

FINANCIAL PRODUCTS SUBJECT TO FOREIGN OWNERSHIP RESTRICTIONS

<p>The purpose of this Guidance Note</p>	<ul style="list-style-type: none"> To assist participants to understand their obligations in relation to holdings of financial products that are subject to foreign ownership restrictions
<p>The main points it covers</p>	<ul style="list-style-type: none"> Which financial products have foreign ownership restrictions Action by an issuer where foreign ownership levels are exceeded Use of the foreign residency indicator Acquiring financial products without breaching a foreign ownership restriction
<p>Related materials you should read</p>	<ul style="list-style-type: none"> ASX Listing Rules Guidance Note 7 <i>Regulation S Offerings on ASX</i>

History: Guidance Note 13 amended 03/07/17. Previous versions of the Guidance Note were issued in 02/15 and under the ASTC Settlement Rules as Guidance Note 4 in 03/04 and under the SCH Business Rules as Explanatory Memorandum 3/97 in 11/97.

Important notice: ASX has published this Guidance Note to assist participants to understand and comply with their obligations under the ASX Settlement Operating Rules. It sets out ASX's interpretation of the ASX Settlement Operating Rules and how ASX is likely to enforce those rules. Nothing in this Guidance Note necessarily binds ASX in the application of the ASX Settlement Operating Rules in a particular case. In issuing this Guidance Note, ASX is not providing legal advice and participants 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 by ASX Settlement Pty Limited ("ASX") to assist ASX Settlement participants to understand their obligations in relation to holdings of financial products that are subject to foreign ownership restrictions.

2. Background

Some financial products of listed entities are subject to aggregate foreign ownership restrictions, either by virtue of legislation or under the constitution of the issuer.

In some cases, these restrictions operate on a permanent basis – for example, the 35% limitation on foreign ownership of fully paid ordinary shares in Telstra Corporation Limited that applies under Part 2A of the Telstra Corporation Act 1991 (Cth).

In other cases, these restrictions operate on a transient basis – for example, the restrictions an issuer may apply prohibiting foreign security holders from taking up an entitlement under a rights issue or other pro rata offer of securities so as to avoid breaching securities laws in relevant overseas jurisdictions.¹ In these cases, the aggregate foreign ownership restriction may in fact be zero.

CHESS assists listed entities in monitoring and enforcing compliance with these restrictions by allowing the issuer to have a class of financial products designated as "FOR financial products".² CHESS will then apply a residency indicator to those securities, which will be included in the messages used for establishing and updating the holder record for holdings of those financial products in CHESS.

A residency indicator is a code used to indicate the status of the ultimate beneficial owner or owners of FOR financial products in a holding on the CHESS subregister or an issuer operated subregister. The indicators are "D" for domestic, "F" for foreign, and "M" for mixed.³

¹ Including restrictions on US ownership applied by issuers seeking to take advantage of the relief available for offerings under the safe harbour provisions of Regulation S under the US Securities Act 1933 – see ASX Listing Rules Guidance Note 7 *Regulation S Offerings on ASX*.

² As defined in ASX Settlement Operating Rule 2.13.1.

³ See the definition of "Residency Indicator" in ASX Settlement Operating Rule 2.13.1.

3. Issuer responsibilities

3.1. Request to include financial products in Schedule 1

The list of approved FOR financial products is set out in Schedule 1 to the ASX Settlement Operating Rules Procedures.

Where an issuer has a class of financial products which is subject to aggregate foreign ownership restrictions, either pursuant to legislation or under the issuer's constitution, it can request ASX to include those products in Schedule 1 by making a written request to ASX to that effect.⁴ 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. The letter should include:

- a description of the class or classes of financial products to be included in Schedule 1;
- the reasons for their inclusion in Schedule 1;
- any relevant timetable or key dates that the issuer wishes to meet; and
- a statement confirming that the issuer will comply with the requirements of ASX Settlement Operating Rule 5.18.1.

The letter should be sent by email to the general email address cad@asx.com.au and copied to the entity's designated ASX Listings Compliance adviser. The letter must be submitted no later than 10 business days prior to the date the entity wishes to have its financial products included in Schedule 1.

Once a class of securities is included in Schedule 1, the issuer must:

- accept electronic notification of the residency status of holders on the CHESS subregister;
- accept electronic notification of the residency status of transferees specified in CHESS to issuer operated subregister transfers;
- give effect to and recognise the status of foreign to foreign allocations effected through CHESS; 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 action referred to under heading 3.2 below.⁵

Where ASX receives such a request and is satisfied that the issuer is capable of complying with the requirements above, ASX must include the financial products in Schedule 1 as FOR financial products and give notice of their inclusion to participants.⁶

3.2. Action by issuer where the foreign ownership percentage level is exceeded

If an issuer whose financial products are included in Schedule 1 determines that the foreign ownership percentage level in respect of those financial products has been exceeded, the issuer must initiate a holding adjustment to move the excess financial products from the relevant CHESS holding to an issuer sponsored holding before the start of day on the next business day.⁷

⁴ ASX Settlement Operating Rule 5.18.1.

⁵ 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).

⁶ ASX Settlement Operating Rule 5.18.2.

⁷ ASX Settlement Operating Rule 5.18.3 and the related Procedure. The issuer must also notify the holder of the number of excess financial products which have been converted to the issuer sponsored holding within 5 business days of the conversion.

If the issuer fails to do so, then the financial products on the CHESSE subregister with a foreign residency indicator become “confirmed FOR financial products” and the issuer must accord them that status.⁸

This designation is important because it means that a foreign person⁹ can then acquire the confirmed FOR financial products by a “foreign to foreign allocation”¹⁰ without being taken to breach the foreign ownership percentage level for that product. Once acquired, the products continue their status as confirmed FOR foreign products, meaning that the new holder can transfer them to another foreign person by a foreign to foreign allocation without the transferee being taken to breach the foreign ownership percentage level for that product.

ASX excludes transactions that are designated as a “foreign to foreign allocation” from settlement netting so that ownership is guaranteed to pass from one foreign owner to another, ensuring that there is no net change in the aggregate level of foreign ownership of the FOR financial product in question.

4. Trading participant responsibilities

ASX Operating Rules Procedure 3500 sets out the reporting requirements for an ASX trading participant to report a trade with the condition code “OR”. This code indicates that the trade is a “foreign to foreign transaction”.

A “foreign to foreign transaction” is a trade in an FOR financial product made between two foreign persons¹¹ on the basis that settlement of the trade will be effected pursuant to the ASX Settlement Operating Rules applicable to FOR financial products, that is, the trade will be excluded from settlement netting so that ownership is guaranteed to pass from one foreign owner to another.¹² The seller’s holding must have a residency indicator of “F” or else the trade will be rejected by CHESSE, resulting in fail fees for the seller.¹³

Trades reported with the “OR” condition code do not increase the volume of securities held by foreign investors in the relevant FOR financial product and therefore are taken not to breach the aggregate foreign ownership restrictions applicable to that FOR financial product.

Where a trading participant wishes to effect a foreign person to foreign person transaction, it must initially report the transaction to the trading platform with the appropriate condition code in accordance with the Rules and Procedures governing that transaction and then cancel the trade and re-report it immediately with the condition code “OR”.

So, for example, where a trading participant effects a foreign to foreign transaction as part of an overnight trade, the trading participant must initially report the transaction to the trading platform by the times specified for reporting overnight transactions under ASX Operating Rule 3320 with the condition code “LT”, and then cancel the trade and re-report it immediately with the condition code “OR”.

⁸ ASX Settlement Operating Rule 5.18.4. The number of confirmed FOR financial products at any point in time is calculated in accordance with the definition of “Confirmed FOR Financial Products” in ASX Settlement Operating Rule 2.13.1.

⁹ “Foreign person” is defined in ASX Settlement Operating Rule 2.13.1 as meaning that the holder has notified the controlling participant that the beneficial owner of the financial products in the holding, for the purposes of legislation or under the constitution of an issuer whose financial products are included in Schedule 1: (a) is a foreign person; (b) is an associate of a foreign person; or (c) has a beneficial interest in the financial products, part of that beneficial interest vesting in a foreign person, other than persons, associates or interests which the legislation or constitution ignores or excludes for the purposes of aggregate foreign ownership restrictions.

¹⁰ A “foreign to foreign allocation” means a transfer or conversion of confirmed FOR financial products, including a transfer pursuant to a transaction effected in accordance with the operating rules of an approved market operator, where the residency indicator of both the source and target holdings is “F”: ASX Settlement Operating Rule 2.13.1.

¹¹ See note 9 above for the definition of “foreign person”.

¹² ASX Operating Rules Procedure 3500.

¹³ ASX will fail a batch instruction in relation to a foreign-to-foreign allocation if the number of confirmed FOR financial products in the seller’s holding specified in the CHESSE message is less than the number of confirmed FOR financial products to be transferred or if the seller’s holding specified does not have a residency indicator of “F”: ASX Settlement Operating Rule 10.11.5.

5. Settlement participant responsibilities

ASX Settlement participants have various obligations in relation to the residency indicators attached to holdings of FOR financial products.

5.1. The initial application of a residency indicator

Before it includes a new holding of FOR financial products in a holder record, a participant must determine whether the residency indicator of a holder record is appropriate for the new holding. If it is not and there is no existing holder record with the appropriate residency indicator, the participant must:

- establish a separate holder record for the new holding with the appropriate residency indicator; and
- transfer the new holding to that holder record.¹⁴

It should be noted that because of differing definitions of "foreign person" under the governing legislation or constitution of different issuers with aggregate foreign ownership restrictions, a holder's status for the purposes of settling transactions in FOR financial products may differ between different issuers and different FOR products. For example, the holder may be considered a domestic holder for the purposes of one issuer and its FOR financial products but a foreign holder for the purposes of another issuer and its FOR financial products. Where these circumstances apply, the holder must have two distinct holder records in CHES; one with a residency indicator of "D" and another with a residency indicator of "F". Holdings of the particular FOR financial products must then be linked to the appropriate holder record.

5.2. Additional obligations where a residency indicator is "M"

If a participant controls a holding which has a residency indicator of "M" and FOR financial products are entered into that holding, it must advise the issuer of the FOR foreign products, at intervals determined by the issuer, of:

- the aggregate number of units in the holding which is beneficially owned by a foreign person; and
- the level of increase or decrease in the number of units, whichever is relevant, which are beneficially owned by a foreign person:
 - since the previous report to the issuer, or
 - if no previous report was submitted, since the FOR financial products were entered into the holding.¹⁵

5.3. Changing a residency indicator

If a participant:

- is directed by a holder to change a residency indicator in a holder record for a holding of FOR financial products; or
- becomes aware that a residency indicator recorded in a holder record for a holding of FOR financial products is incorrect,

the participant must immediately notify ASX of a change to the residency indicator recorded in that holder record in accordance with the Procedures.¹⁶

¹⁴ ASX Settlement Operating Rule 8.7.3.

¹⁵ ASX Settlement Operating Rule 6.9.1. Beneficial ownership by a foreign person is determined by reference to the relevant governing legislation or the issuer's constitution: see note 9 above.

¹⁶ ASX Settlement Operating Rule 8.18.9 and the related Procedure.

5.4. Indemnity for incorrect residency indicators

A participant that provides an incorrect residency indicator to ASX is liable to indemnify ASX and the issuer from and against all losses, damages, costs and expenses which ASX or the issuer may suffer or incur.¹⁷

This does not apply if the participant has provided details which are consistent with the directions of the relevant holder for the purposes of holding FOR financial products and the participant had no reason to believe that those directions were incorrect.¹⁸

It is important, therefore, that participants have robust processes for collecting and verifying residency indicators for holdings of FOR financial products.

5.5. Settlement and accumulation accounts for FOR financial products

Unless otherwise agreed by ASX or specified in the Procedures, a participant must establish a settlement account and an accumulation account with a residency indicator of "F" to facilitate foreign to foreign allocations.¹⁹

A participant which is also a clearing participant and which has multiple PIDs²⁰ must establish a settlement account and an accumulation account with a residence indicator of "F" to facilitate foreign to foreign allocations in respect of each such PID.²¹

A "foreign to foreign transaction" with the condition code "OR" must be settled through a settlement account and accumulation account with a residency indicator of "F", so that it is excluded from netting.

¹⁷ ASX Settlement Operating Rule 8.7.4.

¹⁸ ASX Settlement Operating Rule 8.7.5.

¹⁹ ASX Settlement Operating Rule 6.3.4(b).

²⁰ A PID is the unique identification code allocated by ASX to a participant under the ASX Clear and ASX Settlement Operating Rules.

²¹ ASX Settlement Operating Rules Procedure 6.3.4.