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Overview

ASX welcomes the opportunity to provide a submission on Consultation Paper 220 *Fundraising: Facilitating offers of CHESS Depositary Interests*.

CHESS Depositary Interests (CDIs) have become an important feature of the Australian equity market. They provide an efficient and simple mechanism for investors to access securities in a range of international companies within the Australian regulatory environment.

ASX supports the proposed new class order relief and enhanced 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.

ASX agrees with ASIC's proposed approach to regulating offers of CDIs by 'looking through' the CDI to the underlying foreign share, on the basis that the issuer of a CDI is the issuer of the underlying share or financial product. We consider that this is the correct legal view and it is consistent with the approach that ASX has taken.

The only substantive matter ASX would like to highlight is that the relief in the proposed class order does not extend to foreign managed investment schemes, unlike the existing relief in CO 02/311 and CO 02/312. However, we understand that ASIC is willing to grant separate relief to maintain the existing treatment for these entities. We think that this is important so that potential issuers of foreign managed investment schemes do not face an additional hurdle of being required to seek individual relief.

The proposed class order and regulatory guidance will simplify the regulation of CDIs and make the process of offering CDIs over foreign shares more efficient for issuers. Providing investors with access to a broader range of financial securities through the mechanism of CDIs provides greater choice and exposure to different economic risks and returns. While CDIs have traditionally been issued over the securities of foreign companies, more recently this structure has been extended to Australian Government Bonds. The Simple Corporate Bonds Bill provides a framework for it to be further extended to facilitate the trading of corporate bonds in Australia. The proposed relief, and these other developments, facilitate the provision of a range of products to investors within a well regulated framework.

Our responses to specific questions raised in the consultation paper are set out in the attachment.

Attachment: Answers to some questions posed in CP220

ASIC Proposal	ASIC Questions	ASX Response
<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> <p>(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;</p> <p>(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;</p> <p>(c) an offer for the issue of CDIs over foreign shares is taken to be an offer for issue of the underlying shares; and</p> <p>(d) an offer for the sale of CDIs over foreign shares is taken to be an offer for sale of the underlying shares.</p> <p>Our proposed class order also provides relief so that Ch 6D operates effectively for offers of CDIs, including so that:</p> <p>(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;</p> <p>(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</p> <p>(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.</p> <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>Yes</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>Yes</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>Yes</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>Yes</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>	<p>Not from ASX's perspective</p>

ASIC Proposal	ASIC Questions	ASX Response
<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 depositary nominee.</p> <p>We will consider granting individual relief to facilitate:</p> <p>(a) the use of a depositary nominee other than CDN; and</p> <p>(b) offers of CDIs over interests in foreign managed investment schemes (see proposal D1).</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>ASX agrees that the proposed relief should cover CDIs over foreign shares quoted on ASX (including under ASX's AQUA rules). ASX makes no comment in respect of other market operators.</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>See comments below in relation to relief in respect of CDIs over interests in foreign managed investment schemes.</p>
<p>D1 We propose to revoke [CO 02/311], which provides relief to CDN from the disclosure requirements in:</p> <p>(a) Chapter 6D—for an offer for the issue of CDIs in respect of foreign securities; and</p> <p>(b) Part 7.9—for an offer for the issue of CDIs over interests in foreign managed investment schemes.</p> <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>Yes, subject to the comments below regarding the need for relief in respect of CDIs over interests in foreign managed investment schemes.</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>The only substantive matter is that the relief in the proposed class order does not extend to foreign managed investment schemes, unlike the existing relief in CO 02/311 and CO 02/312. However, we understand that ASIC is willing to grant separate relief to maintain the existing treatment, as discussed below. It is important to maintain the existing relief in this way, so that potential issuers of foreign managed investment schemes do not face an additional hurdle of being required to seek individual relief.</p>
	<p>D1Q3 Is our proposal to revoke [CO 02/311] likely to impact your business costs? If so, please provide details.</p>	<p>The revocation of CO 02/311 is not likely to impact on ASX's business costs.</p> <p>If individual relief is required to be obtained for foreign managed investment schemes there will be costs to issuers in applying for relief and this may also delay the proposed quotations. If separate relief is granted for these schemes this issue will not arise.</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>ASX is aware of a proposal to use CDIs over interests in foreign managed investment schemes. We believe that class order relief is required 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.</p> <p>Additionally, ASX considers that that the relief in relation to managed investment schemes should be updated to clarify that CDIs issued in relation to an AQUA Product which is an interest in a managed investment scheme that is unregistered (pursuant to an ASIC exemption) are captured under that relief. CDIs over interests in such unregistered schemes which</p>

ASIC Proposal	ASIC Questions	ASX Response
		<p>are quoted / traded (but not listed) on ASX were previously expressly captured under [CO 02/312] but appear to have been inadvertently omitted pursuant to variations to that Class Order made under [CO 09/27]. This introduced a new requirement under paragraph 4 of [CO 02/312] that for CDIs issued in relation to unregistered schemes (dealt with under the new 'foreign scheme product' definition) to be captured the foreign scheme needs to be 'included in the official list of the financial market operated by ASX' (i.e. <i>listed</i>). This is narrower than the previous reference in that paragraph to CDIs issued in relation to 'quoted foreign managed investments' (i.e. foreign schemes that were <i>quoted</i> on the financial market of ASX).</p> <p>ASX considers that notwithstanding the above, there is scope within existing [CO 02/312] to treat CDIs issued in relation to an AQUA Product which is an interest in an unregistered managed investment scheme (pursuant to an ASIC exemption) as an interest in such unregistered managed investment scheme. This would mean that it is captured under paragraph 1A (which provides for '<i>Interests</i> in a managed investment scheme that is not required to be registered...'). ASX also considers there is scope to treat CDIs issued in relation to an AQUA Product as an interest in a registered managed investment scheme which is captured under Corporations Regulation 7.11.03 (being relevantly a Division 4 security as a result of being 'an interest in a managed investment scheme that is registered under s601EB of the Act that is quoted in the financial market of [ASX]' pursuant to s1073A(1)(c) and Corporations Regulation 7.11.03).</p> <p>Further, ASX considers there is scope within existing [CO 02/312] to treat CDIs issued in relation to an AQUA Product that is an interest in a registered scheme or an unregistered scheme as a warrant which is captured under paragraph 1 (which provides for '<i>Warrants</i> that are .. able to be traded on the financial market operated by ASX...'). For the purpose of the 'Warrants' definition, the value of AQUA Products (and therefore the CDI) is derived from the AQUA Product's Underlying Instruments (and would generally fall within the ambit of a derivative) however the CDIs are excluded from being a derivative on the basis that they are a legal or equitable right or interest in an interest in a registered managed investment scheme under s764A(1)(b)(ii) or an interest in an unregistered managed investment scheme under s764A(1)(ba)(ii)</p>

ASIC Proposal	ASIC Questions	ASX Response
<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> <p>(a) Chapter 6D—for an offer for the issue of foreign depository interests (FDIs) over foreign securities; and</p> <p>(b) Part 7.9—for an offer for the issue of FDIs over interests in foreign managed investment schemes.</p> <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>Yes</p> <p>No</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> <p>(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</p> <p>(b) that the relief in [CO 02/312] applies to CDIs as intended.</p>	<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>	<p>ASX is unable to comment without having seen the drafting. ASX would be happy to provide comments once a draft of the proposed amendments is available</p> <p>ASX is unable to comment without having seen the drafting.</p>