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Australian Securities and Investments Commission
Level 5, 100 Market Street
Sydney NSW 2000
By email: policy.submissions@asic.gov.au

Dear Doug,

ASIC CP 248 Remaking ASIC class orders on reporting by foreign entities (December 2015)

I am pleased to make this submission on ASIC's proposals to refresh various Class Orders on financial reporting. I make this submission in my private capacity.

I have had many years of experience advising on financial reporting and Corporations Act related issues, primarily at my former employer Ernst & Young. My role included answering complex questions from staff and clients around the country on Class Orders, and drafting and reviewing internal guidance on Class Orders.

In general, I believe both Class Order 98/98 and Class Order 02/1432 are working well. I offer some comments on their current operation, and the proposed Class Orders continuing their relief.

I believe that the relief in both Class Orders should continue.

I agree that ASIC should be able to notify an entity that the relief may not be relied on, and that the proposed restrictions on such ability are reasonable.

Class Order 98/98 comments

Existing Class Order

The main problem I had with CO 98/98 was its complexity. This needed additional internal guidance to be prepared by my previous employer to explain various corporate structures, and what was included and not included in the group, particularly with Australian vs foreign entities. I expect that other accounting firms have also had to prepare similar guidance. The Class Order also often needed detailed one-on-one discussions to apply it to particular situations. While these actions increased costs, there was still a net benefit to the applicable preparers.

Complexities arose:

- particularly with "going up" the control structure – including not only the immediate parent, but the parent's parent etc., and then going down to pick up "sister" entities that operated in Australia that were controlled by the ultimate parent. E.g. A Singapore's company's US parent, and what else that US parent controlled in Australia. This often meant obtaining a corporate structure of parts of the parent that did not involve the immediate Australian group. Sometimes the originating Australian company did not know of the existence of other Australian entities owned by a different division / segment of the ultimate overseas parent.
- Understanding that "carrying on a business in Australia" meant foreign companies that were registered to carry on a business in Australia (i.e. had an ARBN). Usually people would look at the country of incorporation of the foreign entity. While it was unusual for foreign companies to register to carry on a business in Australia, when it had Australian subsidiaries, this still had to be checked.

An anomaly I occasionally came across was a small proprietary company (assessed on its own), that was controlled by a foreign company (and eligible for Class Order relief in the prior year) that is then purchased by an Australian company during the current financial year. Because the small proprietary company was controlled

by a foreign company for part of the financial year, it was caught by sec. 292(2)(b). It was arguable that the Class Order did not apply in the current financial year, particularly if the new owner was an Australian large group.

It is easy to miss this situation. While most preparers understand the lodgement requirements when controlled by a foreign company at the end of the year, there is less understanding of the lodgement requirements for when controlled during the year but not at the end of the year.

Proposed Class Order

Group definition paragraphs (c) and (d) have not carried forward wording from the previous Class Order “(whether or not it carries on business or is formed or registered in Australia)”. While the wording may seem superfluous, as there is already a reference to control, I found the wording helpful in highlighting that overseas entities could be included.

Clause 5(2)(c)(iii) is difficult to understand. It appears to relate to the consequences for lodging opt-in / opt-out forms when the company cannot rely on the relief due to ASIC notification. However, this is not clear.

Clause 5(2)(d) is similarly complex to understand.

Clause 5(2)(c)(i) would appear to require another opt-in notice (Form 384) for companies in the first year for the new Class Order, as on a technical reading, companies would not have relied on relief under subsection (1) as it did not exist in the previous year – though clearly a similar requirement applied under the former Class Order.

It is not clear why ASIC has reverted to the former “incorporated” language when this was replaced by registered under the Company Law Review Act 1998.

Class Order 02/1432 comments

Existing Class Order

I found this Class Order less well known than CO 98/98.

The main problem in application is the need to establish that the foreign company registered in Australia meets requirements similar to sec. 113 of the Corporation Act (proprietary company requirements).

Australian branch employees often do not have the knowledge of the foreign company’s company law, and usually seek to get some sort of legal advice to establish compliance. While this increases costs, there is usually still a net benefit to the applicable preparers.

Proposed Class Order

There is no clear policy reason why foreign registered bodies (equivalent to Australian proprietary companies) are not subject to the same opt-in / opt-out notices like Australian proprietary companies under CO 98/98, or similarly those companies gaining relief under the wholly-owned entities class order.

Clause 6(2)(e) (foreign company assessment against small proprietary criteria). My preference is to have the longer wording like the previous Class Order, as technically sec. 45A(2) does not apply to foreign entities.

Yours faithfully,

David Hardidge FCPA