

[CO 07/18] Variation of Class Order [CO 05/26]

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Related documents: [IR 07/02]

Class Order [CO 07/18] varies ASIC Class Order [CO 05/26] and includes provisions that allow the responsible entity of a registered scheme to make discounted issues to its associates.

Australian Securities and Investments Commission
Corporations Act 2001 — Subsection 601QA(1) — Variation

Enabling legislation

1. The Australian Securities and Investments Commission makes the variations set out in this instrument under subsection 601QA(1) of the *Corporations Act 2001* (the **Act**).

Title

2. This instrument is ASIC Class Order [CO 07/18].

Commencement

3. This instrument commences on the date it is registered under the *Legislative Instruments Act 2003*.

Note: An instrument is registered when it is recorded on the Federal Register of Legislative Instruments (**FRLI**) in electronic form: see *Legislative Instruments Act 2003*, s 4 (definition of **register**). The FRLI may be accessed at <http://www.frli.gov.au/>.

Variation

4. ASIC Class Order [CO 05/26] is varied as follows:
 - (a) in subparagraph 4(b):
 - (i) omit paragraph 601GAA(2)(b), substitute:

“(b) interests are not issued to:

 - (i) the responsible entity; or
 - (ii) an associate of the responsible entity unless the issue is covered by subsection (12A) or (12B);”;

- (ii) in subsection 601GAA(3), omit paragraph (h), substitute:
 - “(h) the responsible entity only issues interests to its associates as members of the scheme or, in the case where the interests are in a class of interests that are quoted on the financial market of ASX or an approved foreign market, in accordance with subsection (12A).”;
- (iii) in subsection 601GAA(9):
 - (A) in paragraph (a), omit “paragraph (2)(a),”; and
 - (B) after paragraph (a) insert:
 - “(aa) the references in paragraphs (2)(a) and (3)(h) to interests in a class of interests that are quoted on the financial market of ASX or an approved foreign market included a reference to interests in a class of interests which form part of stapled securities where the stapled securities are quoted on such a market; and”;
- (iv) after subsection 601GAA(12) insert:
 - “*Underwriting of placements and rights issues by associates of the responsible entity*”
 - (12A) For the purposes of subsections (2) and (3), the responsible entity may issue interests to an associate as an underwriter or sub-underwriter where both of the following apply:
 - (a) the issue is made under:
 - (i) an underwriting agreement between the responsible entity and the associate that is entered on terms that are no more favourable to the associate than terms that would be reasonable in the circumstances if the responsible entity and the associate were dealing at arm’s length; or
 - (ii) a sub-underwriting agreement between an underwriter and the associate that is entered on terms that are no more favourable to the associate than terms that would be reasonable

- in the circumstances if the underwriter and the associate were dealing at arm's length;
- (b) the associate holds an Australian financial services licence that authorises it to deal as an underwriter or sub-underwriter in interests in managed investment schemes and contains conditions to the effect that, where the licensee is an associate of the responsible entity of a registered scheme:
 - (i) the licensee must not exercise voting rights in respect of any interests in the scheme that it acquires as an underwriter or sub-underwriter; and
 - (ii) the licensee may only dispose of interests in the scheme that it acquires as an underwriter or sub-underwriter:
 - (A) in the ordinary course of trading on the financial market of ASX or an approved foreign market; or
 - (B) to a person who is not an associate of the responsible entity; or
 - (C) to a person who is an associate of the responsible entity that acquires the interests in an eligible fiduciary capacity.

Placements to associates of the responsible entity

- (12B) For the purposes of subsection (2), the responsible entity may issue interests to a person who is its associate where all of the following apply:
- (a) before the interests are issued, the associate holds interests in the scheme in an eligible fiduciary capacity;
 - (b) the associate acquires the interests in the eligible fiduciary capacity;

- (c) the proportion of the interests that are issued to the associate does not exceed the proportion of interests in the scheme that the associate held immediately before the issue occurred.
- (12C) For the purposes of subsections (12A) and (12B), a person holds or acquires interests in an *eligible fiduciary capacity* if the interests are held or acquired by the person as:
- (a) a trustee or custodian for a professional investor who is not the responsible entity or an associate of the responsible entity; or
 - (b) a responsible entity of another registered scheme; or
 - (c) a life insurance company, or an agent of a life insurance company, in the investment, administration and management of the assets of a statutory fund under the *Life Insurance Act 1995*; or
 - (d) an approved trustee of a regulated superannuation fund under the *Superannuation Industry (Supervision) Act 1993*.”;
- (v) in subsection 601GAA(13):
- (A) omit the definition of *approved foreign market*, substitute:
- “*approved foreign market* means each of the following:
- (a) American Stock Exchange;
 - (b) Borsa Italiana;
 - (c) Euronext Paris;
 - (d) Euronext Amsterdam;
 - (e) Frankfurt Stock Exchange;
 - (f) Hong Kong Stock Exchange;
 - (g) London Stock Exchange;
 - (h) NASDAQ Stock Market;
 - (i) New York Stock Exchange;
 - (j) New Zealand Exchange;

- (k) Singapore Exchange;
- (l) SWX Swiss Exchange;
- (m) Tokyo Stock Exchange;
- (n) Toronto Stock Exchange.”;
- (B) omit the definition of *ASX*, substitute:
“*ASX* means ASX Limited.”; and
- (C) omit the definition of *related issue*, substitute:
“*related issue* means, in relation to an issue of interests, an issue of interests in the same class at a price set by the responsible entity, which has not been approved or ratified by members in accordance with a provision in the constitution to the effect of subparagraph (2)(c)(ii) or issued in accordance with a provision of the constitution other than one to the effect of subsection (2).”; and
- (vi) omit subsection 601GAB(11) and the note underneath it, substitute:
“(11) When the responsible entity is setting the issue price of interests in accordance with a provision (the *section 601GAA provision*) of the constitution that is covered by section 601GAA, a formula or method that is referred to in this section may only be applied to the extent that it is consistent with the section 601GAA provision.
Note: This subsection ensures that a formula or method covered by this section cannot be used as a means of avoiding complying with the specific requirements of the provisions of the constitution covered by section 601GAA. However, it allows the formula or method to be applied to the extent that it complements those requirements. For example:
 - (a) Subsections 601GAA(3), (5) and (6) provide for the issue of interests at a price which varies from the price that otherwise applies under the constitution. The formula or method may be relevant to working out the price that would otherwise apply.
 - (b) Subsections 601GAA(2) and (4) provide for the issue of interests at a price which varies from the market price. The formula or method may be relevant to working out the market price.”;

- (b) omit subparagraph 5(b) and the note under paragraph 5, substitute:

“(b) where an offer is made in accordance with a provision of the constitution of the scheme to the effect of subsection 601GAA(3) as notionally inserted into the Act by this instrument—requiring some or all of the members who are offered interests as wholesale clients to notify the responsible entity of their acceptance of the offer by a date that occurs before another date, specified in the Product Disclosure Statement for the offer, by which other members are to notify their acceptance, provided that interests are not issued to those first mentioned members before the earliest date on which they may be issued to the other members of the scheme.

Note 1: The exemption in paragraph (b) allows the responsible entity to treat institutional and retail investors differently to the extent of the period that they are given to notify their acceptance of the offer. It does not permit the responsible entity to issue interests to institutional investors before any of the retail investors.

Note 2: Relief from compliance with paragraph 601FC(1)(d) of the Act for differential fee arrangements of the kind covered by notional subsection 601GAA(6) of the Act set out above is provided by ASIC Class Order [CO 03/217]: see especially paragraph 2 of Schedule B.”; and

- (c) after paragraph 5A insert:

“Interpretation

5B. In this instrument:

wholesale client has the meaning given by section 761G of the Act.”.

Dated this 18th day of January 2007

Signed by Brendan Byrne

as a delegate of the Australian Securities and Investments
Commission