

# ASIC Class Order [CO 07/74]

## Wholesale equity schemes: licensing relief for trustees

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*Registered on Federal Register of Legislative Instruments 4/6/2007*

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*Effective 5/6/2007(date of gazettal)*

*Related documents: [IR 07/21]*

*Class Order [CO 07/74] grants conditional relief to trustees from the requirement to hold an Australian financial services licence in relation to wholesale equity venture capital schemes.*

This instrument has effect under s911A(2)(l) of the *Corporations Act 2001*.

This compilation was prepared on 20 August 2008 taking into account amendments up to [CO 08/405]. See the table at the end of this class order.

Prepared by the Australian Securities and Investments Commission.

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### **Australian Securities and Investments Commission Corporations Act 2001 — Paragraph 911A(2)(l) — Exemption**

#### **Enabling legislation**

1. The Australian Securities and Investments Commission (*ASIC*) makes this instrument under paragraph 911A(2)(l) of the *Corporations Act 2001* (the *Act*).

#### **Title**

2. This instrument is ASIC Class Order [CO 07/74].

#### **Commencement**

3. This instrument commences on the later of:
  - (a) the date it is registered under the *Legislative Instruments Act 2003*; and
  - (b) the date of its gazettal.

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.fli.gov.au/>.

## Exemption

4. A person (the *trustee*) who is an eligible trustee of a wholesale equity scheme does not have to comply with the requirement to hold an Australian financial services licence (an *AFS licence*) for the provision of the following financial services (the *wholesale equity financial services*):
- (a) dealing in investment products that form part of the trust property of the wholesale equity scheme; and
  - (b) providing a custodial or depository service in relation to the products mentioned in paragraph (a).

Note: A trustee may also have the benefit of paragraph 911A(2)(b) of the Act which will allow it to issue interests in a wholesale equity scheme without an AFS licence if certain circumstances exist.

[*Historical note:* Paragraph 4 amended 12/8/2008 [CO 08/405] by deleting the words 'before 31 December 2008'. Paragraph 4 previously read:

'4. A person (the *trustee*) who is an eligible trustee of a wholesale equity scheme does not have to comply with the requirement to hold an Australian financial services licence (an *AFS licence*) for the provision before 31 December 2008 of the following financial services (the *wholesale equity financial services*):

- (a) dealing in investment products that form part of the trust property of the wholesale equity scheme; and
- (b) providing a custodial or depository service in relation to the products mentioned in paragraph (a).']

## Where relief applies

5. The exemption in paragraph 4 is only available where all of the following apply:
- (a) a related body corporate (the *manager*) of the trustee holds an AFS licence that:
    - (i) authorises the manager to provide wholesale equity financial services; and
    - (ii) contains conditions to the effect that the manager must:
      - (A) as far as possible, comply with the Act as if the trustee were providing wholesale equity financial services as the manager's representative; and
      - (B) have in place a deed poll that contains enforceable, unlimited and irrevocable covenants, for the benefit of each person (*beneficiary*) to whom the trustee provides a wholesale equity financial service, to the effect that the manager will indemnify the beneficiary in relation to any liability (other than an exempt liability) that arises from the trustee's

provision of a wholesale equity financial service to the beneficiary; and

(C) for the purposes of the relevant financial conditions of the manager's AFS licence — treat the assets, liabilities, cash inflows and cash outflows of the trustee as though they were included in the assets, liabilities, cash inflows and cash outflows of the manager; and

- (b) either of the following applies:
- (i) the trustee and the manager have not issued any interests in the wholesale equity scheme to a person as a retail client and have, from the later of the date of this instrument and when the trustee or manager first issues an interest in the scheme, taken all reasonable steps to ensure that interests in the scheme are not acquired by a person as a retail client; or
  - (ii) if the trustee or manager becomes aware or should reasonably have become aware of matters that give it reason to believe that it has failed, other than in an immaterial respect, to comply with subparagraph (i):
    - (A) 10 business days have not elapsed without full particulars of the failure having been provided to ASIC in writing (to the extent that the trustee or manager knows those particulars or would have known them if it had undertaken reasonable enquiries); and
    - (B) 30 business days have not elapsed from ASIC receiving those particulars from the trustee or manager without ASIC having notified the trustee or manager in writing that the trustee may continue to rely on this instrument; and
- (c) if the trustee or manager becomes aware that, if the trustee held an AFS licence that contained the following conditions:
- (i) a condition to the effect of condition 13 of ASIC Pro Forma [PF 209] *Australian financial services licence conditions (PF 209)* as published at the date of this instrument; and
  - (ii) conditions to the effect of those parts of condition 28 of PF 209 (other than condition 28(a) and conditions 28(d)(iii), (iv) and (v)) that relate to a report by an auditor relating to condition 13; and
  - (iii) a condition that the trustee must lodge with ASIC the report by an auditor that would be required by those parts of condition 28 of PF 209 within 15 months of the time

the trustee first relies on this instrument and then within each period of 13 months thereafter and relating to a period that commences:

- (A) at the date of that first reliance; or
- (B) immediately after the end of the period to which the last previous report lodged under this requirement relates,  
and ends not more than 3 months before the date of lodgment of the report,

as if:

- (iv) references to a responsible officer in condition 13 of PF 209 were to an officer; and
- (v) references to the licensee's annual audit report under condition 28 of the licence in condition 13 of PF 209 were to the report lodged under subparagraph 5(c)(iii) of this instrument; and
- (vi) references to conditions of the licence in condition 28 of PF 209 were to the condition mentioned in subparagraph 5(c)(i) of this instrument,  
it would be in breach, other than in an immaterial respect, of any of those conditions; and
- (vii) 10 business days have not elapsed without the matter being notified to ASIC in writing; and
- (viii) 30 business days have not elapsed from ASIC receiving the notice from the trustee or manager without ASIC having notified the trustee in writing that the trustee may continue to rely on this instrument.

Note 1: Condition 13 and relevant parts of condition 28 of PF 209 set out the base level requirements applicable to all financial services licensees who are not bodies regulated by the Australian Prudential Regulation Authority. Those conditions require the licensee to be solvent at all times and have positive net assets; to have sufficient cash resources to cover the next 3 months with adequate cover for contingencies; and to obtain an audit report on the licensee's compliance with the financial requirements of the licence.

Note 2: An example of the timing requirement in subparagraph 5(c)(iii) is that a trustee which first relies on this instrument on 31 July of the current year, would be required to lodge the report by an auditor by no later than 31 October of the following year. However, that trustee might wish to lodge a report earlier in order to satisfy this requirement. For example, it may lodge the report on 30 September of the following year because it has a 30 June balance date. In that case the report need only relate to the period from 31 July of the current year to at least 30 June of the following year but may extend to a later date.

## Exclusion from reliance

6. The exemption in paragraph 4 does not apply to a person who has been notified in writing by ASIC that the person is excluded from relying on this instrument.

## Interpretation

7. In this instrument:

*custodial or depository service* has the meaning given by section 766E of the Act.

*eligible trustee* means a body corporate that does not control any entity which is the issuer of an investment product which the body corporate holds.

Note: "Control" is defined in section 50AA of the Act.

*exempt liability* means, in relation to a wholesale equity scheme, a liability arising from any act or omission relating to a wholesale equity financial service for which the trustee of the scheme may be indemnified from the trust property.

*incidental property*, in relation to a wholesale equity scheme, means cash, deposits or current accounts with an Australian ADI or interests in a cash management trust that are held for no more than three months pending the acquisition of investment products, or expenditure or distribution to members.

*investment product* means:

- (a) a security within the meaning of section 761A of the Act; or
- (b) an option to acquire, by way of transfer, a security covered by paragraph (a), (b) or (c) of the definition of *security* in section 761A of the Act; or
- (c) a managed investment product within the meaning of section 761A of the Act; or
- (d) a financial product covered by paragraph 764A(1)(ba) of the Act; or
- (e) an option to acquire, by way of transfer, a financial product covered by subparagraph 764A(1)(b)(i) or (ii) of the Act; or
- (f) an option to acquire, by way of transfer, a financial product covered by subparagraph 764A(1)(ba)(i) or (ii) of the Act.

*relevant financial conditions*, in relation to an AFS licence, means conditions to the effect of conditions 13 (base level financial requirements), 21 (financial requirements for holding

client money or property), 22 (financial requirements for licensee transacting with clients) and 28 (audit opinion on financial requirements) of PF 209 (as published at the date of this instrument).

**representative** has the meaning given by section 910A of the Act.

**retail client** has the meaning given by section 761G of the Act.

**trust property** of a wholesale equity scheme means:

- (a) contributions of money or money's worth to the scheme; and
- (b) money borrowed or raised by the trustee for the purposes of the scheme; and
- (c) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraph (a) or (b); and
- (d) income and property derived, directly or indirectly, from contributions, money or property referred to in paragraph (a), (b) or (c).

**wholesale equity scheme** means a trust that is a managed investment scheme to which all of the following apply:

- (a) the scheme is not registered, and is not required to be registered, because of subsection 601ED(2) of the Act; and

Note: Under subsection 601ED(2) a managed investment scheme does not have to be registered if all issues of interests in the scheme that have been made would not have required a Product Disclosure Statement if the scheme had been registered at the time of issue.

- (b) all of the trust property (other than incidental property) consists of investment products; and
- (c) at all times the value of investment products which are quoted on a financial market does not exceed 20% of the trustee's reasonable estimate of the market value of the trust property.

Dated this 31st day of May 2007

Signed by Brendan Byrne

as a delegate of the Australian Securities and Investments  
Commission

**Notes to ASIC Class Order [CO 07/74]****Note 1**

ASIC Class Order [CO 07/74] (in force under s911A(2)(l) of the *Corporations Act 2001*) as shown in this compilation comprises that Class Order amended as indicated in the Tables below.

**Table of Instruments**

<b>Instrument number</b>	<b>Date of making or FRLI registration</b>	<b>Date of commencement</b>	<b>Application, saving or transitional provisions</b>
[CO 07/74]	31/5/2007	5/6/2007	-
[CO 08/405]	12/8/2008	12/8/2008	-

**Table of Amendments**

ad. = added or inserted    am. = amended    rep. = repealed    rs. = repealed and substituted

<b>Provision affected</b>	<b>How affected</b>
Para 4	am. [CO 08/405]