order relief for offers of CDIs, where CDN has been appointed as the depository nominee. This is because, while the ASX Settlement Operating Rules permit the use of a depository nominee (other than CDN), CDN is currently the only depository nominee that has been appointed in relation to CDIs over foreign shares.

Note: Although CDN is a wholly-owned subsidiary of ASX, created to fulfil the functions of a depository nominee, foreign companies listed on financial markets other than ASX (e.g. NSXA, APX and SIM VSE) may appoint CDN to act as nominee for CDIs over their foreign shares.

- 15 We also proposed to issue guidance, as set out in the draft regulatory guide attached to CP 220 (draft regulatory guide), in relation to the circumstances in which we would consider granting individual relief to facilitate the use of a depository nominee other than CDN.
- 16 One respondent submitted that our proposed class order relief should cover any AFS licence holder with an appropriate authorisation on its AFS licence. This respondent asserted that confining our class order relief to cases where CDN is acting as the depository nominee may, for example, competitively disadvantage other custodians seeking to provide nominee services, because these custodians will have to apply to ASIC for individual relief.

ASIC's response

We have maintained our guidance in RG 253 that we will consider granting individual relief to facilitate the use of a depository nominee other than CDN.

This is because there are currently no depository nominees other than CDN. We consider it appropriate to assess relief for other depository nominees on an individual basis. RG 253 sets out the factors we will consider in deciding whether to grant individual relief, including:

- the terms, conditions and authorisations imposed on the depository nominees' AFS licence; and
- the extent to which the proposed depository nominee is governed by the ASX Settlement Operating Rules, or other market rules, that impose equivalent obligations and responsibilities on the depository nominee and provide

equivalent protections of the rights and entitlements of CDI holders.

We may consider expanding the scope of our relief in [CO 14/827] to other depository nominees in the future, should the need arise.

CDIs over options

- 17 In CP 220 (Proposal B2), we proposed to issue class order relief for offers of CDIs, where the underlying financial product is a share in a foreign company, including a share in a foreign company described as an ‘exchange traded fund’ (ETF).
- 18 We also proposed to issue guidance, as set out in the draft regulatory guide, in relation to the circumstances in which we would consider granting individual relief to facilitate offers of CDIs that do not fall within our class order relief.
- 19 One respondent recommended that we consider extending our proposed class order relief to offers of CDIs over options issued by foreign companies. The respondent suggested that a number of foreign companies have issued CDIs over options that are quoted on ASX, and that it would be beneficial for our class order relief to cover offers of CDIs over options so that there is certainty about how these offers are regulated under the Corporations Act.

ASIC’s response

As a result of the feedback received, and because CDIs over options are currently being used in the market, we have extended our relief in [CO 14/827] to offers of CDIs over options to acquire shares in a foreign company, where the underlying options are quoted on ASX, NSXA, APX or SIM VSE.

This is because the purpose of [CO 14/827] is to ensure that all equity fundraising by foreign companies (whether in the form of an offer of shares or options to acquire shares, or CDIs over those shares or options) is regulated in the same way—that is, as offers of securities under Ch 6D of the Corporations Act.

The relief in [CO 14/827] also reflects current market practice. That is, foreign companies are providing disclosure to investors under Ch 6D of the Corporations Act for offers of CDIs over their options.

CDIs over interests in foreign managed investment schemes

- 20 In CP 220 (Proposal B2), we proposed to issue guidance, as set out in the draft regulatory guide, in relation to the circumstances in which we would

consider granting individual relief to facilitate offers of CDIs over interests in foreign managed investment schemes.

- 21 In CP 220 (Proposal D1), we also proposed to revoke the relief for CDN in [CO 02/311] for the issue of CDIs over interests in foreign managed investment schemes, on the basis that CDIs over foreign managed investment scheme interests are not currently being used in the market and, as a result, class order relief is not necessary.
- 22 One respondent submitted that ASIC should maintain the existing relief in [CO 02/311] and extend the scope of proposed class order relief to offers of CDIs over interests in foreign managed investment schemes, so that potential issuers of foreign managed investment scheme interests do not face additional compliance burdens in having to seek individual relief.

ASIC's response

We have maintained our policy in RG 253 that we will consider granting individual relief to facilitate offers of CDIs over interests in foreign managed investment schemes.

This is because, there are currently no CDIs issued over interests in foreign managed investment schemes and any relief for offers of such CDIs would be novel. We consider that any disclosure or other relief should be considered by ASIC on an individual basis.

We may consider issuing class order relief for CDIs over interests in foreign managed schemes at some point in the future, should the need arise (and once we have considered a number of individual relief applications and have developed the appropriate legal and policy settings).

Further, [CO 02/311] (now revoked) only provided CDN with relief from the disclosure requirements in Pt 7.9 of the Corporations Act for offers of CDIs over interests in foreign managed investment schemes. Accordingly, issuers of foreign managed investment scheme interests are not disadvantaged by the revocation of the relief in [CO 02/311].

We have also provided individual disclosure relief to CDN, for the avoidance of doubt, in substantially the same form as the relief in [CO 02/311], so that CDN is not required to give disclosure under Pt 7.9 of the Corporations Act for offers of CDIs over interests in foreign managed investment schemes.

C The scope of our licensing relief

Key points

This section outlines the issues raised by respondents—and our response to those issues—in relation to the scope of our proposed class order relief for foreign companies from the requirement to hold an AFS licence in connection with dealings in CDIs over their shares.

It covers the types of foreign entities, depository nominees and types of 'dealing' covered by our licensing relief.

Types of entities

- 23 In CP 220 (Proposal B3), we proposed 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.
- 24 We proposed to limit our licensing relief to foreign companies that would otherwise be entitled to rely on the self-dealing exemption. As such, foreign investment companies were excluded from our proposed licensing relief.
- 25 In addition, we proposed to issue guidance, as set out in the draft regulatory guide, explaining our views as to why the depository nominee does not require any licensing relief (i.e. because 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).
- 26 One respondent recommended that, given the uncertainty about who 'issues' CDIs (i.e. the foreign company or the depository nominee), our proposed licensing relief should cover:
- (a) all foreign entity issuers, irrespective of whether the issuer is a foreign company, foreign investment company or foreign managed investment scheme, on the basis that excluded foreign entities may face additional compliance burdens where they are subject to similar licensing regulation in their home jurisdictions; and
 - (b) depository nominees for 'dealing' in CDIs beyond the provision of custodial and depository services (and that this relief should not be limited to CDN, but should cover all depository nominees).

ASIC's response

We have not extended the scope of our licensing relief in [CO 14/827] to cover the circumstances in paragraph 26, because we consider that this relief is not necessary or appropriate. We are of the view that in relation to:

- Foreign investment companies—our licensing relief is intended to replicate how the Corporations Act would otherwise apply to Australian companies. As Australian investment companies do not have the benefit of the self-dealing exception, we do not consider it appropriate to provide foreign investment companies that fall within s766C(5) of the Corporations Act with licensing relief.
- Foreign managed investment schemes—we do not consider it appropriate to provide licensing relief for these entities for the same reasons we have not extended our disclosure relief in [CO 14/827] to CDIs over interests in foreign managed investment schemes: see paragraphs 20-22.
- Depository nominees (CDN or otherwise)—we have considered the meaning of 'dealing' in s766C of the Corporations Act and are of the view that the depository nominee's role in relation to CDIs does not involve it directly acquiring, issuing, underwriting, varying or disposing of the CDIs or 'arranging' for other parties (e.g. the foreign company or CDI holders) to otherwise deal in CDI. To the extent the depository nominee is considered to be issuing CDIs, then it may rely on the self-dealing exception. However, given a depository nominee must be the holder of an AFS licence under the ASX Settlement Operating Rules (see Rule 4.3.1), we consider that a custodial and depository authorisation is sufficient to cover the nominee's role in relation to CDIs and that additional licensing relief is unnecessary (we have provided additional explanation in RG 253 clarifying this view).

Types of dealing

- 27 In CP 220 (Proposal B3), we proposed 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.
- 28 One respondent recommended that, because of the uncertainty about who 'issues' CDIs (i.e. the foreign company or the depository nominee), our proposed licensing relief should cover all 'dealing' in relation to CDIs, and not just 'arranging' for CDN or a CDI holder (or a proposed CDI holder) to deal in CDIs.

ASIC's response

We have not extended the scope of our licensing relief in [CO 14/827] to cover all 'dealing' in relation to CDIs by a foreign company, as we consider that this relief is not necessary.

We have considered the meaning of 'dealing' in s766C of the Corporations Act and are of the view that:

- a foreign company's role in relation to CDIs over its shares does not involve the company directly acquiring, underwriting, varying or disposing of the CDIs;
- to the extent the foreign company is considered to be issuing CDIs, then it may rely on the self-dealing exception; and
- in light of this, we consider that licensing relief for the foreign company is only necessary to the extent it is 'arranging' for other parties (being CDN or CDI holders) to deal in CDIs.

We have provided additional explanation in RG 253 clarifying our views.

Appendix: List of non-confidential respondents

- ASX Limited
 - Computershare
 - Corporations Committee of the Business Law Section of the Law Council of Australia
 - Herbert Smith Freehills
 - National Stock Exchange of Australia Limited
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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 financial market operated by ASX Limited
ASX Settlement Operating Rules	The operating rules of ASX Settlement
ASX Settlement	ASX Settlement Pty Limited (formerly known as ASX Settlement and Transfer Corporation Pty Limited)
APX	Asia Pacific Exchange Limited or the financial 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
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
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 financial market operated by National Stock Exchange of Australia Limited
offeror	<p>Any entity making an offer of securities under Ch 6D of the Corporations Act, including any entity issuing or transferring securities under Ch 6D</p> <p>Note: Offering securities includes inviting applications for the issue of securities and inviting offers to purchase the securities: s700(2).</p>
Pt 7.6 (for example)	A part of the Corporations Act (in this example numbered 7.6), unless otherwise specified
SIM VSE	SIM Venture Securities Exchange or the financial market operated by SIM Venture Securities Exchange Ltd
s741 (for example)	A section of the Corporations Act (in this example numbered 741), unless otherwise specified

Related information

Headnotes

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

Class orders and pro formas

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

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

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

[CO 14/827] *Disclosure relief for offers of CHESSE Depository Interests*

Regulatory guides

RG 253 *Fundraising: Facilitating offers of CHESSE Depository*

Legislation

Corporations Act, Chs 6D, Pts 7.6, 7.9, s700, 741, 761, 766B, 766C

Consultation papers and reports

CP 220 *Fundraising: Facilitating offers of CHESSE Depository Interests*

Other documents

ASX Settlement Operating Rules