

US ENTITIES – REGULATION S OFFERINGS ON ASX

<p>The purpose of this Guidance Note</p>	<ul style="list-style-type: none"> 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
<p>The main points it covers</p>	<ul style="list-style-type: none"> The exemption available to the registration and prospectus requirements in section 5 of the US Securities Act of 1933 under Regulation S 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 The conditions that must be met to attract the SEC no-action relief ASX's Foreign Ownership Restriction (FOR) facility and how that facilitates compliance by US entities with Regulation S The need for US entities to have CHESS Depository Interests, or CDIs, issued in respect of their securities The statements that must be included in a prospectus for Regulation S securities Lifting the FOR restrictions when Regulation S no longer applies
<p>Related materials you should read</p>	<ul style="list-style-type: none"> Guidance Note 1 <i>Applying for Admission – ASX Listings</i> Guidance Note 4 <i>Foreign Entities Listing on ASX</i> Guidance Note 5 <i>CHESS Depository Interests (CDIs)</i>

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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.

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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 S¹ of the Securities Act of 1933 of the United States of America² and a no-action letter ASX Limited (ASX) has obtained from the United States Securities and Exchange Commission.³

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,⁴ 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

¹ 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.

² Referred to in this Guidance Note as the "US Securities Act".

³ Referred to in this Guidance Note as the "SEC".

⁴ 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.⁵

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 securities⁶ made outside the US.⁷

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

- it must be made in an “offshore transaction”;⁸
- if made prior to the expiration of the applicable “distribution compliance period”,⁹ it must not be made to a “US person”¹⁰ or for the account or benefit of a US person (other than a distributor);¹¹
- “offering restrictions” must be implemented;¹² 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.¹³

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 exchange¹⁴ that is located outside the US.¹⁵

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”¹⁶ 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

⁵ 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.

⁶ 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)).

⁷ 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)).

⁸ Rule 903(a)(1).

⁹ 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.

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

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

¹² Rule 903(b)(3)(i).

¹³ Rule 903(a)(2).

¹⁴ 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.

¹⁵ 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)).

¹⁶ 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.¹⁷

“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.¹⁸

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).¹⁹

Rule 903(b)(3)(iii)(B) (relevantly) requires an offer or sale, if made prior to the expiration of the applicable “distribution compliance period”,²⁰ 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.

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

¹⁸ Rule 902(c)(1).

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

²⁰ 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 period²¹ 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).²²

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: <http://www.asx.com.au/documents/asx-compliance/us-sec-regulation-s-no-action-letter.pdf>.

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 5;
- (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.

²¹ See note 9 above.

²² 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).

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.²³ 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.²⁴

In the case of a Regulation S security, the "foreign" flag is applied to "US persons", as that term is defined in Regulation S,²⁵ and the permitted level of foreign ownership is set at zero.

Using the FOR facility, a US entity can immediately identify whether a US person 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.²⁶

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", highlighting in each case that the securities are subject to restrictions on transfer to US persons. The existence and nature of the restrictions applicable to the securities in question are also advised to the market by ASX and ASX Settlement²⁷ circulars.

²³ See '5. ASX's Foreign Ownership Restriction (FOR) facility' on page 6.

²⁴ 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*.

²⁵ The term "US person" is defined Rule 902(k).

²⁶ 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).

²⁷ 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 7).

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 securities²⁸ automatically include a notation to the effect that:

"US Persons, as defined under US law, are prohibited from holding these securities."

For these restrictions and mechanisms to be put in place, a US entity simply has to request ASX Settlement to include its securities in Schedule 1 of the ASX Settlement Operating Rules as "FOR financial products". The following information must be provided with the request.

- a description of the class or classes of securities to be included as FOR financial products;
- confirmation that the "foreign person" designation is to be applied to all "US Persons", as that term is defined in Regulation S,²⁹ and setting out the full text of the current definition of that term so that it can be included in ASX and ASX Settlement circulars notifying market and settlement participants of the restriction;
- confirmation that the relevant foreign ownership percentage level in respect of the securities is to be set at zero; and
- confirmation that the entity 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.

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 required information no later than 10 business days prior to the anticipated date for commencement of quotation and trading of its securities on 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.³⁰ 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,³¹ issued over its ASX quoted securities and establish a CHESS subregister and an issuer sponsored subregister in those CDIs.³²

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.

²⁸ Again, see '6. CHESS and CHESS Depository Interests' on page 7.

²⁹ See note 10 above.

³⁰ 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.

³¹ 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.

³² See Listing Rules 2.16 and 8.2 and ASX Settlement Operating Rule 13.5.4.

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 Depositary 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) 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.³³

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).³⁴

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.

If ASX has any concerns in this regard, it may ask a US entity seeking to raise capital on the ASX to provide it with an opinion from a US legal counsel acceptable to ASX that its offer and prospectus comply with US securities laws.

8. 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”.³⁵ To do this, it simply needs to request ASX Settlement in writing to remove its securities from Schedule 1 of the ASX Settlement Operating Rules, meaning that they will no longer qualify as “FOR financial products” and the FOR facility will no longer apply to them.

Before agreeing to do this, however, ASX may ask a US entity seeking to remove the Regulation S restrictions to provide it with an opinion from a US legal counsel acceptable to ASX confirming that the restrictions may be removed without breaching US securities laws.

³³ See notes 16 and 17 above and accompanying text.

³⁴ 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.

³⁵ See note 9 above.