

### US ENTITIES – REGULATION S OFFERINGS ON ASX

<p><b>The purpose of this Guidance Note</b></p>	<ul style="list-style-type: none"> <li>To assist US entities considering a listing on the ASX market via an initial public offering of equity securities to understand certain relief available to them under Regulation S of the Securities Act of 1933 of the United States of America and a no-action letter ASX has obtained from the SEC</li> </ul>
<p><b>The main points it covers</b></p>	<ul style="list-style-type: none"> <li>The exemption available to the registration and prospectus requirements in section 5 of the US Securities Act of 1933 under Regulation S</li> <li>The no-action relief letter ASX has obtained from the SEC to enable offers and sales of certain Regulation S securities to be made on ASX without complying with Rule 903(b)(3)(iii)(B) and Rule 903(b)(3)(iv) of Regulation S</li> <li>The conditions that must be met to attract the SEC no-action relief</li> <li>ASX's Foreign Ownership Restriction (FOR) facility and how that facilitates compliance by US entities with Regulation S</li> <li>The need for US entities to have CHESS Depository Interests, or CDIs, issued in respect of their securities</li> <li>The statements that must be included in a prospectus for Regulation S securities</li> <li>Lifting the FOR restrictions when Regulation S no longer applies</li> </ul>
<p><b>Related materials you should read</b></p>	<ul style="list-style-type: none"> <li>Guidance Note 1 <i>Applying for Admission – ASX Listings</i></li> <li>Guidance Note 4 <i>Foreign Entities Listing on ASX</i></li> <li>Guidance Note 5 <i>CHESS Depository Interests (CDIs)</i></li> <li>ASX Settlement Operating Rules Guidance Note 13 <i>Financial Products subject to Foreign Ownership Restrictions</i></li> </ul>

**History:** Guidance Note 7 amended 08/10/21. Previous versions of this Guidance Note were issued in 03/04, 09/01, 07/00 and 10/15.

**Important notice:** ASX has published this Guidance Note to assist US entities wishing to list and raise capital on the ASX market to avail themselves of the relief set out in the no-action letter obtained by the ASX from the US SEC dated 7 January 2000. Nothing in this Guidance Note necessarily binds ASX in the application of the ASX Listing Rules in a particular case. In issuing this Guidance Note, ASX is not providing legal advice and US entities should obtain their own advice from a qualified professional person in respect of their obligations. ASX may withdraw or replace this Guidance Note at any time without further notice to any person.

### Table of Contents

1. Introduction	2
2. Section 5 of the US Securities Act and Regulation S	2
3. SEC no-action relief	4
4. The conditions that must be met to attract the SEC no-action relief	5
5. ASX's Foreign Ownership Restriction (FOR) facility	6
6. CHESS and CHESS Depository Interests	8
7. Prospectus requirements	8
8. US legal opinion	9
9. Ongoing obligations	9
10. Lifting the FOR restrictions	10
Annexure Sample Content of FOR US Market Announcement	11

## 1. Introduction

This Guidance Note is published to assist US entities considering a listing on the ASX market via an initial public offering of equity securities to understand certain relief available to them under Regulation S<sup>1</sup> of the Securities Act of 1933 of the United States of America<sup>2</sup> and a no-action letter ASX Limited (ASX) has obtained from the United States Securities and Exchange Commission.<sup>3</sup>

The relief means that US entities can raise capital on the ASX market under certain conditions without registering their securities under the US Securities Act and without having to prepare a prospectus that complies with that Act,<sup>4</sup> provided certain conditions are met.

An ASX listing brings with it significant benefits. These include access to:

- one of the world's largest investment pools underpinned by Australia's mandatory superannuation system;
- price discovery in a deep and liquid market worth well over a trillion dollars;
- the world class trading platform and clearing and settlement infrastructure of ASX,

as well as the status that comes from being listed on one of the world's top 10 exchanges.

These benefits make ASX an attractive alternative to listing on a US securities exchange. This is particularly the case for smaller, privately-owned, growth-oriented entities that may have difficulty competing for attention in US securities markets and raising capital on suitable terms through a US public offering. For them, the cost of raising capital is likely to be lower, and time to market is likely to be quicker, by conducting a public offering in compliance with Australian law and listing on ASX, compared to conducting a public offering in compliance with US law and listing on a US securities exchange.

## 2. Section 5 of the US Securities Act and Regulation S

Section 5 of the US Securities Act essentially makes it unlawful for any person:

- to sell a security through the use or medium of any prospectus unless a registration statement is in effect in relation to the security; or

<sup>1</sup> Rules §230.901 – §230.905 of the US Code of Federal Regulations. References in this Guidance Note to Rules are to the Rules contained in Regulation S.

<sup>2</sup> Referred to in this Guidance Note as the "US Securities Act".

<sup>3</sup> Referred to in this Guidance Note as the "SEC".

<sup>4</sup> Of course, they must still prepare a prospectus that complies with Australian law in order to lawfully raise capital in Australia: see section 706 of the Corporations Act 2001 (Cth) and Listing Rule 1.1 condition 3.

- to carry or transmit any prospectus relating to any security unless the prospectus meets the requirements of section 10 of that Act.<sup>5</sup>

There are a number of exemptions and exclusions from the registration and prospectus requirements in section 5. Key among them for present purposes is Regulation S, which exempts from section 5 certain offers or sales of securities<sup>6</sup> made outside the US.<sup>7</sup>

For an offer or sale to qualify for the Regulation S exemption, among other things:

- it must be made in an “offshore transaction”;<sup>8</sup>
- if made prior to the expiration of the applicable “distribution compliance period”,<sup>9</sup> it must not be made to a “US person”<sup>10</sup> or for the account or benefit of a US person (other than a distributor);<sup>11</sup>
- “offering restrictions” must be implemented;<sup>12</sup> and
- there must be no “directed selling efforts” in the US by the issuer, a distributor, any of their respective affiliates or any person acting on their behalf.<sup>13</sup>

To be an “offshore transaction”, the offer must not be made to a person in the US and either:

- at the time the buy order is originated, the buyer is outside the US or the seller and any person acting on its behalf reasonably believe that the buyer is outside the US; or
- the transaction is executed in, on or through a physical trading floor of an established foreign securities exchange<sup>14</sup> that is located outside the US.<sup>15</sup>

To implement “offering restrictions” means ensuring that all offering materials and documents (other than press releases) used in connection with offers and sales of the securities prior to the expiration of the applicable “distribution compliance period”<sup>16</sup> include statements to the effect that the securities have not been registered under the US Securities Act and may not be offered or sold in the US or to US persons (other than distributors) unless the securities are registered under that Act, or an exemption from the registration requirements of that Act is available. In the case of offers or sales of equity securities by US issuers, the offering materials and documents

<sup>5</sup> Technically, the US Securities Act makes it unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to do these things.

<sup>6</sup> Rules 901 and 903. Typically, a US entity not subject to SEC reporting requirements and wishing to raise capital on ASX will fall within Category 3 in Rule 903(b)(3) and will need to comply with the requirements set out in that Rule.

The exemption in Rule 903 not only applies to the issuer of the securities in question, but also to a distributor, any of the respective affiliates of the issuer or a distributor, or any person acting on behalf of the issuer or a distributor. There is a separate exemption in Rule 904 which applies to offers and sales by any person other than the issuer, a distributor, any of their respective affiliates or any person acting on their behalf.

For these purposes, “distributor” means any underwriter, dealer, or other person who participates, pursuant to a contractual arrangement, in the distribution of the securities offered or sold in reliance on Regulation S (Rule 902(d)).

<sup>7</sup> References to the US in Regulation S include its territories and possessions, any State of the US, and the District of Columbia (Rule 902(l)).

<sup>8</sup> Rule 903(a)(1).

<sup>9</sup> The term “distribution compliance period” is defined in Rule 902(f). It is usually a period of one year in the case of equity securities (Rule 903(b)(3)(iii)), and 40 days in the case of debt securities (Rule 903(b)(3)(ii)), beginning when the securities are first offered to persons other than distributors in reliance on Regulation S or the date of closing of the offering, whichever is later.

<sup>10</sup> The term “US person” is defined in Rule 902(k).

<sup>11</sup> For equity securities, see Rule 903(b)(3)(iii)(A) and, for debt securities, see Rule 903(b)(3)(ii)(A).

<sup>12</sup> Rule 903(b)(3)(i).

<sup>13</sup> Rule 903(a)(2).

<sup>14</sup> ASX does not have a physical trading floor and so this element of Rule 902(h)(1) does not apply to public offerings on the ASX.

<sup>15</sup> Rule 902(h)(1). Offers and sales of securities specifically targeted at identifiable groups of US citizens abroad, such as members of the US armed forces serving overseas, are deemed not to be made in “offshore transactions” (Rule 902(h)(2)).

<sup>16</sup> See note 9 above.

must also state that hedging transactions involving those securities may not be conducted unless in compliance with the US Securities Act. Such statements must appear:

- on the cover or inside cover page of any prospectus or offering circular used in connection with the offer or sale of the securities;
- in the underwriting section of any prospectus or offering circular used in connection with the offer or sale of the securities; and
- in any advertisement made or issued by the issuer, any distributor, any of their respective affiliates, or any person acting on their behalf.<sup>17</sup>

“Directed selling efforts” means any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the US for any of the securities being offered in reliance on Regulation S. This includes placing an advertisement in a publication with a general circulation in the US that refers to the offering of securities being made in reliance upon Regulation S.<sup>18</sup>

There are a number of other conditions that need to be met for an issuer to qualify for the exemption in Regulation S. A US entity wishing to raise capital on the ASX relying on that exemption should engage US legal counsel experienced in international securities offerings to advise it on compliance with those requirements.

### 3. SEC no-action relief

The structure of ASX’s market and clearing and settlement facilities present particular difficulties in complying with two specific conditions that must be met to attract the exemption in Regulation S – the requirements in Rule 903(b)(3)(iii)(B) and Rule 903(b)(3)(iv).<sup>19</sup>

Rule 903(b)(3)(iii)(B) (relevantly) requires an offer or sale, if made prior to the expiration of the applicable “distribution compliance period”,<sup>20</sup> to be made pursuant to the following conditions:

- the purchaser of the securities (other than a distributor) certifies that it is not a US person and is not acquiring the securities for the account or benefit of any US person or is a US person who purchased securities in a transaction that did not require registration under the Act;
- the purchaser of the securities agrees to resell such securities only in accordance with the provisions of Regulation S, pursuant to registration under the Act, or pursuant to an available exemption from registration; and agrees not to engage in hedging transactions with regard to such securities unless in compliance with the Act;
- the securities of a domestic issuer contain a legend to the effect that transfer is prohibited except in accordance with the provisions of Regulation S, pursuant to registration under the Act, or pursuant to an available exemption from registration; and that hedging transactions involving those securities may not be conducted unless in compliance with the Act; and
- the issuer is required, either by contract or a provision in its bylaws, articles, charter or comparable document, to refuse to register any transfer of the securities not made in accordance with the provisions of Regulation S, pursuant to registration under the Act, or pursuant to an available exemption from registration; provided, however, that if the securities are in bearer form or foreign law prevents the issuer of the securities from refusing to register securities transfers, other reasonable procedures (such as a legend described in the paragraph above) are implemented to prevent any transfer of the securities not made in accordance with the provisions of Regulation S.

<sup>17</sup> Rule 902(g). Such statements may appear in summary form on prospectus cover pages and in advertisements.

<sup>18</sup> Rule 902(c)(1).

<sup>19</sup> There are also difficulties for other persons subject to Rule 904 in complying with similar requirements in Rule 904(b)(1)(ii).

<sup>20</sup> See note 9 above.

Rule 903(b)(3)(iv) (relevantly) requires each distributor selling securities to a distributor, a dealer, or a person receiving a selling concession, fee or other remuneration, prior to the expiration of the applicable distribution compliance period<sup>21</sup> to send a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales as apply to a distributor.

In 1999, ASX approached the SEC with a request for no-action relief to enable offers and sales of Regulation S securities to be made on ASX without complying with Rule 903(b)(3)(iii)(B) and Rule 903(b)(3)(iv).<sup>22</sup>

SEC provided ASX with the requested relief by a no-action letter dated 7 January 2000. A copy of the letter is available on the ASX website at: <https://www2.asx.com.au/content/dam/asx/about/compliance/us-sec-regulation-s-no-action-letter.pdf>.<sup>23</sup>

#### 4. The conditions that must be met to attract the SEC no-action relief

The SEC no-action letter applies to initial public offerings in equity securities by US entities in connection with, and subsequent to, a listing on ASX, provided the conditions described in the no-action letter are met.

To attract the relief in the no-action letter, a US issuer must satisfy the following conditions (the numbers below match the numbers in the SEC no-action letter):

- (1) the prospectus used in the offering of Regulation S securities must disclose that all purchasers from a distributor in the offering will be deemed to have made representations regarding their non-US status (or other exempt status, such as qualified institutional buyer status under the Rule 144A exemption from registration) and agreements regarding restrictions on resale and hedging under Regulation S (and, where appropriate, Rule 144A);
- (3) any certificated securities, including global securities, certificates into which global certificates may be subdivided, and any physical, certificated securities issued to holders prior to the expiration of the distribution compliance period, must bear the restrictive legend required by Rule 903(b)(3)(iii)(B)(3). Thereafter these certificated securities must bear a restrictive legend to the extent consistent with Rule 144. Any definitive securities that are issued during the distribution compliance period (other than in a transaction in compliance with Rule 144A) must satisfy all of the requirements of Rule 903(b)(3)(iii)(B), including the legending and certification requirements;
- (5) any information provided by the issuer or managing underwriters to publishers of publicly available databases about the terms of any new issuance of Regulation S securities must include a statement that the securities have not been registered under the Securities Act and are subject to restrictions under Regulation S;
- (8) the confirmation sent to each purchaser of Regulation S Securities in either the initial offering or in the secondary market trading must include a notice that the securities are subject to the restrictions of Regulation S;
- (9) the issuers of Regulation S Securities must provide assurances that no securities bearing the legend required by Rule 903(b)(3)(iii)(B)(3) may be transferred by the issuer's transfer agent without a favourable opinion of counsel or other assurance that the transfer complies fully with the Securities Act; and
- (10) the issuer of Regulation S Securities must provide notification of the Regulation S status of its securities in shareholder communications such as annual reports, periodic interim reports, and its notices of shareholder meetings.

<sup>21</sup> See note 9 above.

<sup>22</sup> The no action letter also applies to compliance with Rule 904(b)(1)(ii) (see note 19 above), as well as Rules 903(b)(3)(iii)(B) and 903(b)(3)(iv).

<sup>23</sup> Under the heading "Applications for listing". It is called "US SEC Regulation S No Action Letter for Initial Public Offerings by US Companies on the ASX".

The remainder of the conditions in the no-action letter are satisfied by the way in which ASX has structured its arrangements for Regulation S securities, including in particular ASX's Foreign Ownership Restriction (FOR) facility.<sup>24</sup> Those conditions are:

- (2) no ASX participating organisation (as that term is defined in the no-action letter) may execute a transaction on ASX in Regulation S Securities if that participating organisation knows that the purchaser is a US person or is acting for the account or benefit of a US person, and ASX participating organisations must make reasonable efforts to ascertain whether a purchaser is a US person or is acting for the account or benefit of a US person, and implement measures designed to assure reasonable compliance with this requirement;
- (4) the Regulation S securities must be identified in the records maintained by entities such as the CUSIP Bureau as restricted so that participants in book-entry clearance facilities and others that trade the securities will have notice that transfers of the securities to US purchasers are restricted and must qualify under an appropriate exemption (absent registration);
- (6) the trading symbol that identifies particular securities on ASX trading screens and elsewhere must be modified by adding a common identifier to indicate that the Regulation S Securities are restricted; and
- (7) beginning a reasonable period prior to the initial listing of any Regulation S Security on ASX and continually thereafter, ASX must publish widely an explanation of the restricted stock identifier.

To meet these four conditions, a US issuer simply needs to apply to ASX to have its securities made subject to the FOR facility in the manner set out below.

## 5. ASX's Foreign Ownership Restriction (FOR) facility

The FOR facility is a facility offered by ASX that enables ASX listed entities to electronically monitor and enforce foreign ownership levels on a continuous basis. This is achieved by flagging holder records with a residency indicator ("domestic", "foreign" or "mixed") and assigning a permitted level of foreign ownership.<sup>25</sup>

In the case of a Regulation S security, the "foreign" flag is applied to "US persons" who are not "Qualified Institutional Buyers" (or QIBs), as those terms are defined under US law.<sup>26</sup> The permitted level of foreign ownership is set at zero.

Using the FOR facility, a US entity can immediately identify whether a US person who is not a QIB has acquired a Regulation S security potentially in violation of the US Securities Act and take divestment action to reverse the transaction and cure the violation.<sup>27</sup>

The FOR facility includes mechanisms for informing ASX market and settlement participants of the restrictions that apply to transactions in Regulation S securities. The securities are identified on ASX trading screens as being "FOR US" securities and the market data information disseminated to information vendors includes the notation "ORD US PROHIBITED EXCLUDING QIB"<sup>28</sup>, highlighting in each case that the securities are subject to restrictions on transfer to US persons other than QIBs. The existence and nature of the restrictions applicable to the securities in question are also advised to ASX market and settlement participants by an ASX notice and an ASX Settlement<sup>29</sup>

<sup>24</sup> See '5. ASX's Foreign Ownership Restriction (FOR) facility' on page 6.

<sup>25</sup> See ASX Settlement Operating Rule 8.7.3. Further details of the FOR facility can be found in ASX Settlement Operating Rules Guidance Note 13 *Financial Products Subject to Foreign Ownership Restrictions*.

<sup>26</sup> The term "US person" is defined Rule 902(k) of Regulation S.

<sup>27</sup> Divestment action is authorised by, and effected pursuant to, ASX Settlement Operating Rule 5.12.4. If the securities in question are registered on the CHESS subregister, they must first be transferred to the issuer sponsored subregister so that the issuer can then effect the necessary divestment (ASX Settlement Operating Rule 5.12.1).

<sup>28</sup> This Guidance proceeds on an assumption that a US entity would not want to restrict US "Qualified Institutional Buyers" (or "QIBs") from subscribing for or purchasing their securities. If that is not the case, the FOR restriction and the ASX notice will need to be amended accordingly.

<sup>29</sup> ASX Settlement Pty Limited, a wholly owned subsidiary of ASX and the operator of the ASX Settlement facility known as "CHESS" (see '6. CHESS and CHESS Depository Interests' on page 8).

circular. A sample of the ASX notice is included in the Annexure to this Guidance Note. The ASX Settlement circular is in the same terms.

The FOR facility also includes a mechanism for informing security holders of the restrictions that apply to transactions in Regulation S securities. The holding statements issued by CHESS for the CDIs over those securities<sup>30</sup> automatically include a notation to the effect that:

*“US Persons who are not a QIB, as defined under US law, are prohibited from holding these securities.”*

For these restrictions and mechanisms to be put in place, a US entity must make a written request to ASX Settlement for the entity’s securities to be included in Schedule 1 of the ASX Settlement Operating Rules<sup>31</sup> as “FOR financial products”.<sup>32</sup> The request should take the form of a letter on the entity’s letterhead or on the letterhead of a professional adviser or representative acting on behalf of the entity which is emailed to [chesscsops@asx.com.au](mailto:chesscsops@asx.com.au) and copied to the Listings Compliance adviser handling the entity’s admission application. The letter should include:

- a description of the class or classes of securities to be included in Schedule 1 of the ASX Settlement Operating Rules as FOR financial products;
- a statement that the “foreign person” designation is to be applied to all “US Persons” other than “Qualified Institutional Buyers”, as those terms are defined in Regulation S and Rule 144A respectively;<sup>33</sup>
- a statement that the relevant foreign ownership percentage level in respect of the securities is to be set at zero;
- a statement that the entity will comply with the requirements of ASX Settlement Operating Rule 5.18.1<sup>34</sup> and, in particular, will take divestiture or forfeiture action in respect of securities determined to have been offered or sold in breach of Regulation S on a daily basis; and
- written confirmation from US legal counsel acceptable to ASX<sup>35</sup> confirming:
  - a notice in the terms set out in the sample notice in the Annexure to this Guidance Note will accurately reflect the current definitions of “US Persons” and “Qualified Institutional Buyers” in Regulation S and Rule 144A respectively; or
  - the changes that need to be made to the sample notice in the Annexure to this Guidance Note in order to accurately reflect the current definitions of “US Persons” and “Qualified Institutional Buyers” in Regulation S and Rule 144A respectively.

The written confirmation mentioned in the last bullet point above may be provided on a stand-alone basis or may be included in the US legal opinion mentioned in section 8 below.

In order to give market and settlement participants enough time to effect the necessary changes to their systems, an entity must submit its request to ASX Settlement with all of the required information mentioned above no later than 10 business days prior to the anticipated date for commencement of quotation and trading of its securities on ASX.

<sup>30</sup> Again, see ‘6. CHESS and CHESS Depository Interests’ on page 8.

<sup>31</sup> Schedule 1 of the ASX Settlement Operating Rules refers to the reader to Schedule 1 of the ASX Settlement Operating Rules Procedures for the classes of financial products that have been designated as FOR Financial Products. In turn, the latter Schedule refers the reader to the list of FOR financial products published by ASX Settlement from time to time on the ASX Online website (<https://www.asxonline.com/>).

<sup>32</sup> ASX Settlement Operating Rule 5.18.1.

<sup>33</sup> See note 10 above.

<sup>34</sup> See ‘9 Ongoing obligations’ on page .9.

<sup>35</sup> For the avoidance of doubt, both the legal counsel and the terms of the confirmation (including any assumptions or qualifications) must be acceptable to ASX.

## 6. CHESS and CHESS Depository Interests

Trades in ASX quoted securities are cleared and settled through an electronic system called CHESS (Clearing House Electronic Subregister System). CHESS facilitates the paperless transfer of ownership of ASX quoted securities through an electronic subregister system.

Under the CHESS system, a listed entity's principal register of securities is made up of two electronic uncertificated subregisters – a "CHESS subregister" maintained by ASX Settlement and an "issuer sponsored subregister" maintained by the issuer, with security holders having the option to register their securities on either subregister.<sup>36</sup> Legal title to ASX quoted securities is transferred electronically by entry in the applicable subregister.

Corporate laws in the US effectively preclude a US entity from using CHESS to hold legal title to its securities. To facilitate clearing and settlement of transactions in its securities by ASX, therefore, a US entity listed on ASX must instead have CHESS Depository Interests, or CDIs,<sup>37</sup> issued over its ASX quoted securities and establish a CHESS subregister and an issuer sponsored subregister in those CDIs.<sup>38</sup>

CDIs are a type of electronic depository receipt that allow investors to obtain all the economic benefits of owning securities without actually holding legal title to them. They were developed by ASX to facilitate the clearing and settlement of transactions in securities through CHESS where the transfer of legal title to the securities themselves is not able to be effected through CHESS. CHESS Depository Nominees Pty Limited, the operator of the CDI facility, is issued with a global securities certificate by the issuer of the securities, giving it legal title to the securities in question. It then issues CDIs to investors, representing their beneficial ownership of the underlying securities.

Usually an issuer will appoint a professional share registry in Australia to maintain the issuer sponsored subregister on its behalf. ASX would recommend that a US entity seeking to list on ASX appoint an Australian share registry at the earliest opportunity. The registry will be able to assist the entity with the formalities involved in issuing CDIs over its securities and also in having its securities approved as "FOR financial products" for the purposes of the FOR facility.

For further guidance on CDIs, see Guidance Note 5 *CHESS Depository Interests (CDIs)*.

## 7. Prospectus requirements

As mentioned previously, to qualify for the exemption in Regulation S, an issuer's prospectus must include the required "offering restrictions". This means including statements on the cover or inside cover page and in the underwriting section to the effect that the securities have not been registered under the US Securities Act and may not be offered or sold in the US or to US persons (other than distributors or QIBs) unless the securities are registered under that Act, or an exemption from the registration requirements of that Act is available and that hedging transactions involving those securities may not be conducted unless in compliance with the US Securities Act.<sup>39</sup>

To qualify for the SEC no-action relief, an issuer's prospectus must also include statements to the effect that all purchasers from a distributor in the offering will be deemed to have made representations regarding their non-US status (or other exempt status, such as qualified institutional buyer status under the Rule 144A exemption from registration) and agreements regarding restrictions on resale and hedging under Regulation S (and, where appropriate, Rule 144A).<sup>40</sup>

<sup>36</sup> To register securities on the CHESS subregister, a person must have a sponsorship agreement with a participant in the ASX Settlement facility. Registering securities on the CHESS subregister effectively gives the sponsoring participant control of the holdings for the purposes of settlement.

<sup>37</sup> In the SEC no-action letter, CDIs are referred to as "CHESS Units of Foreign Securities" or "CUFS". These are a particular type of CDI.

<sup>38</sup> See Listing Rules 2.16 and 8.2 and ASX Settlement Operating Rule 13.5.4.

<sup>39</sup> See notes 16 and 17 above and accompanying text.

<sup>40</sup> See condition 1 to the SEC no-action letter, as set out in '4. The conditions that must be met to attract the SEC no-action relief' on page 5.



In addition, ASX will require the issuer's prospectus to include a statement to the effect that while ASX and ASX Settlement maintain the systems and procedures outlined in the SEC no-action letter, neither of them is responsible for any failure by the issuer to comply with those systems and procedures.

A US entity wishing to raise capital on the ASX relying on Regulation S and the SEC no-action letter should engage US legal counsel experienced in international securities offerings to assist it with the preparation of its prospectus and to ensure that it includes the wording that must be included in it under Regulation S and the SEC no-action letter from a US perspective. It should also liaise with ASX at the earliest opportunity to discuss the wording that must be included in its prospectus from ASX's perspective.

## 8. US legal opinion

ASX will require, as a condition of a US entity being admitted to the Official List in reliance on Regulation S and the SEC no-action letter, to provide to ASX a written opinion from US legal counsel acceptable to ASX<sup>41</sup> to the effect that:

- the offering restrictions and associated statements in the entity's prospectus are consistent with Regulation S, Rule 144A and the requirements in the SEC no-action letter;
- assuming the entity's offer has been, or will be, conducted in the manner described in its prospectus, the offer will be exempt from the registration requirements in section 5 of the US Securities Act of 1933, as amended; and
- assuming the entity's offer has been, or will be, conducted in the manner described in its prospectus and the offering restrictions described in its prospectus are implemented in the manner described in its prospectus, the offer and any subsequent re-sales of the entity's securities on the ASX to Qualified Institutional Buyers will not violate US federal securities laws.

## 9. Ongoing obligations

For so long as it has any securities included as FOR securities in Schedule 1 of the ASX Settlement Operating Rules, a US entity must:

- accept electronic notification of the residency status of holders on the CHES subregister;
- accept electronic notification of the residency status of transferees specified in CHES to issuer operated subregister transfers;
- give effect to and recognise the status of foreign to foreign allocations effected through CHES; and
- monitor the foreign ownership percentage level on a daily basis by requesting a foreign holding net movement report in respect of each business day, and where the issuer determines it is necessary, take the appropriate action to enforce the foreign ownership restrictions.<sup>42</sup>

In practice, these obligations are undertaken on behalf of the US entity by its registry. It is therefore important that a US entity have as its registry an entity capable of complying with these obligations.

<sup>41</sup> Again, for the avoidance of doubt, both the legal counsel and the terms of the opinion (including any assumptions or qualifications) must be acceptable to ASX. In this regard, ASX will accept an assumption that the offeror will comply with the offering restrictions and associated statements in the entity's prospectus and a qualification that the SEC no-action letter is not binding on the SEC or US courts.

<sup>42</sup> ASX Settlement Operating Rule 5.18.1(a)-(d). These obligations operate in addition to the statutory contract between an issuer and ASX under ASX Settlement Operating Rule 1.2 (application and effect of these rules). The issuer also acknowledges that it bears sole responsibility for monitoring the foreign ownership percentage level: ASX Settlement Operating Rule 5.18.1(e).

### 10. Lifting the FOR restrictions

Generally speaking, a US entity is able to remove the restrictions on the offer or sale of Regulation S securities after the expiration of the applicable “distribution compliance period”.<sup>43</sup> To do this, it needs to make a written request to ASX Settlement for its securities to be removed from Schedule 1 of the ASX Settlement Operating Rules.<sup>44</sup> Again, the request should take the form of a letter on the entity’s letterhead or on the letterhead of a professional adviser or representative acting on behalf of the entity which is emailed to [chesscsops@asx.com.au](mailto:chesscsops@asx.com.au) and copied to the entity’s Listings Compliance adviser.

Before agreeing to the request, ASX will usually require the US entity to provide a written opinion from US legal counsel acceptable to ASX<sup>45</sup> confirming that the removal of the FOR US restrictions will not breach applicable US federal securities laws.

Upon their removal from Schedule 1 of the ASX Settlement Operating Rules, the entity’s securities will no longer qualify as “FOR financial products” and the FOR facility and the associated restrictions will no longer apply to them.

---

<sup>43</sup> See note 9 above.

<sup>44</sup> ASX Settlement Operating Rule 5.18.9.

<sup>45</sup> Again, for the avoidance of doubt, both the legal counsel and the terms of the opinion (including any assumptions or qualifications) must be acceptable to ASX.

### Annexure

#### Sample Content of FOR US Market Announcement

The following class of Financial Products (**XYZ Financial Products**) has been included in Schedule 1 of the ASX Settlement Operating Rules as a FOR Financial Product effective *[quotation date]*.

Issuer	Financial Product	ASX Code
<i>[Issuer Full Name]</i>	CHESS Depository Interests <i>[ratio]</i> – U.S. Person Prohibited Excluding QIB	<i>[Issuer ASX Code –eg XYZ]</i>

XYZ Financial Products are scheduled to commence trading on *[quotation date]* under ASX code XYZ.

Under U.S law, an **Excluded U.S. Investor**, as defined below, will not be entitled to acquire any XYZ Financial Products during the applicable distribution compliance period except:

- (a) in accordance with the provisions of Regulation S under the U.S. Securities Act of 1933, as amended (**U.S. Securities Act**);
- (b) pursuant to Rule 144A under the U.S. Securities Act;
- (c) pursuant to an effective registration statement under the U.S. Securities Act; or
- (d) pursuant to any other available exemption from the registration requirements of the U.S. Securities Act, and in each case in accordance with all applicable U.S. state securities laws.

In order to ensure that these foreign ownership restrictions can be monitored and that XYZ Financial Products are not acquired by, or for the account of, or benefit of any Excluded U.S. Investor, ASX Settlement has agreed:

- (a) to classify XYZ Financial Products as FOR Financial Products under the ASX Settlement Operating Rules and to include XYZ Financial Products in Schedule 1 of the ASX Settlement Operating Rules; and
- (b) to implement certain additional procedures in relation to XYZ Financial Products, as contemplated in ASX Listing Rules Guidance Note 7 *US Entities – Regulation S Offerings on ASX* and ASX Settlement Operating Rules Guidance Note 13 *Financial Products subject to Foreign Ownership Restrictions*.

The following conditions apply to XYZ Financial Products:

#### Foreign Person

The 'Foreign Person' designation applies to all 'Excluded U.S. Investors', as defined below.

#### Level of Foreign Ownership

The relevant Foreign Person ownership level is **zero**.

**This means that an Excluded U.S. Investor must not acquire any XYZ Financial Product.**

XYZ, as Issuer of the Financial Products, has agreed to be bound by the additional obligations of an Issuer of FOR Financial Products under Rule 5.18 of the ASX Settlement Operating Rules.

XYZ Financial Products are being offered and will be traded on the ASX market in reliance on the safe harbour provisions of Regulation S under the U.S. Securities Act and pursuant to Rule 144A under the U.S. Securities Act. In addition, XYZ Financial Products are being offered and will be traded in compliance with the procedures set out in the no-action letter dated 7 January 2000 given to ASX by the United States Securities and Exchange Commission in respect of offerings on the ASX market, other than in relation to procedures that allow U.S. Persons who are Qualified Institutional Buyers to purchase CDIs in secondary market transactions on ASX. Certain of these procedures can be satisfied by the application of the status of FOR Financial Products to XYZ Financial Products under the ASX Settlement Operating Rules.

Where an investor is currently designated as 'F', and wishes to hold XYZ Financial Products, but is not an Excluded U.S. Investor, a new holder record should be established for that investor designated as 'D' for the purposes of holding XYZ Financial Products.

From [quotation date], where an investor is currently designated as 'F' or 'M', and is an Excluded U.S. Investor, that person cannot acquire and hold any XYZ Financial Products.

**Participants should liaise with clients intending to purchase or hold XYZ Financial Products and make all necessary enquiries to ensure that those clients are not Excluded U.S. Investors, and that those clients who are Excluded U.S. Investors are made aware that they cannot acquire any XYZ Financial Products. Failure to do so may result in client loss. Similarly, Participants may be liable for any failure to establish a new Holder Record designated as 'D' or effect a change of residency indicator where it is necessary.**

### Foreign and Mixed Holdings

XYZ Financial Products cannot be acquired by an Excluded U.S. Investor in holdings designated as 'F' or 'M' under any circumstances, as they may be subject to divestment action by XYZ as set out under the ASX Settlement Operating Rules.

### Divestment Periods and Procedure

From [quotation date], if the Foreign Ownership Percentage Level is breached, that is, if any Excluded U.S. Investor designated as 'F' or 'M' becomes registered as holding XYZ Financial Products, XYZ reserves the right, to the maximum extent permitted by law, to take divestment or forfeiture action in respect of those Financial Products.

### Definitions

In this notice:

- **'Excluded U.S. Investor'** means a holder of XYZ Financial Products (or a person who seeks to be entered on the register as a holder of XYZ Financial Products) who is a U.S. Person that is not a Qualified Institutional Buyer or holds or will hold XYZ Financial Products for the account or benefit of any U.S. Person who is not a Qualified Institutional Buyer;
- **'Qualified Institutional Buyer'** has the meaning given in Rule 144A under the U.S. Securities Act;
- **'U.S. Person'** has the meaning given in Rule 902(k) of Regulation S under the U.S. Securities Act;
- **'U.S. Securities Act'** means the U.S. Securities Act of 1933, as amended; and
- **'United States'** means the United States of America, its territories and possessions, any State of the United States and the District of Columbia.

As at the date of this Notice, **'U.S. Person'** is defined in Rule 902(k) of Regulation S under the U.S. Securities Act to mean:

- any natural person resident in the United States;
- any partnership or corporation organized or incorporated under the laws of the United States;
- any estate of which any executor or administrator is a U.S. Person;
- any trust of which any trustee is a U.S. Person;
- any agency or branch of a foreign entity located in the United States;
- any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a U.S. Person;

- any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the United States; and
- any partnership or corporation if:
  - organised or incorporated under the laws of any foreign jurisdiction, and
  - formed by a U.S. Person principally for the purpose of investing in securities not registered under the U.S. Securities Act, unless it is organised or incorporated, and owned by accredited investors (as defined in the U.S. Securities Act) who are not natural persons, estates or trusts.

As at the date of this Notice, Rule 902(k) of Regulation S under the U.S. Securities Act provides that the following are not '**U.S. Persons**':

- any discretionary account or similar account (other than an estate or trust) held for the benefit or account of a non-U.S. Person by a dealer or other professional fiduciary organized, incorporated, or (if an individual) resident in the United States;
- any estate of which any professional fiduciary acting as executor or administrator is a U.S. Person if:
  - an executor or administrator of the estate who is not a U.S. Person has sole or shared investment discretion with respect to the assets of the estate; and
  - the estate is governed by foreign law;
- any trust of which any professional fiduciary acting as trustee is a U.S. Person, if a trustee who is not a U.S. Person has sole or shared investment discretion with respect to the trust assets, and no beneficiary of the trust (and no settlor if the trust is revocable) is a U.S. Person;
- an employee benefit plan established and administered in accordance with the law of a country other than the United States and customary practices and documentation of such country;
- any agency or branch of a U.S. Person located outside the United States if:
  - the agency or branch operates for valid business reasons; and
  - the agency or branch is engaged in the business of insurance or banking and is subject to substantive insurance or banking regulation, respectively, in the jurisdiction where located; and
- the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies, affiliates and pension plans, and any other similar international organizations, their agencies, affiliates and pension plans.