



**ASIC**

Australian Securities & Investments Commission

## CONSULTATION PAPER 225

# Remaking ASIC class orders on offers of foreign securities

December 2014

### About this paper

This consultation paper sets out ASIC's proposals to remake class orders relating to Regulatory Guide 72 *Foreign securities prospectus relief* (RG 72). Under the *Legislative Instruments Act 2003* these class orders will expire ('sunset') if not remade.

We are seeking feedback on our proposals to remake into ASIC instruments the following class orders:

- [CO 00/178], [CO 00/180], [CO 00/183], [CO 00/214] (due to expire on 1 October 2016);
- [CO 00/179], [CO 02/144], [CO 02/150] and [CO 07/9] (due to expire on 1 April 2017);
- [CO 02/263] (due to expire on 1 April 2018); and
- [CO 09/68] (due to expire on 1 October 2019).

We are also seeking feedback on our proposals to allow [CO 00/181] and [CO 00/185] to expire on their sunset date of 1 October 2016.

We are proposing to make consequential amendments to RG 72 as a result of our updates to the associated class orders.

### 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 on 11 December 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 foreign securities. 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

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

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

Please refer to our privacy policy at [www.asic.gov.au/privacy](http://www.asic.gov.au/privacy) for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 9 February 2015 to:

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## What will happen next?

|                |                  |  |
|----------------|------------------|--|
| <b>Stage 1</b> | 11 December 2014 | ASIC consultation paper released                                   |
| <b>Stage 2</b> | 9 February 2015  | Comments due on the consultation paper                             |
| <b>Stage 3</b> | 2015             | Final class orders issued and amended<br>Regulatory guide released |

## A Background

### Key points

Legislative instruments, such as class orders, are repealed automatically, or 'sunset', after 10 years, unless action is taken to preserve them.

We are consulting on our proposal to remake class orders relating to Regulatory Guide 72 *Foreign disclosure prospectus relief* (RG 72). These class orders give relief in relation to offers and advertising of foreign securities. They are due to sunset over the next few years.

### Our relief for offers of foreign securities

#### Disclosure relief

- 1 Regulatory Guide 72 *Foreign securities prospectus relief* (RG 72) sets out our relief from the provisions of Ch 6D and Pt 7.9 of the *Corporations Act 2001* (Corporations Act) for offers of foreign securities in Australia. The relief extends to:
  - (a) rights issues—Class Order [CO 00/183] *Foreign rights issue*;
  - (b) foreign scrip takeovers—Class Order [CO 09/68] *Prospectus and PDS relief for foreign scrip takeovers*;
  - (c) foreign schemes of arrangement—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*; and
  - (d) personal offers (20 or fewer offers in Australia in 12 months)—Class Order [CO 00/214] *Foreign securities: listed foreign companies making 20 or fewer offers in Australia in 12 months* and Class Order [CO 02/263] *Foreign interests in a managed investment scheme traded on an approved foreign exchange: 20 or fewer offers in Australia in 12 months*.
- 2 This disclosure relief enables Australian investors to participate in offers of foreign securities that may not otherwise be extended to them due to the expense of complying with Australian law.

#### Advertising relief

- 3 We have also given relief from the advertising restrictions in s734(2) and 1018A for advertisements and notices that relate to foreign securities:
  - (a) Class Orders [CO 00/178], [CO 00/179], [CO 00/180] *Foreign securities: publishing of reports and notices*;

- (b) Class Order [CO 02/144] *Financial products issued by a foreign issuer: incidental circulation of published material*; and
- (c) Class Order [CO 02/150] *Foreign financial products: publishing of reports and notices*.

Our relief applies to advertisements and notices that are primarily circulated outside Australia.

## Expiry of class orders (sunsetting)

- 4 Under the *Legislative Instruments Act 2003* (Legislative Instruments Act), legislative instruments cease automatically, or ‘sunset’, after 10 years, unless action is taken to exempt or preserve them. Section 50(1) repeals a legislative instrument on either 1 April or 1 October—whichever date occurs first on or after the 10th anniversary of its registration on the Federal Register of Legislative Instruments (FRLI). Repeal does not undo the past effect of the instrument.
- 5 To preserve its effect, a legislative instrument must be remade before the sunset date. The purpose of sunsetting is to ensure that instruments are kept up to date and only remain in force while they are fit for purpose, necessary and relevant.

## Our approach to remaking legislative instruments

- 6 If it is necessary to remake a legislative instrument, our focus is on making it clear and user friendly. We will also, where possible, simplify and rationalise its content and conditions. For example, we will remove or reduce an obligation or burden in a class order if we are able to do so without undermining ASIC’s priorities of ensuring investors and financial consumers are confident and informed and markets are fair and efficient.
- 7 We will consult affected stakeholders on all ASIC legislative instruments that have more than a minor regulatory impact, and are subject to sunsetting, to ensure:
- (a) we carefully consider the continuing regulatory and financial impact of the instrument; and
  - (b) the instrument retains its effectiveness in addressing an identified issue or problem.
- 8 Generally, a regulation impact statement (RIS) is required for new and amended policy that has a significant regulatory impact: see the [Australian Government Guide to Regulation](#). We will review all class orders that have a significant regulatory impact before the scheduled sunset date. Where our review finds that a class order is not operating effectively and efficiently, we

will prepare a RIS to assess our proposed changes to the class order. Where the class order is operating effectively, we will remake the class order without substantive changes (other than changes intended to reduce regulatory burden and improve efficiency).

## Remaking RG 72 class orders

- 9 Most of the RG 72 class orders are due to sunset over the next few years (from 1 October 2016 to 1 October 2019). We have reviewed the operation and terms of the RG 72 class orders and propose to remake the instruments listed in Table 1. Most of our proposed amendments are aimed at clarifying, updating or simplifying requirements. We have also changed some of the requirements in the older class orders so that they are consistent with the requirements in [CO 07/9] and [CO 09/68]. These more recent class orders were developed based on feedback to Consultation Paper 67 *Disclosure in reconstructions* (CP 67) and Consultation Paper 79 *Disclosure relief for foreign scrip takeovers* (CP 79).
- 10 The draft instruments are available on the ASIC website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 225.

**Table 1: Update of RG 72 class orders**

| Class order   | Proposed update  | Outline of proposed amendments  |
|---|--|---|
| [CO 00/183]<br>Relief for pro-rata offers if securities quoted on approved foreign market | Reissue as ASIC Corporations (Foreign Securities—Rights Issues) Instrument 2015.<br>See Section B    | <ul style="list-style-type: none"> <li>Expand exemption to all of Pts 6D.2 and 6D.3 rather than specific provisions</li> <li>Update list of approved foreign markets</li> <li>Reduce quotation requirement from 36 months to 3 months</li> <li>Update definition of ‘Australian offeree’ to be consistent with [CO 09/68]</li> <li>Remove requirement to lodge documents with ASIC</li> <li>Amend disclosure requirement so that Australian offerees are given a version of the offer document given to offerees in the primary foreign jurisdiction if no English version available</li> <li>Add the relief from the on-sale restrictions that is currently in Class Order [CO 04/671] <i>Disclosure for on-sale of securities and other financial products</i></li> </ul> |
| [CO 09/68]<br>Relief for foreign scrip bids   | Reissue as ASIC Corporations (Disclosure Relief—Foreign Scrip Bids) Instrument 2015<br>See Section B | <ul style="list-style-type: none"> <li>Update list of approved foreign markets</li> <li>Clarify disclosure requirement so that Australian offerees are given a version of the offer document given to offerees in the eligible foreign country if no English version available</li> <li>Add the relief from the on-sale restrictions that is currently in [CO 04/671]</li> </ul>  |



| Class order   | Proposed update  | Outline of proposed amendments  |
|---|--|---|
| [CO 07/9]<br><br>Prospectus and Product Disclosure Statement (PDS) relief for schemes of arrangement regulated in Hong Kong, Malaysia, New Zealand, Singapore, South Africa and the United Kingdom.<br><br>Also PDS relief for Pt 5.1 schemes (analogous to the exemption in s708(17)). | Reissue as ASIC Corporations (Disclosure Relief—Compromises or Arrangements) Instrument 2015<br><br>See Section B  | Add the relief from the on-sale restrictions that is currently in [CO 04/671]   |
| [CO 00/214] and [CO 02/263]<br><br>Relief for small scale personal offers (analogous to the exemption in s708(1) and 1012E))  | Reissue as ASIC Corporations (Foreign Securities—Small Scale Personal Offers) Instrument 2015<br><br>See Section B | <ul style="list-style-type: none"> <li>• Combine into single class order giving relief from disclosure requirement in Ch 6D and Pt 7.9</li> <li>• Redraft consistent with s708 and 1012E</li> <li>• Update list of approved foreign markets</li> <li>• Clarify the disclosure requirement so that Australian offerees are given a version of the offer document given to offerees in the primary foreign jurisdiction</li> </ul>  |
| [CO 00/178], [CO 00/179], [CO 02/144], [CO 02/150]<br><br>Relief from s734(2) and 1018A for advertisements in relation to foreign securities that are incidentally published in Australia   | Reissue as ASIC Corporations (Foreign Securities—Incidental Advertising) Instrument 2015<br><br>See Section B      | <ul style="list-style-type: none"> <li>• Combine into one class order giving relief from s734(2) and 1018A for authors and publishers</li> <li>• Extend relief to electronic distribution</li> <li>• Remove restriction on where publication can be produced (may be produced in Australia so long as publication here merely incidental)</li> <li>• Remove requirement to comply with foreign law</li> <li>• Remove requirement to provide a prospectus before offering or issuing securities in this jurisdiction (this requirement already exists under Corporations Act)</li> </ul> |
| [CO 00/180]<br><br>Relief from s734(2) for notices and reports given to approved foreign market   | Reissue as ASIC Corporations (Foreign Securities—Publishing Notices) Instrument 2015<br><br>See Section B          | <ul style="list-style-type: none"> <li>• Update list of approved foreign markets</li> <li>• Change exemption to modification because this better reflects s734(7)</li> </ul>  |

Note: The new instruments will be assigned an identifying number once they are issued and registered on FRLI.

- 11 This consultation paper asks for your feedback on these proposed changes to the RG 72 class orders: see Section B. We are also proposing to update RG 72, and seek your feedback on these amendments: see Section C and the draft updated RG 72, which is available on the ASIC website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 225.
- 12 We are also seeking your feedback on the proposed sunseting of [CO 00/181] and [CO 00/185]: see Section D.

## B Remaking class orders

### Key points

We are proposing to remake the following class orders, which provide disclosure and advertising relief for offers of foreign securities:

- [CO 00/183] (see proposal B1);
- [CO 09/68] (see proposal B2);
- [CO 07/9] (see proposal B3);
- [CO 00/214] and [CO 02/263] (see proposal B4);
- [CO 00/178], [CO 00/179], [CO 02/144], [CO 02/150] (see proposal B5); and
- [CO 00/180] (see proposal B6).

We have formed the preliminary view that these class orders are operating effectively, and continue to form a useful part of the legislative framework.

We plan to preserve the current substantive effect of the class orders. We have redrafted the instruments using ASIC's current style and format and have made minor amendments designed to remove unnecessary burdens. The draft ASIC instruments, which reflect the amendments proposed in this paper, are available on our website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 225.

## Rights issues for foreign securities—[CO 00/183]

### Proposal

**B1** To preserve its effect beyond the sunset date of 1 October 2016, we propose to remake [CO 00/183] without significant changes: see the draft ASIC Corporations (Foreign Securities—Rights Issues) Instrument 2015 in Attachment 1 to this consultation paper. You can access the current instrument on [www.comlaw.gov.au](http://www.comlaw.gov.au) by clicking on the following direct link: [\[CO 00/183\]](#).

The main changes proposed are to:

- (a) extend relief to all the provisions of Pts 2 and 3 of Ch 6D;
- (b) extend relief to shortfall offers made after the initial pro-rata offers;
- (c) reduce the quotation requirement from 36 months to three months;
- (d) amend the calculation of the 10% limit on securities offered in Australia, consistent with [CO 09/68];
- (e) remove the requirement to lodge documents with ASIC;
- (f) remove the requirement for foreign offer documents to be translated into English;

- (g) amend the disclosure requirement so that Australian offerees are given a version of the offer document given to offerees in the primary foreign jurisdiction if no English version is available;
- (h) require the foreign company to take reasonable steps to comply with foreign regulatory requirements (rather than an absolute requirement to comply), consistent with [CO 09/68];
- (i) add the relief from the on-sale restrictions that is currently in [CO 04/671]; and
- (j) update the list of approved foreign markets with the current names of those markets.

The draft updated RG 72 sets out our proposed guidance on our updated relief for foreign rights issues: see Attachment 7 to this consultation paper.

#### *Your feedback*

B1Q1 Do you agree that our relief should extend to shortfall offers? Are shortfall offers a common feature of foreign rights issues?

B1Q2 Do you have any comment on our proposal to amend the calculation of the 10% limit on securities offered?

B1Q3 Do you agree we should remove the requirement for Australian offerees to be given an offer document in English?

## **Rationale**

- 13 [CO 00/183] gives disclosure relief for an offer of foreign securities to Australian shareholders under a pro-rata offer such as a rights issue. We have proposed to extend the class order so that it gives relief from all the provisions of Pts 6D.2 and 6D.3, consistent with [CO 07/9] and [CO 09/68]. Once substantive disclosure relief is given, the other provisions of Ch 6D have limited operation.

### **Shortfall offers**

- 14 Consistent with our relief for rights issues in Class Order [CO 08/35] *Disclosure relief for rights issues*, we plan to extend our relief for foreign rights issues to cover shortfall offers. These are offers of the securities that were not taken up under the rights issue and which are made to shareholders no later than two months after the rights issue.

### **Quotation condition**

- 15 [CO 00/183] requires that the securities offered are in a class that is quoted on an approved foreign market throughout the 36-month period preceding the offer. We have proposed to adopt a quotation requirement that is consistent with the disclosure exemptions for quoted securities in s708AA

and 708A(5). The draft ASIC Corporations (Foreign Securities—Rights Issues) Instrument 2015 therefore requires that:

- (a) the securities to which the offer relates are in a class of securities that were quoted on an approved foreign market at all times in the three months before the day the offer is made; and
- (b) trading was not suspended for more than a total of five days during the shorter of:
  - (i) the period during which the class of securities is quoted; and
  - (ii) the period of 12 months before the day on which the offer is made.

### **Prescribed threshold for Australian holdings**

16 Our disclosure relief for foreign rights issues only applies where a relatively small proportion of the offers will be made to Australian investors. We accept that in this situation, the cost of complying with Australian law may be excessive: see current RG 72.11. [CO 00/183] requires that the aggregate offer price of shares offered to Australian shareholders is not more than 10% of the aggregate price of all shares offered to offerees.

17 We plan to amend this requirement so that the number of securities offered in Australia is no more than 10% of the number of securities offered to all offerees. The new test recognises that Australian offerees may hold securities in foreign companies through nominees: see the proposed definition of ‘Australian offeree’ in the draft ASIC Corporations (Foreign Securities—Rights Issues) Instrument 2015. Both these changes are consistent with [CO 09/68]: see CP 79 at paragraphs 15–16.

### **Disclosure and lodgement requirements**

18 [CO 00/183] requires that Australian offerees are given the same access as other offerees to written information (or, where applicable, an English translation of such information) about the offer. We plan to remove the requirement for an English translation, which is consistent with our current relief for foreign bids in [CO 09/68]. The foreign company will be required to give Australian offerees disclosure that is:

- (a) the same disclosure that is used in the primary foreign jurisdiction; and
- (b) in English, if an English version is available.

19 ‘Primary foreign jurisdiction’ is defined as the place of the approved foreign market on which securities in the offer class are quoted or, if the securities are quoted on more than one approved foreign market, the place of the approved foreign market in which the largest numbers of offers will be received under the pro-rata offer.

- 20 [CO 00/183] requires the foreign company to lodge with ASIC a copy of the offer document for the rights issue and a statement with the number and percentage of persons to whom offers are being made in this jurisdiction. We plan to remove this requirement because lodgement of these documents serves no important regulatory purpose and may impose an unnecessary cost on companies. Removing the lodgement requirement is also consistent with [CO 07/9] and [CO 09/68].

### Compliance with foreign regulatory requirements

- 21 [CO 00/183] requires the offer to comply with all legislative requirements in the place of the location of the approved foreign market and the operating rules of that market. Consistent with [CO 09/68], in the draft ASIC Corporations (Foreign Securities—Rights Issues) Instrument 2015 we have proposed to require the foreign company to take all reasonable steps to ensure the offer is made in accordance with foreign regulatory requirements. This ‘reasonable steps’ wording was adopted in [CO 09/68] so that minor or technical breaches of foreign law that occur despite reasonable steps being taken would not prevent a foreign company’s reliance on the class order: see CP 79.

## Foreign scrip bids—[CO 09/68]

### Proposal

- B2** To preserve its effect beyond the sunset date of 1 October 2019, we propose to remake [CO 09/68] in its current form without any significant changes: see the draft ASIC Corporations (Foreign Securities—Foreign Scrip Bids) Instrument 2015 in Attachment 2 to this consultation paper. You can access the current instrument on [www.comlaw.gov.au](http://www.comlaw.gov.au) by clicking on the following direct link: [\[CO 09/68\]](#).

The only changes proposed are to:

- (a) clarify the disclosure requirement so that Australian offerees are given a version of the offer document given to offerees in the eligible foreign country (which is the jurisdiction in which the takeover is regulated);
- (b) add the relief from the on-sale restrictions that is currently in [CO 04/671]; and
- (c) update the list of approved foreign markets with the current names of those markets.

The draft updated RG 72 sets out our proposed guidance on foreign scrip bids: see Attachment 7 to this consultation paper.

### *Your feedback*

- B2Q1 Do you have any comment on our relief for foreign scrip takeover bids?

## Rationale

- 22 The terms of [CO 09/68] were consulted on in some detail in CP 79 and we do not consider any significant amendment is required.

## Disclosure relief for compromises or arrangements—[CO 07/9]

### Proposal

- B3 To preserve its effect beyond the sunset date of 1 April 2017, we propose to remake [CO 07/9] in its current form without any changes, other than adding the on-sale relief that is currently in [CO 04/671]: see the draft ASIC Corporations (Disclosure Relief—Compromises or Arrangements) Instrument 2015 in Attachment 3 to this consultation paper. You can access the current instruments on [www.comlaw.gov.au](http://www.comlaw.gov.au) by clicking on the following direct link: [\[CO 07/9\]](#).

The draft updated RG 72 sets out our proposed guidance on foreign schemes of arrangements: see Attachment 7 to this consultation paper.

#### *Your feedback*

- B3Q1 Do you have any comment on our disclosure relief for schemes of arrangement?

## Rationale

- 23 Our disclosure relief for foreign schemes of arrangement in [CO 07/9] is based on the prospectus exemption for Australian schemes of arrangement in s708(17). We consulted on this relief in CP 67. We consider that the relief is working effectively and have not proposed to make any changes.

## Small scale personal offers of foreign securities—[CO 00/214] and [CO 02/263]

### Proposal

- B4 To preserve their effect beyond the respective sunset dates of 1 October 2016 and 1 April 2018, we propose to remake [CO 00/214] and [CO 02/263] without significant changes: see the draft ASIC Corporations (Foreign Securities—Small Scale Personal Offers) Instrument 2015 in Attachment 4 to this consultation paper. You can access the current instruments on [www.comlaw.gov.au](http://www.comlaw.gov.au) by clicking on the following direct links: [\[CO 00/214\]](#) and [\[CO 02/263\]](#).

The main changes proposed are to:

- (a) combine [CO 00/214] and [CO 02/263] into one instrument, modifying Ch 6D and Pt 7.9 to create a small scale personal foreign offer exemption in notional s708(7A) and 1012EA;

- (b) ensure the small scale personal foreign offer exemption in notional s708(7A) and 1012EA both operate in addition to the small scale personal offer exemption in s708(1) and s1012E;
- (c) clarify the meaning of 'personal offer' so that it is more consistent with s708(2) and 1012E(5);
- (d) redraft the 20-investor test consistent with s708(3)(a), 708(5), 1012E(6) and 1012E(8);
- (e) require the foreign company to take all reasonable steps to ensure the offer document complies with foreign law (rather than an absolute requirement to comply with foreign law);
- (f) clarify the disclosure requirement so that Australian offerees are given any document that would have been required to be given to them under the laws of the primary foreign jurisdiction if they received the offer in that jurisdiction; and
- (g) update the list of approved foreign markets with the current names of those markets.

The draft updated RG 72 sets out our proposed guidance on small scale personal offers of foreign securities: see Attachment 7 to this consultation paper.

#### *Your feedback*

- B4Q1 Do you agree that our relief for foreign small scale personal offers should operate in addition to the legislative exemptions for small scale personal offers in s708(1) and 1012E?
- B4Q2 Do you agree we should retain the requirement for a certified English translation? Do you have any feedback on the cost and time involved in obtaining such an English translation?

## **Rationale**

- 24 We plan to update our relief for small scale personal offers of foreign securities so that it is more consistent with the legislative exemptions for small scale personal offers in s708(1)–(7) and 1012E. Our proposed relief will operate in addition to the legislative exemptions for small scale personal offers (i.e. offers made in reliance on our proposed relief will not count toward the 20-investor limit in s708(1) or 1012E). This addresses an inconsistency where offers made in reliance on [CO 00/214] count toward the 20-investor limit in s708(5), but offers made in reliance on [CO 02/263] do not count toward the 20-investor limit in s1012E.
- 25 Currently, [CO 00/214] and [CO 02/263] require that any offer documentation complies with the law applicable in the jurisdiction of the approved foreign market or the operating rules of that market. We plan to substitute this with a requirement that the foreign company take all reasonable steps to ensure the offer document complies with foreign

regulatory requirements. This is consistent with the approach in [CO 09/68]: see paragraph 21.

- 26 We have proposed to retain the current requirement for a certified English translation if the offer document is not in English, because investors who receive an offer under our relief for small scale offers may not have any pre-existing investment with the issuer, and it cannot be presumed that they are confident making an investment decision when the disclosure is in a foreign language. This is in contrast with our other relief for offers of foreign securities, which can only be made to existing members.

## Incidental advertising of foreign securities—[CO 00/178], [CO 00/179], [CO 02/144] and [CO 02/150]

### Proposal

- B5** To preserve their effect beyond the sunset date, we propose to remake [CO 00/178], [CO 00/179], [CO 02/144] and [CO 02/150] without significant changes: see the draft ASIC Corporations (Foreign Securities—Incidental Advertising) Instrument 2015 in Attachment 5 to this consultation paper. You can access the current instruments on [www.comlaw.gov.au](http://www.comlaw.gov.au) by clicking on the following direct links: [\[CO 00/178\]](#), [\[CO 00/179\]](#), [\[CO 02/144\]](#), and [\[CO 02/150\]](#).

The main changes proposed are to:

- (a) combine class orders [CO 00/178], [CO 00/179], [CO 02/144], [CO 02/150] into one instrument giving relief from s734(2) and 1018A and covering both authors and publishers of statements;
- (b) extend relief to electronic distribution;
- (c) remove any restriction on where the publication is produced;
- (d) remove reference to complying with foreign legislative requirements;
- (e) remove the requirement in [CO 00/178], [CO 00/179], [CO 02/144], [CO 02/150] to provide a prospectus or PDS before offering securities in this jurisdiction; and
- (f) simplify drafting.

The draft updated RG 72 sets out our proposed guidance on our relief for advertising of foreign offers: see Attachment 7 to this consultation paper.

#### *Your feedback*

- B5Q1 Do you have any comment on our relief for incidental advertising?



## Rationale

27 Sections 734 and 1018A of the Corporations Act restrict the advertising of offers of securities in Australia. [CO 00/178], [CO 00/179], [CO 02/144] and [CO 02/150] give relief from these restrictions to authors and publishers for advertisements that are primarily published outside Australia.

Note: [CO 00/178] gives relief from s734(2) for authors, [CO 00/179] gives relief from s734(2) for publishers, [CO 02/150] gives relief from s1018A for authors and [CO 02/144] gives relief from s1018A for publishers.

28 For ease of reference, we plan to combine these class orders into one instrument that will give relief from both s734 and 1018A for authors and publishers.

29 Currently, the class orders only apply to advertisements that are published in newspapers and periodicals. We propose to extend our relief so that it applies to advertisements that are published in or by way of:

- (a) newspapers and magazines;
- (b) radio and television broadcasting services; and
- (c) electronic services (including services through the internet) that are operated on a commercial basis and are similar to newspapers, magazines, radio or television.

This recognises that, in the current environment, advertisements and statements in relation to foreign securities and other financial products may be undertaken by various forms of electronic distribution. It also ensures consistency with s1018A.

30 The class orders currently only give relief if the newspaper or periodical is produced outside this jurisdiction. We have proposed removing this restriction because the location of production is less relevant with the emergence of electronic media. However, the relief will still only apply to advertisements that are incidentally published in Australia

31 We have proposed to remove the requirement that a prospectus or PDS be provided before securities are offered in this jurisdiction because this requirement already exists under Ch 6D and Pt 7.9 of the Corporations Act. We plan to amend RG 72 with guidance that our relief only exempts incidental advertising in Australia and not offers securities: see draft RG 72.33.

32 We plan to remove the condition relating to compliance with foreign regulatory requirements because the relief is not restricted to entities listed in any particular jurisdiction and it only relates to incidental conduct in this jurisdiction. We have amended draft RG 72 to point out that compliance with foreign law is still required: see the note to draft RG 72.32.

## Publishing notices for foreign securities—[CO 00/180]

### Proposal

**B6** To preserve its effect beyond the sunset date of 1 October 2016, we propose to remake [CO 00/180] without any significant changes: see the draft ASIC Corporations (Foreign Securities—Publishing Notices) Instrument 2015 in Attachment 6 to this consultation paper. You can access the current instrument on [www.comlaw.gov.au](http://www.comlaw.gov.au) by clicking on the following direct link: [\[CO 00/180\]](#).

The only changes proposed are to:

- (a) update the list of approved foreign markets with the current names of those markets;
- (b) change the exemption to a modification; and
- (c) modernise the language and drafting style.

The draft updated RG 72 sets out our proposed guidance on our relief for advertising: see Attachment 7 to this consultation paper.

#### *Your feedback*

B6Q1 Do you have any comment on our relief for publishing notices?

### Rationale

33 [CO 00/180] gives relief for notices given by bodies listed on an approved foreign market. An advertisement or publication will not contravene s734(2) if it:

- (a) relates to an offer of securities of a body that is listed on an approved foreign market and consists of a notice or report by the foreign company, or one of its officers, about its affairs to market operator; or
- (b) consists solely of a notice or report of a general meeting of a body that is listed on an approved foreign market.

Note: This relief is similar to the exception in s734(7) for entities listed on an Australian market.

34 We do not consider [CO 00/180] requires any significant amendment. We have proposed to continue the relief by way of a modification to s734 in the draft ASIC Corporations (Foreign Securities—Publishing Notices) Instrument 2015 and update the list of approved foreign markets.

## C Updating guidance

### Key points

We are proposing to update RG 72 to reflect changes to the class orders: see proposal C1.

### Disclosure relief for foreign securities—RG 72

#### Proposal

- c1 There are no substantive changes to our policy on relief for offers of foreign securities or advertising relief for foreign securities, but we are proposing to update RG 72 to reflect changes made to the instruments: see the draft updated RG 72, with our changes marked up, in Attachment 7 to this consultation paper. We have also provided some additional guidance on a few specific issues.

#### *Feedback*

- C1Q1 Is our guidance on our relief for offers of foreign securities useful?
- C1Q2 Is our guidance on our relief for the advertising and publicity of foreign securities useful?
- C1Q3 Is there any additional guidance we should provide in RG 72?

#### Rationale

- 35 RG 72 outlines the relief we have given from Ch 6D and Pt 7.9 of the Corporations Act for offers of foreign securities and advertising of financial securities. We do not plan to make any substantive change to our policy in RG 72, but we have proposed to update the guide when we remake the related class orders so that it refers to the correct instrument numbers and sets out the amended requirements.

## D Sunsetting class orders

### Key points

We are proposing to allow the following class orders to sunset:

- [CO 00/181] (see proposal D1); and
- [CO 00/185] (see proposal D2).

### [CO 00/181] *Foreign securities: publishing of notices and reports*

#### Proposal

- D1 We propose to allow [CO 00/181] to expire on its sunset date of 1 October 2016 because we have formed the view that foreign companies will not commonly (if ever) require the relief it provides. You can access the instrument on [www.comlaw.gov.au](http://www.comlaw.gov.au) by clicking on the following direct link: [\[CO 00/181\]](#).

#### Your feedback

- D1Q1 Do you have any comment on our proposal to allow [CO 00/181] to expire?

#### Rationale

- 36 [CO 00/181] exempts foreign companies that are listed (or reasonably expect to be listed) on an approved foreign market from:
- (a) s727—to the extent that this section requires a prospectus to comprise one document (first exemption); and
  - (b) s711(6)—the requirement for a prospectus to specify a 13-month expiry date (second exemption).
- 37 We consider that the first exemption is unnecessary because s712 permits incorporation by reference and an issuer should be able to rely on s712 if their prospectus would otherwise comprise more than one document.
- 38 In relation to the second exemption, we consider that a foreign prospectus can comply with s711(6) by stating that no securities will be issued to Australian offerees after the 13-month expiry date specified in the document.

## [CO 00/185] *Foreign securities*

### Proposal

D2 We propose to allow [CO 00/185] to expire on its sunset date of 1 October 2016 because we have formed the view that foreign companies will not commonly (if ever) require the relief it provides. You can access the instrument on [www.comlaw.gov.au](http://www.comlaw.gov.au) by clicking on the following direct link: [\[CO 00/185\]](#).

#### *Your feedback*

D2Q1 Do you have any feedback on our proposal to allow [CO 00/185] to expire?

### Rationale

- 39 [CO 00/185] gives limited ‘procedural’ relief from Ch 6D for foreign bids and schemes. ASIC consulted on revoking [CO 00/185] when introducing substantive relief for bids and schemes, but did not do so because it covers a broader range of control transactions than [CO 07/9] or [CO 09/68]. For example, [CO 00/185] extends to bids where Australians hold more than 10% of the bid class securities.
- 40 A bidder relying on [CO 00/185] would still need to lodge a prospectus and comply with most of Ch 6D. We analysed the relief given by [CO 00/185] and have formed the preliminary view that it is of limited utility. We consider that it is more appropriate for a foreign company to apply for individual relief where a control transaction does not come within our relief for foreign scrip bids or schemes of arrangement and explain which provisions of Ch 6D are problematic in the context of their specific transaction. Generally we would expect a transaction to comply with Australian law if more than 10% of the offerees were located in this jurisdiction.

## E Regulatory and financial impact

- 41 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 they will strike an appropriate balance between:
- (a) facilitating certain offers of foreign securities to Australian investors; and
  - (b) ensuring investors are confident and informed.
- 42 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).
- 43 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.
- 44 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  |
|------------------------------|---|
| approved foreign market      | A financial market that has been approved by ASIC for the purposes of the relief set out in RG 72 (as listed in the individual instruments)   |
| ASIC                         | Australian Securities and Investments Commission  |
| bid class securities         | The class or classes of securities the subject of a foreign scrip takeover  |
| Ch 6D (for example)          | A chapter of the Corporations Act (in this example numbered 6D), unless otherwise specified   |
| [CO 00/178] (for example)    | A class order issued by ASIC (in this example numbered 00/178)  |
| Corporations Act             | <i>Corporations Act 2001</i> , including any regulations made for the purposes of the Act   |
| CP 79 (for example)          | An ASIC consultation paper (in this example numbered 79)  |
| foreign company              | As defined in s9 of the Corporations Act  |
| foreign scrip takeover bid   | A foreign regulated takeover bid where scrip forms all or part of the consideration offered for bid class securities  |
| Legislative Instruments Act  | <i>Legislative Instruments Act 2003</i>   |
| PDS                          | Product Disclosure Statement  |
| Product Disclosure Statement | A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act<br><br>Note: See s761A for the exact definition. |
| Pt 7.9 (for example)         | A part of the Corporations Act (in this example numbered 7.9), unless otherwise specified   |
| RG 72 (for example)          | An ASIC regulatory guide (in this example numbered 72)  |
| rights issue                 | An offering of securities by a company to all its shareholders in proportion to their existing holdings   |
| RIS                          | Regulation Impact Statement   |
| s708 (for example)           | A section of the Corporations Act (in this example numbered 708), unless otherwise specified  |
| sunsetting                   | The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect   |