



ASIC

Australian Securities & Investments Commission

INFORMATION SHEET 93

Practical guidance for operators of foreign collective investment schemes

This information sheet is for operators of foreign collective investment schemes (FCIS).

It explains what you, as an FCIS operator, must do if you wish to rely on class order relief or apply for individual relief under Regulatory Guide 178 *Foreign collective investment schemes* (RG 178), including:

- how to apply for registration as a foreign company;
- the documents you must lodge if you are relying on class order relief;
- notifications required under relief;
- how to apply for individual relief; and
- how to lodge forms and documents.

The relevant class orders are listed in Table 1.

Table 1: Class orders for FCIS

Where the FCIS is regulated (home jurisdiction)	Relevant class order
United States, New Zealand, Jersey	Class Order [CO 04/526] <i>Foreign collective investment schemes</i>
Singapore	Class Order [CO 07/753] <i>Singaporean collective investment schemes</i>
Hong Kong	Class Order [CO 08/506] <i>Hong Kong collective investment schemes</i>

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

How to apply for registration as a foreign company

As a standard regulatory condition of relief under the relevant class orders, an FCIS operator must register as a foreign company in Australia. Registration under Div 2 of Pt 5B.2 of the *Corporations Act 2001* (Corporations Act) may be required by the relevant class order or by the Corporations Act itself.

If the relevant FCIS is structured as a company, then the company must register as a foreign company.

Registering as a foreign company

To register as a foreign company, you must complete Form 402 *Application for registration as a foreign company*.

This form asks for general details about the corporation and must be completed in full. The guide to the form (which is included with the form) has more details on how to appropriately complete and lodge the form.

The guide also sets out what documents must accompany the form. These documents include:

- a current certificate of registration, or a document of similar effect, that confirms that the company is currently registered in your home jurisdiction;
- a certified copy of the company's constitution;
- a memorandum of appointment of a local agent, or a power of attorney in favour of a local agent (see 'How to appoint a local agent' below);
- notice of any charges on the company property in Australia or an external territory of Australia; and
- a memorandum stating the powers of certain directors.

If any of the documents accompanying Form 402 are not in English, you must include a certified translation of that document into English.

There are prescribed fees for registering as a foreign company: Information Sheet 30 *ASIC fees for commonly lodged documents* (INFO 30) at www.asic.gov.au.

For information about how to lodge Form 402, see 'How to lodge documents' below.

If the application form and accompanying documents are in complete order, the application process usually takes approximately 1–2 weeks. After your application is processed, we will issue you with a 9-digit identifying number, known as an Australian Registered Body Number (ARBN), and a certificate of registration.

Appointing a local agent

As a registered foreign company, you must appoint a local agent under s601CF of the Corporations Act. A local agent must be a natural person or a company that is resident in Australia. A local agent of a registered foreign company is:

- answerable for doing all acts, matters and things that the foreign company is required to do by or under the Corporations Act; and
- personally liable for any penalties imposed on the foreign company for a contravention of the Corporations Act if a court or tribunal hearing the matter is satisfied that the local agent should be so liable.

There are two ways of appointing a local agent:

- by a memorandum of appointment (see Form 418 Memorandum of appointment of local agent); or
- by a power of attorney duly executed by or on behalf of the foreign company.

You will need to lodge the memorandum of appointment or power of attorney with a completed Form 404 *Notification of change to agent of a foreign company* and the prescribed fees with ASIC. For information about how to lodge Form 404, see 'How to lodge documents' below.

If at any time the local agent you have appointed ceases to act for you, you must appoint a new local agent. A foreign company may have more than one local agent at the same time.

So if the old agent ceases acting for you and/or you appoint a new one, you must notify us of these changes on a Form 404.

Documents you must lodge under class order relief

After registering as a foreign company, to rely on any of the relevant class orders, you need to provide certain information, including:

- a letter;
- supporting documents; and
- a deed of covenant.

There is no fee applicable if you are relying on class order relief.

All information and documents provided must be in English (or if they are not in English, a certified translation must be provided if required by ASIC).

For information about how to lodge the letter and supporting documents, see 'How to lodge forms and documents' below.

Letter

You must provide a dated letter to ASIC that you intend to provide financial services in Australia in reliance on a specified class order. The letter should set out the following:

- your full name, address and contact details as the FCIS operator;
- the class order on which you intend to rely;
- the name of the relevant overseas regulatory authority;
- a statement that you have not been previously notified by ASIC that you are excluded from relying on the class order;
- a statement that you have not previously notified ASIC that you will not rely on the class order; and
- the full name, title and signature of the person who is authorised to sign on your behalf.

Supporting documents

You must provide the following documents with the letter, among other things:

- evidence of your authorisation, licence or permission from your overseas regulatory authority;

Note: An example is copy of your licence, or if the relevant overseas regulatory authority does not issue a separate authorisation provide a current extract from the website of the overseas regulatory authority being authenticated by a person who is authorised to sign on your behalf together with a letter from you advising ASIC why a separate authorisation cannot be obtained from the overseas regulatory authority.

- a written consent letter that refers to you consenting to the sharing of information about yourself between the overseas regulatory authority and ASIC;

Note: The written consent should be addressed to ASIC and should be from the FCIS operator that is relying on the class order. It must have a date and must be signed by a person who is authorised to sign on behalf of the FCIS operator. The written consent should include the full name of the FCIS operator, the relevant class order, the full name of the person signing including their title and contact details. The written consent should also include words to the effect that the FCIS operator consents to the disclosure by the relevant overseas regulatory authority to ASIC, and from ASIC to the relevant overseas regulatory authority of any information or document that the relevant overseas regulatory authority or ASIC has in relation to the FCIS operator. There is no obligation for you to get a written consent from the overseas regulatory authority.

- a copy of the most recent financial statements of any FCIS you propose to operate in Australia, any audit report, and any subsequent public disclosures of your financial position or compliance with the overseas regulatory regime or disclosure regulatory regime;
- a copy of the most recent offer document relating to the FCIS;
- a copy of the constitution or other governing rules of the FCIS;
- a description of how you will plan for, monitor and assess your compliance with the conditions of any relief and any Australian laws to which it will be subject;
- a description of your intended financial services activities in Australia;
- information about the interests in the FCIS that you intend to issue in Australia and how you plans to seek members in Australia; and
- evidence of membership with an ASIC-approved Australian external dispute resolution (EDR) scheme or membership with an ASIC equivalent foreign EDR scheme.

Deed of covenant

We will also require an original signed counterpart of a deed that contains the following information:

- the full name of the FCIS operator;
- details of the class order you intend to rely on;
- the name of the relevant overseas regulatory authority
- a statement that the deed is for the benefit of and enforceable by ASIC and any other person referred to in s659B(1) of the Corporations Act.

Note: It is best practice to define the terms 'ASIC' and 'other persons referred to in s659B(1) of the Corporations Act' in the deed for purposes of clarity. Section 659B(1) of the Corporations Act includes: ASIC; a Minister of the Commonwealth; Minister of a State or Territory of Australia; a holder of an office established by a law of the Commonwealth or a State or Territory in Australia; or a body corporate incorporated for a public purpose by a law of the Commonwealth or a State or Territory in Australia to the extent to which it is exercising a power conferred by a law of the Commonwealth or a State or Territory in Australia. Terms being used in the deed should be consistent with those being used in the relevant class order.

- a statement that the deed applies notwithstanding that you may have ceased to rely or never have relied on the class order;
- a statement that the deed is irrevocable except with ASIC's prior written consent;

- a statement that you submit to the non-exclusive jurisdiction of the Australian courts in legal proceedings conducted by ASIC (including under s50 of the *Australian Securities and Investments Commission Act 2001*) or any investor in the FCIS who is resident in Australia and, in relation to proceedings relating to a financial services law, by any person referred to in s659B(1) of the Corporations Act and whether brought in the name of ASIC or the Crown or otherwise;
- a statement that you covenant to comply with any order of an Australian court in respect of any matter relating to the provision of the financial services; and
- a statement that you covenant that, on written request of either the relevant overseas regulatory authority or ASIC, you will give or vary written consent and take all other practicable steps to enable and assist the relevant overseas regulatory authority to disclose to ASIC and ASIC to disclose to the relevant overseas regulatory authority any information or document that the overseas regulatory authority or ASIC has that relates to you as the FCIS operator.

We do not have a pro forma for this deed of covenant; we require that the deed will have the effect intended under the relevant provisions of the relevant class order. It should be dated (including the day, month and year) and should include the full name, title and signatures of any person signing the deed of covenant on your behalf. You can send the original counterpart of the deed to us by mail, after lodging the letter and supporting documents (including a copy of the deed) with us by email. Any questions about the deed required by the class order should be raised with us at Applications@asic.gov.au.

Confirmation of relief

We will notify you in writing if the information you have provided with your application is adequate and therefore, whether you can rely on the class order relief. The timing of this confirmation will depend on the adequacy of information you provide to us (i.e. that you have provided us with all relevant and complying documents referred to in the class order). For example, we may not issue a letter of adequacy unless you have provided us with the original counterpart of the deed of covenant.

Notifications required under relief

After we have advised you in writing that you can rely on the relevant class order, you have an ongoing obligation to notify us of certain information. There is no prescribed form for these ongoing notifications.

Note: These notifications may also apply as conditions to individual relief as specified in the individual relief instrument.

Significant changes

If you are relying on class order relief, you must notify ASIC as soon as practicable and in any event within 15 business days after you have become aware or should reasonably have become aware of significant changes to, for example, your licence, registration, authorisation or other approval granted by the overseas regulatory authority that is relevant to the operation of the FCIS.

The requirements for notifying ASIC of significant changes are set out in the relevant class order—that is:

- in [CO 04/526] (for FCIS regulated in the United States, New Zealand, Jersey);
- in [CO 07/753] (for FCIS regulated in Singapore); and
- in [CO 08/506] (for FCIS regulated in Hong Kong).

Examples of notifications include:

- if there is any significant change to your authorisation relevant to the financial services provided or intended to be provided in Australia;
- if the overseas regulatory authority authorises you to engage in any additional types of financial service;
- if the overseas regulatory authority terminates part or all of your authorisation;
- if you are granted a significant exemption or other relief from the relevant overseas regulatory authority regime; or
- significant investigation, enforcement or disciplinary action taken by any overseas regulatory authority against the FCIS operator.

Note: See RG 178.86–178.87 for what we mean by ‘significant’ investigation, enforcement or disciplinary action.

Breaches

If you are relying on class order relief and you become aware or should reasonably have become aware that you are in breach of any of the requirements of the relevant class order, you need to provide full details to ASIC of the breach within 10 business days after that time. Breach notifications should be sent to Applications@asic.gov.au.

The terms and conditions of the class order relief are strict, and failure to comply with these requirements would result, among other things, in your relief under the class order from the registration, licensing and product disclosure requirements lapsing, so that you will no longer be able to continue to rely on it. If you are unable to continue to rely on the relevant class order, you must advise ASIC in writing that this is the case and consider applying for individual relief.

Our decision about whether or not to grant relief following a breach would depend on the circumstances surrounding the matter, the nature of the breach, the number of times the breach has occurred, any history of non-compliance with the relevant overseas regulatory authority, the currency of your accreditation with the relevant overseas regulatory authority, and full details of the systems and procedures you have or you will be putting in place to address the breach.

We encourage you to regularly monitor your compliance with the terms and conditions of the relevant class order and report any breaches to us promptly, rather than leaving reporting to the end of the 10 business-day period permitted in the class order. If we have insufficient time to consider your response before the expiration of the 10 business-day period, there is an increased risk that the relief may expire.

Apart from any modifications or exemptions under the relevant class order or as specified by ASIC, you must comply with all other relevant Australian laws, including laws that ASIC administers.

What to include with notifications

You must include the following information with notifications, which will help us in assessing the notifications and recording the information on our database:

- your name and address as the FCIS operator and any changes to your name or address since you last lodged any notification;
- your organisation number or reference number as recorded on the ASIC database;
- the name of your local agent (if applicable) together with the name of any previous local agent since you last lodged any notification;

- details of the class order you are relying on;
- the name of the country where you are incorporated or formed;
- the full name of the regulatory authority that is currently regulating your activity overseas for purposes of RG 178; and
- the full name and address of the person who is lodging the ongoing notification on your behalf together with the person's role in the organisation, their contact details (e.g. phone, fax or email) and their registered address.

There is no fee for lodging these notifications with ASIC if you are relying on the class order relief: see 'How to lodge forms and documents' below.

Applying for individual relief

If you do not want to or are unable to rely on class order relief, you can apply for individual relief. Individual relief will reflect similar terms and conditions to the class orders issued under RG 178. Applications for individual relief should be sent to Applications@asic.gov.au.

What to include in your application

In your application for relief, you should clearly identify and explain in sufficient detail:

- the type of relief you are applying for;
- the legal basis of your application for relief;
- the regulatory issue or problem that you want ASIC to consider;
- the legal and cost/benefit arguments for relief;
- whether you have consulted with ASIC or other relevant regulatory organisation(s);
- whether any third parties are affected by your application for relief, and if so, whether you have consulted with those third parties;
- whether your application is urgent, and if so, why; and
- your response to the questions in Appendix 2 of RG 178, which gives examples of questions about your overseas regulatory regime that you should generally address.

Make sure you include supporting documents and the prescribed fee as required with your application: see 'How to lodge forms and documents' below.

Signed declaration

Your application should be accompanied by your signed declaration, or if you are a corporate entity, a statement authorised by the proper authority, that to the best of your knowledge and after making proper inquiries, the information and documents you have provided in response to the questions in Appendix 2 of RG 178 and in support of your application are true, correct and complete, and that you acknowledge that ASIC may take action to verify that the statements made in the application are not false or misleading.

Notifications

If you are granted individual relief, you have an ongoing obligation to notify us of certain information: see 'Notifications required under relief' above.

How to lodge forms and documents

Table 2 gives guidance on how to lodge the different forms and documents mentioned in this information sheet.

There are prescribed fees for certain forms and applications. For more information about fees, see Information Sheet 30 *ASIC fees for commonly lodged documents* (INFO 30) at www.asic.gov.au.

If you are required to lodge any supporting documents and they are not in English, you must include a certified translation of that document in English.

Table 2: Lodging forms and documents

Form or document	How to lodge
Form 402 <i>Application for registration as a foreign company</i>	At any ASIC Service Centre Kiosk (see www.asic.gov.au/asicoffices) or By mail to: Australian Securities and Investments Commission PO Box 4000 Gippsland Mail Centre VIC 3841 Australia
Form 404 <i>Notification of change to agent of a foreign company</i>	At any ASIC Service Centre Kiosk (see www.asic.gov.au/asicoffices) or By mail to: Australian Securities and Investments Commission PO Box 4000 Gippsland Mail Centre VIC 3841 Australia
Documents in support of reliance on class order relief	By email to Applications@asic.gov.au . Send the deed of covenant by mail to: Australian Securities and Investments Commission GPO Box 9827 Sydney NSW 2001 Australia
Documents in support of application for individual relief	By email to Applications@asic.gov.au .
Notifications required under class order or individual relief	By email to Applications@asic.gov.au .

Where can I get more information?

- ASIC publications referred to in this information sheet, including RG 178, relevant class orders and forms are available free of charge on our website at www.asic.gov.au.
- If you have specific questions about this relief, please email us at Applications@asic.gov.au.
- For our general policy on applying for relief, download Regulatory Guide 51 *Applications for relief* (RG 51) at www.asic.gov.au/rg.
- For concise guidance on applying for relief, download Information Sheet 82 *Applying for relief* (INFO 82) at www.asic.gov.au/rg.

- For details of any applicable fees, download Regulatory Guide 21 *How ASIC charges fees for relief applications* (RG 21) at www.asic.gov.au/rg.
- For more information about registering as a foreign company, appointing a local agent, fulfilling post-registration obligations and other relevant information, see Information Sheet 32 *Foreign companies* (INFO 32).
- Contact ASIC on 1300 300 630 (or +61 3 5177 3988 if dialling from overseas).

Important notice

Please note that this information sheet is a summary giving you basic information about a particular topic. It does not cover the whole of the relevant law regarding that topic, and it is not a substitute for professional advice. Omission of any matter in this information sheet will not relieve a company or its officers from any penalty incurred by failing to comply with the statutory obligations of the Corporations Act.

You should also note that because this information sheet avoids legal language wherever possible, it might include some generalisations about the application of the law. Some provisions of the law referred to have exceptions or important qualifications. In most cases your particular circumstances must be taken into account when determining how the law applies to you.