

Level 24, 44 Market Street  
Sydney NSW 2000  
Tel: +61 2 8235 2530  
Fax: +61 2 9299 3198  
acsa@ifsa.com.au  
www.custodial.org.au

7 July 2009

Australian Securities & Investments Commission  
No. 1 Martin Place  
SYDNEY NSW 2000

Attention Mr John Price

Dear Sirs

### **ASIC Class Order Relief for Share and Interest Purchase Plan**

The Australian Custodial Services Association (**ACSA**) represents the interests of the custodial services industry in Australia.

ACSA wishes to make this submission in relation to ASIC's Regulatory Guide 125 *Share Purchase Plans* issued 18 June 2009 and ASIC Class Order [CO09/425] *Share and Interest Purchase Plans*, issued 15 June 2009.

### **Background on ACSA**

ACSA is a company limited by guarantee and currently represents members holding securities in excess of \$1.3 trillion in custody and administration, and employing in excess of 3,000 people. All ACSA members either hold an Australian financial services licence (AFS licence) under which they are authorised to provide custodial or depository services, or are authorised representatives of such licencees.

ACSA member clients comprise persons who fall within the definition of "professional investor" under the *Corporation Act 2001 (Corporations Act)*. The entities for whom members of ACSA act largely comprises of other financial services licencees, such as responsible entities of managed investment schemes, trustees of wholesale unit trusts, trustees of public offer, industry and corporate superannuation funds, life insurance companies and general insurers, together with listed companies, federal and state governments and government agencies, global custodians, international banks and other major financial institutions.

Of relevance to this submission, ACSA members provide custodial services to IDPS operators, operators of IDPS-like schemes and trustees of superannuation master trusts.

Those ACSA member clients were pleased by the recent change to ASIC's position in relation to the ability of the issuers of shares and interests under share and interest purchase plans to make offers to custodians for the beneficiaries of shares or interests held by those custodians but are now concerned by a possible obstacle raised in Regulatory Guide 125.

... cont 2

Our concern arises both in the context of:

1. Domestic Custody (such as for IDPS and master trusts); and
2. Global Custody (where there are multiple custodians in the chain).
  
3. Domestic Custody - opportunity for investors in IDPS and master trusts

An IDPS or IDPS –like scheme<sup>1</sup> offers an investor an opportunity to invest in securities and interest but with the added convenience of centralised administration and reporting in relation to the investor's transactions and holdings.

Similarly, an investor (member) in a superannuation master trust that offers single share investment strategies is given an opportunity to obtain economic exposure to listed shares and interests which they select from a menu of investment options made available by the trustee.

To the extent possible, both of these platforms are designed to give an investor the rights and benefit which would accrue to them if they had invested directly in the underlying share or interest. Particularly in the case of IDPS, this is reflected in the terms of the Class Order relief which is made available for the operation of these structures. So for example, the Regulatory Guide concerning investor directed portfolio services provides as follows:

*"An IDPS is a managed investment scheme having the following features:*

- (a) *Assets in which a client is to have an economic interest may be acquired or held by a custodian (which may or may not be the operator);*
- (b) *The client has the **sole discretion** to decide what (but not necessarily when) assets will be acquired or disposed of .....*;
- (d) *Any discretion of the holder of assets held through the IDPS may be exercised in accordance with the direction from time to time of the relevant client and not otherwise .....*"

The Regulatory Guide goes on to provide:

*"A fundamental characteristic of an IDPS is that all investment decisions are made by the client, although the operator can give effect to directions previously given by the client. This is why we are treating this arrangement as a service rather than as an investment product."<sup>2</sup>*

Similarly in relation to superannuation funds, sub-s52(4) of the *Superannuation Industry (Supervision) Act 1993 (Cth)* allows members to have investment strategy choice at an individual asset level. This permits an investor (member) in a superannuation master trust to direct the trustee as to the investment options into which they wish their benefits to be invested, which may include listed shares and listed interest investments.

It is clear that the intention of these structures is to provide retail investors with the advantages of investing directly in shares and interests, but with the added convenience of aggregated administration and reporting.

---

<sup>1</sup> A registered managed investment scheme that operates like an IDPS

<sup>2</sup> RD1 for a .15

2. Global Custody – multiple custodians

As a result of global investments, a common structure in the custodial services industry involves the appointment of a sub-custodian by a global custodian (which is itself acting as custodian for various underlying clients). A sub-custodian is appointed by the global custodian to hold assets which the global custodian is either unable to hold (due to regulatory requirements or otherwise) or has made a decision that it will appoint a sub-custodian to hold for reasons such as operational expertise and efficiency. For example, to hold Australian listed equities, a custodian must be a participant with access to CHES.

We have included a diagram of a typical structure in Example 5 attached.

In a structure involving a global custodian, there are multiple custodians and multiple levels in the chain of ownership. The possible obstacle posed by Regulatory Guide 125 raises particular concerns for ACSA members, many of whom are either acting in the capacity as sub-custodian in this structure, or are a global custodian who have appointed another ACSA member as its sub-custodian.

**Change in approach**

Class Order [CO02/831] clearly provided that an offer could only be made available to a registered holder of listed shares or listed scheme interests, with the term, 'registered holder' being defined to mean a person recorded in the register of members of a listed company or listed scheme as a member of that company or scheme. If a trustee or nominee was expressly noted on the register of members as holding shares or interest on account of another person, then the beneficiary could then be taken to be the registered holder in regard to those shares or interest, but the beneficiary was not otherwise permitted to participate in a share or interest purchase plan.

Accordingly, it has always been a disadvantage to investments in IDPS, superannuation master trusts and similar structures which permit investors to direct the relevant trustee or responsible entity to acquire a named share or interest in respect of which they wish to have an economic exposure that investors in them could not participate in share purchase plans made available to other retail investors. The same issues apply in the global custody structure. This anomaly has given ACSA members and their clients concern in the past, with issuers keen for ACSA members to accept offers made in relation to each underlying investor's holding. However, it has been the view of ACSA that the previous form of Class Order relief available in relation to share purchase plans has not permitted that acceptance. We attach for your reference a copy of an ACSA circular to its members dated March 2009 in which this position is explained.

That Class Order is now to be phased out and will be superseded by CO09/425, which is the subject of this submission.

The new Class Order exempts an issuer from compliance with Part 6D.2 or 6D.3 of the *Corporations Act 2001* (other than section 736 and 738) for an offer of shares for issue under a purchase plan and exempts a responsible entity of a registered scheme from compliance with section 1012B or Division 4 of Part 7.9 of the *Corporations Act* in relation to an offer of interests in the scheme for issue, or an issue of interest in the scheme, under a purchase plan.

... cont 3

A 'purchase plan' is defined to mean an arrangement under which offers are made to registered holders of shares or interests which are on the same terms, where the issue price is less than the market price during a specified period in the 30 days before the date of the offer or the date of issue and the total application price for the shares or interest acquired by a person on their own behalf or by a custodian on behalf of the person in any 12 months period does not exceed \$15,000. An arrangement will still be a 'purchase plan' if an offer made enables a registered holder who is a custodian to acquire shares or interests on behalf of a person on whose behalf the custodian is holding shares or interests in the class.

A 'custodian' is defined as a registered holder:

- (a) that holds an AFS licence that covers the provision of custodial or depository services or includes a condition requiring the holder to comply with the requirements of ASIC Class Order CO2/294 or;
  - (b) that is exempt under;
    - (i) Paragraph 7.6.01(1)(k) of the Corporations Regulations 2001; or
    - (ii) ASIC Class Order [CO05/1270] to extent that it relates to ASIC Class Order [CO03/184]
- from the requirement to hold an AFS licence for the provision of custodial or depository service.

The new Class Order CO09/425 clearly contemplates the potential for an issuer to make "custodian offers". A custodian offer is an offer to a registered holder to the extent that it is of the kind referred to in paragraph (b) of purchase plan. The Class Order<sup>3</sup> permits an issuer to make offers to a custodian provided that the custodian makes certain certifications in writing to issuer including:

- (a) That the custodian holds shares or interests in the class on behalf of one or more other persons who have instructed the custodian to apply for shares or interests on their behalf;
- (b) The number of participating beneficiaries;
- (c) The name and address of each participating beneficiary;
- (d) In respect of each participating beneficiary, the number of shares or interests in the class the custodian holds on their behalf;
- (e) In respect of each participating beneficiary, the number or dollar amount of shares or interests they instructed the custodian to apply for on their behalf; and
- (f) That there are no participating beneficiaries in respect of whom the total of the application price exceeds \$15,000 for the offer made under the purchase plan or under similar purchase plans made available in a 12 month period.

... cont 4

---

<sup>3</sup> Paragraph 9,

## **Intermediary custody and the new Class Order**

The Class Order clearly contemplates intermediary custody, that is, arrangements under which the registered holder of the securities is in fact acting on behalf of another person who in turn has the master custody role in relation to the underlying client or investor. This is particularly borne out by the reference in the definition of "custodian" to persons who are exempt from the requirement to hold an AFS licence because of regulation 7.6.01 (1)(k). In the case where that regulation applies, the relevant nominee does not hold an AFS licence but would be acting on behalf of a master custodian who in turn has an arrangement to hold a financial product on trust for or on behalf of a client.

This fact, together with the fact that the beneficial interest in the relevant shares or interests will always reside with the underlying investor, could lead to the conclusion, based on the Class Order alone, that the nominee or sub-custodian at the bottom of a custody intermediary chain, is still able to participate in a purchase plan on behalf of those investors at the top of the chain. Examples of common custodial structures to which this is relevant are shown in attachments to this letter.

## **Problem with ASIC Regulatory Guide 125**

However, in any event, ASIC Regulatory Guide 125 has made this position unclear.

At paragraph 21 of the Regulatory Guide, there is a discussion of intermediary custody. The note, at paragraph (a) provides:

*Note: 'Beneficiary' in this context means a first-level client of a custodian. The phrase 'holds shares' means holds legal title. A "second-level" custodian, i.e. a custodian that is a client of the "first-level" custodian cannot accept share purchase plan offers for each of their own clients."*

This note has resulted in a concern, among ACSA members and ACSA member clients as to the ability of a nominee or sub-custodian to participate in share purchase plans on behalf of investors in IDPS or superannuation master trust structures or for underlying investors in a global custody structure. As shown in the attached examples, many of these structures use a short chain of custodial entities for reasons of operational expertise and efficiency.

For the reasons given above, it should not be the case that an investor in a particular listed share or listed interest is precluded from participating in a share purchase plan only because of the manner in which their interest is held. That is, the ability of an investor in an IDPS, master trust or similar structure to participate in a share purchase plan should not hinge on whether the client's interests are held through a custodian or nominee, as this would appear to be arbitrary and unfair. As recognised in the Regulatory Guide, there are benefits to both issuers and investors in permitting fund raising to occur through share and interest purchase plans and ensuring that retail investors are able to participate. In particular, at paragraph 5 of Regulatory Guide 125, it is said:

*"Without relief from the disclosure requirements of Ch. 6D it is unlikely that share purchase plans would be offered. This would disadvantage retail investors, who are most likely to participate in share purchase plans and who may be excluded from other fund raising opportunities such as institutional placements."*

... cont 6

A significant portion of retail investors now invest directly in shares and interests through IDPS and superannuation master trust structures. There is also a significant portion of the market which uses a sub-custodian and a nominee company to hold the assets. In the circumstances, there appears to be no reason to treat those investments differently from investments that are made directly. In fact, it appears that ASIC considers this to be the case as it has sought to amend its position by issuing revised Class Order 09/425 and by deliberating framing the definition of "custodian" so that it incorporates some intermediary custody structure. We also note that the Explanatory Statement to the Class Order clearly indicates that the intention was to enable participation by "*retail investors ..... who own shares or units through investment platforms (such as master trusts) ....*" (page 2).

However, in the absence of clarification from ASIC of RG 125.21, custodians will feel unable to make the participation in share purchase plans available to underlying retail investors.

**Response required**

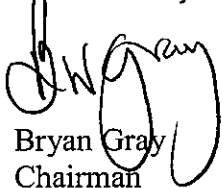
ACSA seeks confirmation from ASIC that it intended by the Regulatory Guide and ASIC Class Order 09425 to permit custodians, sub-custodians and nominees, who are the registered holders of shares and interests, examples of which are given the attachments to this letter, to participate in share purchase plans for the benefit of those investors who hold the beneficial ownership.

ACSA would like to meet with ASIC as a matter of urgency to discuss this issue. Currently, investors in IDPS, IDPS-like, master trust and global custody structures will be denied the opportunity to participate in future share purchase plans pending clarification from ASIC.

ACSA would also appreciate the opportunity to discuss the certification requirements with ASIC. As ASIC will appreciate from the diagrams attached, ACSA members have no knowledge of the details of individual beneficial owners who wish to participate in share purchase plans and will rely on their clients to provide the relevant information. Can the certification be provided directly by those persons?

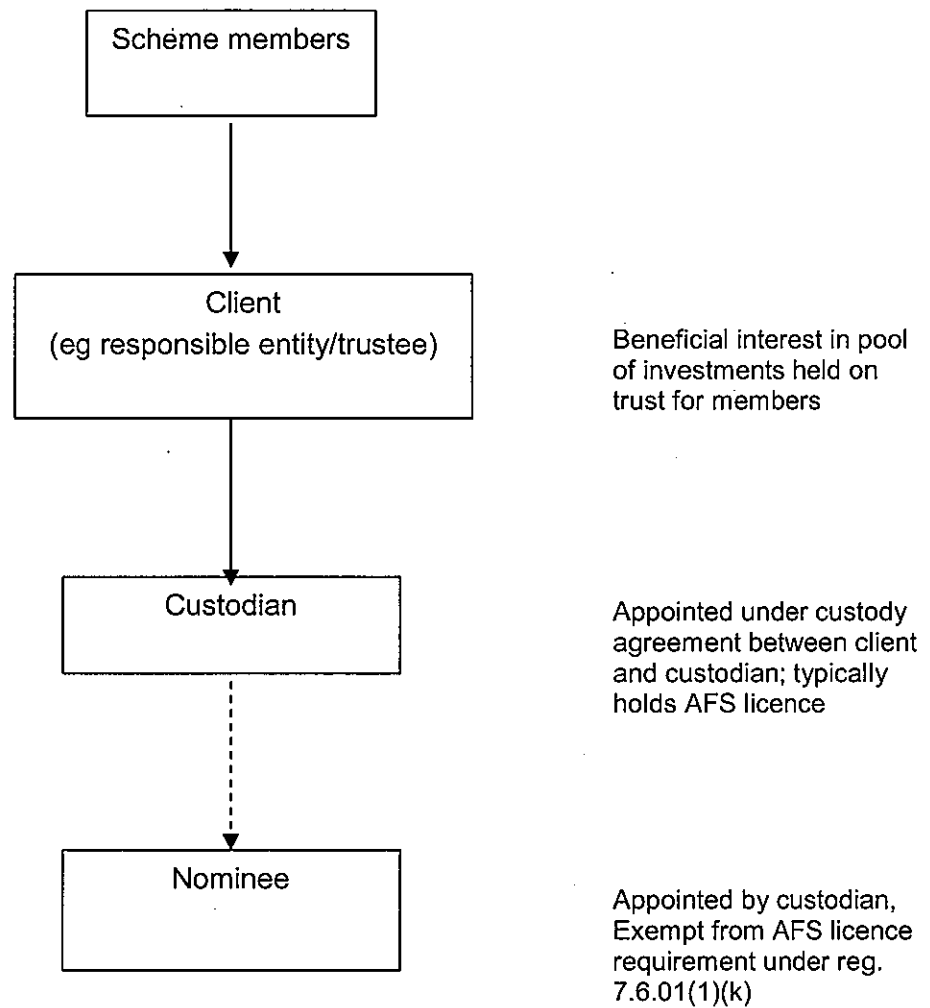
Please contact David Travers on (02) 8262 5020 or Lisa Simmons on (02) 9258 6595 to arrange a time.

Yours faithfully

  
Bryan Gray  
Chairman

**EXAMPLE 1**

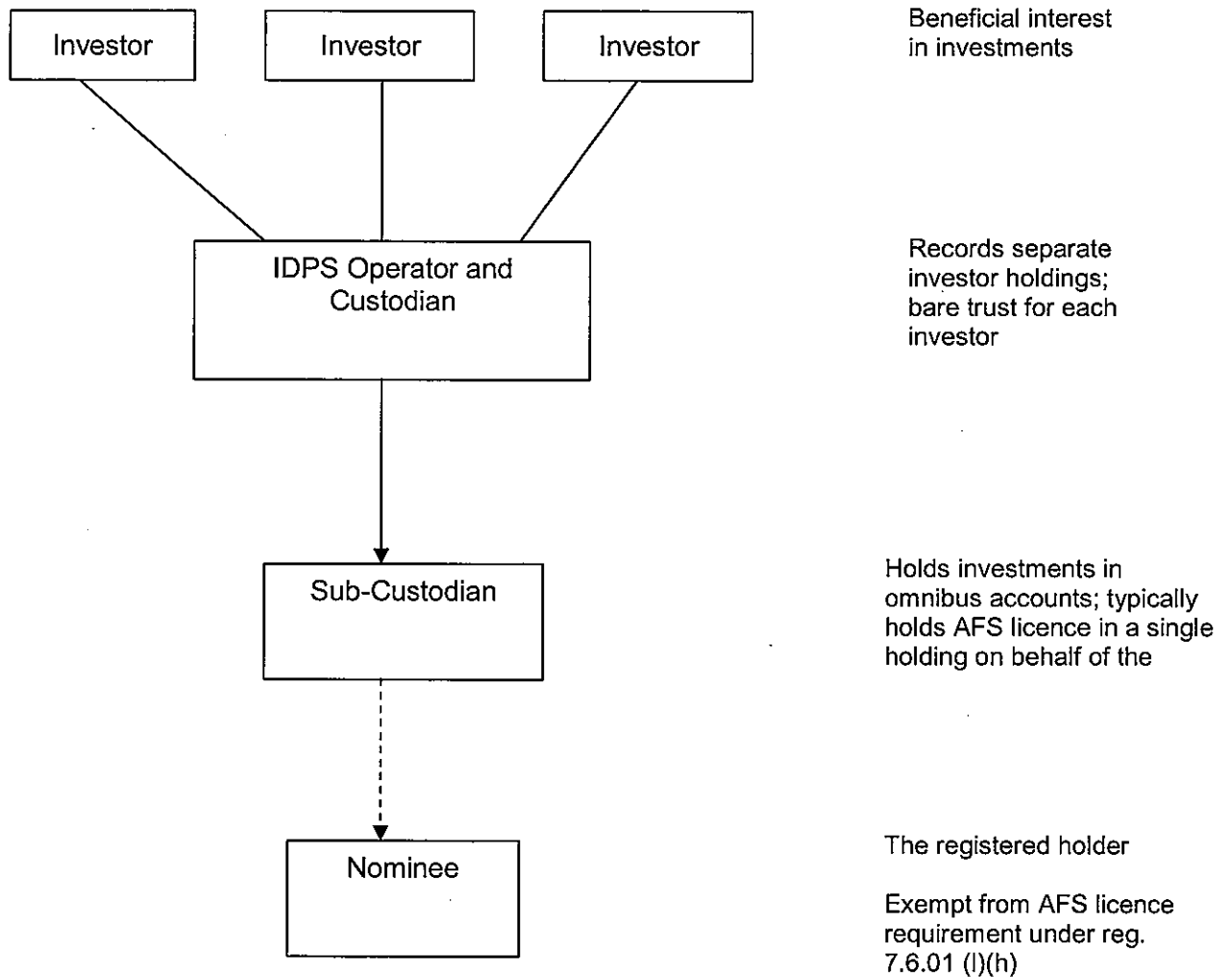
**SIMPLE CUSTODY MODEL WITH NOMINEE<sup>4</sup>**



<sup>4</sup> ACSA members would not consider this to be an example where scheme members should be able to participate individually in a share purchase plan. In this instance, scheme member would not have the ability to direct the responsible entity or trustee in relation to its investment in a particular security, nor does a member face economic exposure to the single security which it has directed the responsible entity or trustee to acquire (but rather has exposure to the pool selected by the responsible entity or trustee)

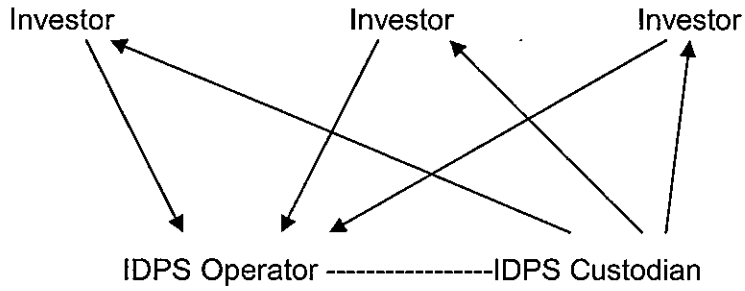
**EXAMPLE 2**

**IDPS OPERATOR WITH SUB-CUSTODIAN**



**EXAMPLE 3**

**IDPS OPERATOR WITH IDPS CUSTODIAN**



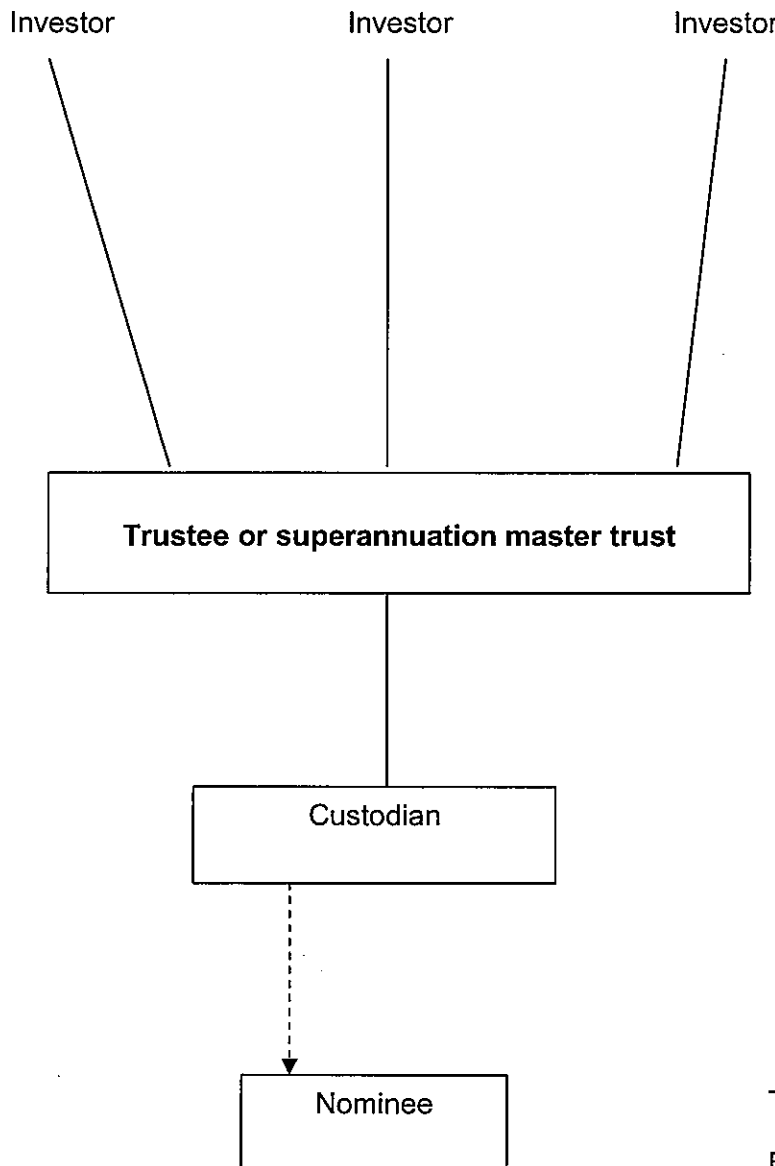
IDPS Custodian holds an interest in securities for each investor; under an arrangement with the IDPS operator; arrangement is bare trust

Nominee

The registered holder  
Exempt from AFS  
licence requirements  
under reg. 7.6.01(l)(k)

**EXAMPLE 4**

**MASTER TRUST WITH CUSTODIAN**



Investors instruct master trustee to invest in specific securities; investor gets returns linked to investment performance; technically, all investors have beneficial interest in pool of investments, but individual investors direct trustee

APRA Regulated RSE licensee; SIS Act requires trustee to appoint a custodian

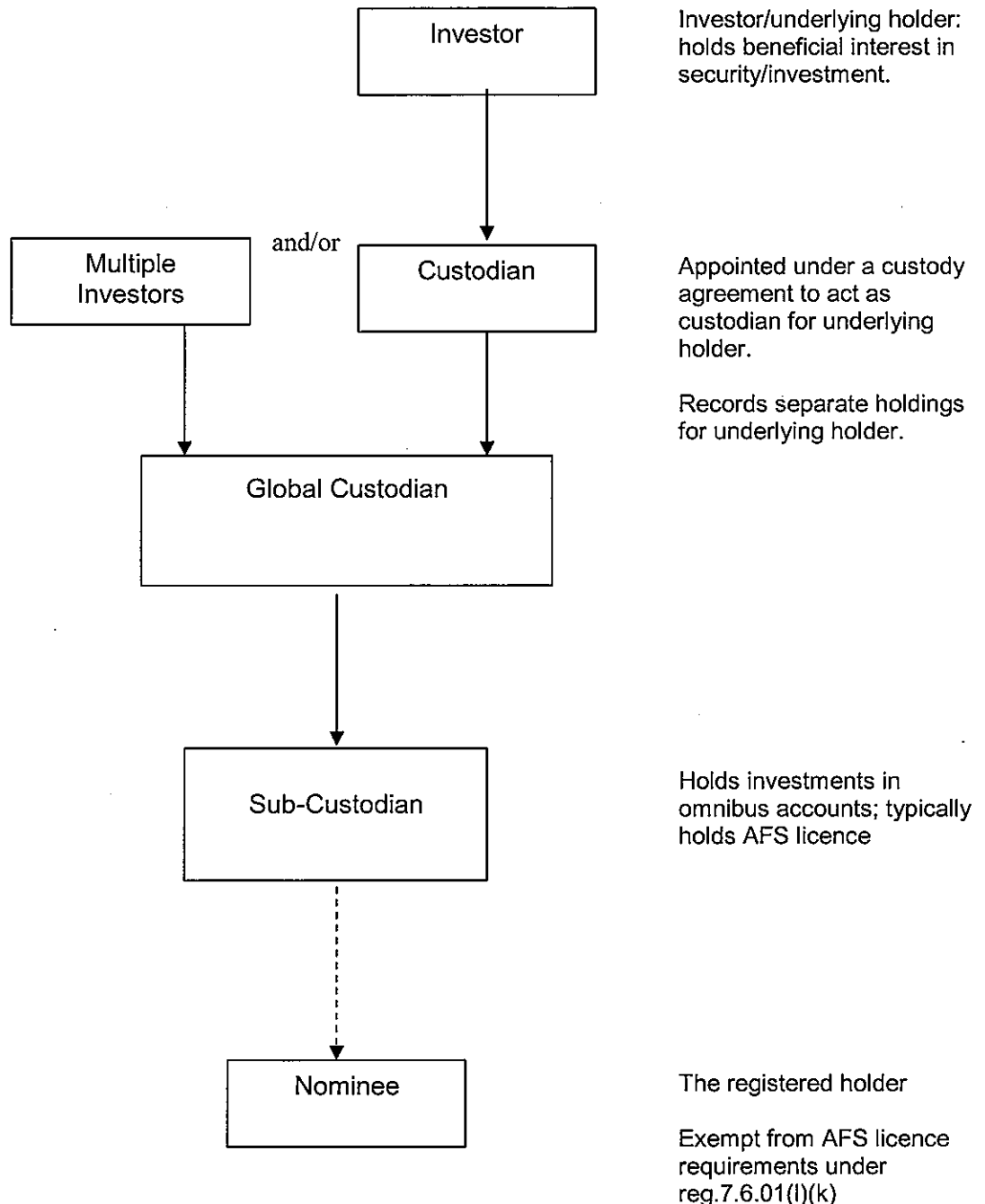
Holds investments in omnibus accounts; typically holds AFS licence

The registered holder

Exempt from AFS licence requirements under reg.7.6.01(l)(k)

**EXAMPLE 5**

**GLOBAL CUSTODY MODEL WITH MULTIPLE CUSTODIANS, SUB-CUSTODIAN AND NOMINEE AS REGISTERED HOLDER**



**Note:** The above diagram represents a typical structure when global custodians are involved. The concern of ACSA members is that the wording of CO09/425 and the interpretation offered in Regulatory Guide 125 would not allow an offer to be made by the Global Custodian (as the second level) to the underlying holders who hold the beneficial interest in the securities/investments.