

# ASIC CLASS ORDER [CO 08/10]

## EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (ASIC) makes ASIC Class Order [CO 08/10] *Share and interest sale facilities* under s601QA(1)(a), s911A(2)(l) and s1020F(1)(a) of the *Corporations Act 2001* (the Act).

Paragraph 601QA(1)(a) provides that ASIC may exempt a class of persons from the provisions of Ch 5C of the Act. Paragraph 911A(2)(l) provides that ASIC may exempt a class of persons from the requirement to hold an Australian financial services (AFS) licence under Part 7.6 of the Act. Paragraph 1020F(1)(a) provides that ASIC may exempt a class of persons from the provisions of Part 7.9 of the Act.

### **1. Background**

Sale facilities can be a convenient and cost effective way for holders of shares and interests in managed investment schemes, especially those with small holdings, to sell their shares or interests at or near their current market value. Sometimes, in conjunction with a sale facility, issuers also offer a related purchase facility under which holders can, as an alternative to selling their shares or interests, purchase more shares or interests of the same class.

### **2. Purpose of the class order**

#### **What is the problem addressed by the class order?**

Some sale facilities and related purchase facilities may satisfy the definition of a 'managed investment scheme' for the purposes of Ch 5C of the Act (e.g. because participating members contribute shares, interests or money, which are then pooled and used to produce benefits for the members, and the members do not have day-to-day control). The scheme registration, licensing and product disclosure requirements might therefore apply to the entities involved in operating these facilities (i.e. the issuer, the operator of the issuer's registry and the broker appointed the issuer).

The operation of certain sale facilities may also arguably be prohibited under s1019F of the Act, which prevents a person from inviting another person to make an offer to sell a financial product in circumstances where, if the invitation were instead an offer to purchase the financial product, that offer would be covered by Div 5A of Part 7.9 of the Act.

### **Why is a class order necessary to address this problem?**

The purpose of CO 08/10 is to facilitate the operation of sale facilities and related purchase facilities in circumstances where ASIC is satisfied that:

- the prohibition in s1019F, the managed investment provisions and related provisions of the Act were not intended to apply;
- strict compliance with these provisions would be impractical or disproportionately burdensome for the operators of the facilities; and
- there would be no significant regulatory benefit in requiring compliance.

### **3. Operation of the class order**

#### **Exemptions**

Paragraph 4 of CO 08/10 provides exemptions to issuers of shares and interests who operate a sale facility or related purchase facility from:

- the obligation to register a managed investment scheme under s601ED of the Act in relation to the facility;
- the product disclosure provisions under Divisions 2 to 5 of Part 7.9 of the Act in relation to an interest in the facility; and
- the requirement to hold an AFS licence covering dealing in, and general advice in relation to, an interest in the facility.

Paragraph 5 of CO 08/10 provides an exemption from Div 5A of Part 7.9 of the Act to issuers of shares and interests who invite a holder of those products to make an offer to sell those products through a sale facility. This exemption is to avoid doubt.

Both of these exemptions are intended to cover persons who act as an agent of the issuer in operating the facility and giving invitations to sell products through the facility. This will usually include the operator of the issuer's registry and the broker appointed by the issuer.

#### **Where relief applies**

These exemptions will only apply to a sale facility or related purchase facility where:

- the facility is for the sale or purchase of shares or interests that are admitted to quotation on a licensed market or approved foreign market;
- the sale or purchase of financial products is completed in the ordinary course of trading on the relevant market;
- each participating holder is paid their proportion of the proceeds of sale or transferred the number of products that is allocated to them within eight weeks from their election to participate in the facility; and
- for related purchase facilities, each participating holder may purchase financial products through the facility (aggregated with products of the same class

purchased through any previous facility) for consideration totalling no more than \$5000 in any consecutive 12 month period.

### **Conditions of the relief**

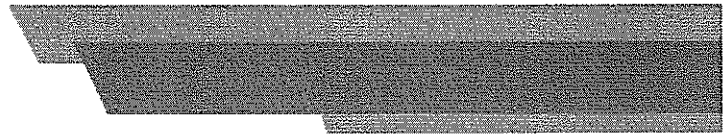
The relief in CO 08/10 is subject to conditions that:

- the issuer gives or sends to holders an invitation document that contains certain information about the market value of financial products, how the facility works, how the proceeds of sale or financial products purchased will be allocated between participating holders and what the holder can do instead of participating in the facility; and
- the issuer take reasonable steps to ensure the facility is not operated during any period where a control transaction has been publicly proposed and has not ended; and
- the issuer takes reasonable steps to ensure that, where a related purchase facility is available in conjunction with a sale facility, a participating holder can only participate in either, but not both, of the facilities.

## **4. Consultation**

Before making CO 08/10, ASIC consulted with relevant industry stakeholders. The consultation process included the publication of Consultation Paper 85 *Share and unit sale facilities* (CP85) in July 2007, which outlined ASIC's proposal for this class order relief and sought comments from stakeholders.

ASIC prepared a Business Cost Calculator (BCC) report for this class order relief, which was been approved by OBPR (see attachment).



## **Australian Securities and Investments Commission**

### **Business compliance costs for proposed class order relief for sale facilities**

The following is an assessment of the business compliance costs for ASIC's proposal to facilitate the operation of certain sale facilities and related purchase facilities by granting class order relief from the following provisions of the *Corporations Act 2001* (the Act):

- the prohibition on unsolicited offers in s1019F of the Act; and
- for the avoidance of doubt, the managed investment provisions in Chapter 5C, the licensing provisions in Part 7.6, and the Product Disclosure Statement provisions in Part 7.9 of the Act.

#### **Number of businesses affected by the proposal**

The proposed relief will cover:

- product issuers that offer a sale facility,
- financial services licensee engaged by the product issuers to sell product on a financial market, and
- the product issuer's share registry.

The proposed relief will only apply to certain sale facilities—e.g. facilities where the licensee sells the shares or interests at a price that is determined in the ordinary course of trading on a licensed market or approved foreign market.

We estimate that approximately 14 sale facilities are likely to be operated per year. This estimate is based on the average number of sale facilities for which ASIC has received individual relief applications over the past four years. We do not expect any significant change in the number of sale facilities offered following the proposed class order relief.

We anticipate that all of these sale facilities would be operated through one of the two major share registries that operate in Australia. This is based on our experience dealing with past individual relief applications.

#### **Assessment of business compliance costs**

##### Up-front costs

We estimate that up-front costs to access the class order relief would be borne by the two share registries that assist their clients to provide sale facilities. The estimated costs are \$20,000 for designing of disclosure documents, legal advice and system modifications. This estimate is based on information provided by one of the registries in response to Consultation Paper 85 *Share and unit sale facilities* (CP 85) (the other registry supported the proposal but did not provide any cost information). As the registries provide services in relation to a number of sale facilities, we would expect these would be one-off costs that they would recoup from a number of clients, and not a cost that recurs for each sale facility with which the registry is involved.

### Ongoing costs

For each sale facility operated by an issuer, it will incur costs in complying with the proposed disclosure condition (e.g. legal, printing and distribution costs). However, we do not think the proposal will significantly increase these costs for issuers because:

- the invitation that issuers send out will usually already contain most of this information; and
- the disclosure condition will not have a significant impact on printing or distribution costs—these are costs that issuers will incur regardless of whether ASIC imposes the disclosure condition.

We estimate the total additional cost each time an issuer offers a sale facility will be approximately \$160 for legal advice on compliance with the terms of the class order. This estimate is made on the basis that the class order will be about 3-5 pages long and would be likely to involve about two hours of legal services. Cost of an in house lawyer (five years post admission) estimated to be about \$80 per hour (source: Mahlab lawyer salary survey). This cost will be incurred by approximately 14 issuers per year (see above under 'Number of business affected by the proposal').

### Cost savings

The cost impact of not giving the proposed class order would involve making individual applications for relief.

We estimate that the cost savings of the proposed class order relief will be:

- statutory application fees of approximately \$4620 (per issuer) – this estimate is based on the fees typically payable for relief applications received by ASIC over the last four years; and
- legal costs of approximately \$400 (per issuer) – this estimate is made on the basis that preparing an application and responding to any queries from ASIC is likely to involve approximately five hours of legal services. Cost of an in house lawyer (five years post admission) estimated to be about \$80 per hour (source: Mahlab lawyer salary survey).

