Status: **legally binding**

Product Ruling

CHESS depositary interests over interests in the SPDR® S&P 500® ETF Trust

Relying on this Ruling

This publication (excluding appendix) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

Terms of use of this Ruling

This Ruling has been given on the basis that the entity who applied for the Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Ruling.

Changes in the law

Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in schemes such as this. In keeping with that intention, the Commissioner suggests promoters and advisers ensure that participants are fully informed of any legislative changes after the Ruling has issued. Similarly, entities that are considering participating in the Scheme are advised to confirm with their tax adviser that changes in the law have not affected this Ruling since it was issued.

No guarantee of commercial success

The Commissioner does not sanction or guarantee this product. Further, the Commissioner gives no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential participants must form their own view about the commercial and financial viability of the product. The Commissioner recommends a financial (or other) adviser be consulted for such information.

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Status: **legally binding**

What this Ruling is about

1. This Ruling sets out the income tax consequences for entities that participate as an investor in CHESS depositary interests (CDIs) over units in the SPDR® S&P 500® ETF Trust (the Fund), offered under a Product Disclosure Statement (PDS) issued by State Street Global Advisors Trust Company as the trustee of the Fund (the Trustee) and State Street Global Advisors, Australia Services Limited (the AQUA Product Issuer).

2. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997*, unless otherwise indicated. Terms which are defined in the PDS referred to in paragraph 11 of this Ruling have been capitalised.

3. This Ruling does not address:

- the tax consequences
  - of any financial accommodation the investor obtains to fund the purchase of their CDIs
  - of any costs (including brokerage charges) paid by the investor in relation to their CDIs
  - arising upon a transfer or assignment of the investor's CDIs to another party (other than a transfer on the AQUA market), and
  - of any foreign exchange currency gains or losses arising under the scheme, and
- whether this scheme constitutes a financial arrangement for the purposes of Division 230 (taxation of financial arrangements).

Who this Ruling applies to

4. This Ruling applies to you if you:

- accepted to participate in the scheme described in paragraphs 11 to 24 of this Ruling, as an investor, on or after 1 July 2023 but on or before 30 June 2026, and
- an Australian resident for tax purposes.

5. This Ruling does not apply to you if you:

- are accepted to participate in the scheme described in paragraphs 11 to 24 of this Ruling before 1 July 2023 or after 30 June 2026
- participate in the scheme through offers made other than through the PDS, or you enter into an undisclosed arrangement with the promoter or a promoter associate, or an independent adviser that is interdependent with scheme obligations or scheme benefits (which may include tax benefits) in any way
- trade in CDIs and are treated for tax purposes as trading in the CDIs or other equity interests, carry on a business of investing in CDIs or other equity interests, or hold the CDIs as trading stock or as a revenue asset, or
- are subject to Division 230 in respect of this scheme.

Requirements of the Superannuation Industry (Supervision) Act 1993

6. This Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993*. The Commissioner gives no assurance that the Scheme is an appropriate investment for a superannuation fund. The trustees of superannuation funds are advised that no consideration has been given in this Ruling as to whether investment in this Scheme may contravene the provisions of the *Superannuation Industry (Supervision) Act 1993*.

Date of effect

7. This Ruling applies from 1 July 2023 to investors specified in paragraph 4 of this Ruling who enter into the scheme described in paragraphs 11 to 24 of this Ruling from 1 July 2023 until 30 June 2026.

8. However, the Ruling only applies and may be relied on to the extent that there is no change in the scheme or in the investor's involvement in the scheme. If the scheme carried out is materially different from the scheme described at paragraphs 11 to 24 of this Ruling, this Ruling cannot be relied upon and may be withdrawn or modified.

Ruling

9. Subject to paragraph 3 of this Ruling and the assumptions in paragraph 10 of this Ruling:

(a) Distributions from the Fund will be treated as dividends and will be assessable to the investor as the holder of the CDIs under section 97 of the *Income Tax Assessment Act 1936* (ITAA 1936).

(b) CDIs held by the investor are CGT assets under subsection 108-5(1).

(c) Any disposal of the CDIs by the investor on the AQUA market of the Australian Securities Exchange (ASX) will give rise to a CGT event A1 under section 104-10.

(d) Any capital gain realised by the investor from the disposal of the CDIs will be treated as a discount capital gain pursuant to section 115-5 where the investor is an individual, a complying superannuation entity, or a trust and has held the CDIs for at least 12 months.

(e) Subject to the foreign income tax offset limit in section 770-75, the investor will be entitled to a foreign income tax offset under Division 770 in an income year for foreign income tax paid by the investor (or Depositary Nominee) on an amount received by the investor from the Fund that is included, in part or whole, in the investor's assessable income for that income year.

(f) CDIs held by the investor are not 'qualifying securities' as defined in subsection 159GP(1) of the ITAA 1936.

(g) Division 230 will not apply to any gains or losses with respect to this scheme where the investor is excepted from the Division pursuant to section 230-455.

(h) Provided the scheme ruled on is entered into and carried out as described in this Ruling, the anti-avoidance provisions in Part IVA of the ITAA 1936 will not apply to the investor.

Assumptions

10. This Ruling is made on the basis of the following necessary assumptions:

(a) The investor is an Australian resident for tax purposes.

(b) Individual investors are not under a legal disability.

(c) The Fund will qualify for tax as a regulated investment company for United States (US) federal income tax purposes each year and by distributing all of its income each year will not be liable to pay US federal income tax or excise tax on its distributed income.

(d) The investor is not treated for tax purposes as trading in the CDIs, carrying on a business of investing in the CDIs and other equity interests, or holding the CDIs as trading stock or as a revenue asset.

(e) Any distributions by the Fund flowing to the Depositary Nominee will be paid out of the Fund's current or accumulated earnings and profits and will therefore be treated as a dividend for US federal income tax purposes.

(f) The investor will not claim a foreign income tax offset under Division 770 in respect of foreign income tax which they are considered not to have paid in accordance with the anti-avoidance rule under section 770-140.

(g) The scheme will be executed in the manner described in the scheme documentation referred to in paragraph 11 of this Ruling and in the Scheme section of this Ruling.

(h) All dealings between the investor, the AQUA Product Issuer, Depositary Nominee (or its custodian), the Sponsor and the Trustee will be at arm's length.

Scheme

11. The scheme is identified and described in the following:

- application for a product ruling as constituted by documents and information received on 2 May 2023
- amended and restated standard terms and conditions of the Standard & Poor's Depositary Receipts® (SPDR®) Trust Series 1, dated 1 January 2004 and Amendments dated 1 November 2004, 1 February 2009, 23 November 2009, 12 April 2017 and 4 August 2017
- US Prospectus of the SPDR® S&P 500® ETF Trust, dated 27 January 2023, and
- SPDR® S&P 500® ETF Trust PDS dated 17 June 2017 and Supplementary Product Disclosure Statements dated 30 June 2017, 29 September 2017, 21 January 2020, 14 February 2022 and 30 September 2022.

Note: Certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

12. For the purposes of describing the Scheme, there are no other agreements (whether formal or informal, and whether or not legally enforceable) which an investor, or any associate of investor, will be a party to which are a part of the Scheme.

13. All Australian Securities and Investments Commission requirements are, or will be, complied with for the term of the agreements.

Overview of scheme

14. The AQUA Product Issuer and Trustee receive offers for units in the Fund from investors through an Authorised Participant and a PDS issued by the AQUA Product Issuer and the Trustee.

15. The Fund is:

- a US exchange traded fund (ETF) which invests in a portfolio of securities with the objective of tracking the S&P 500 Index
- a unit investment trust created under the laws of the State of New York, US
- principally listed and trades on NYSE Arca, Inc. (the US Exchange)
- registered as an investment company under the *Investment Company Act 1940* (US), as amended, and
- treated as a corporation for US federal income tax purposes.

16. The Fund has been cross-listed on the AQUA market of the ASX. The cross-listing has been implemented by the creation of CDIs over units in the Fund which represent an undivided ownership interest in the portfolio of securities of the Fund. Such CDIs are quoted for trading under the AQUA rules (set out in Schedule 10A to the ASX Operating Rules).

17. Legal title in the cross-listed units in the Fund is held by the nominee of the US securities depositary for an Australian depositary nominee (the Depositary Nominee) or its custodian.

18. The Fund issues and redeems units at the net asset value per unit once each US business day. Only certain institutional investors (typically market makers or other broker-dealers) that are registered authorised participants in the US (US Authorised Participants) are permitted to purchase or redeem units directly with the Fund, and they may do so only in blocks of 50,000 units.

19. The CDIs are created by an approved Authorised Participant arranging for the relevant basket of Fund units to be transferred to the Depositary Nominee (or its custodian).

20. On receipt of the Fund units the Depositary Nominee issues corresponding CDIs to the relevant Authorised Participant.

21. Australian retail investors are only able to trade in CDIs on the secondary market (the AQUA market of the ASX). That is, there are no primary issues or redemptions of CDIs over units in the Fund to or by Australian retail investors.

22. CDIs are redeemed by the Depositary Nominee cancelling CDIs and transferring the corresponding Fund units to the relevant Authorised Participant (or their relevant Depositary Trust Company participant).

Status: **legally binding**

23. A CDI confers on its holder (the investor) a beneficial interest in a unit in the Fund, including the distributions on those units. Each CDI corresponds to a single Fund unit on a one-for-one basis.

24. Investors are entitled to receive an amount representing dividends accumulated under the Fund less fees, quarterly or monthly as determined by the Trustee and the Sponsor. Other income may be distributed annually as determined by the Trustee.

Commissioner of Taxation
30 August 2023

Status: **not legally binding**

Appendix – Explanation

This Explanation is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

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Assessability of distributions to investors

25. CDIs provide a beneficial interest to the investor in the units in the Fund. Each CDI gives rise to a separate trust estate. Distributions from the Fund will represent income of each trust estate represented by a CDI and will be assessable to the investor under section 97 of the ITAA 1936.

26. Distributions from the Fund will be treated as dividends as the Fund is treated as a company for US federal income tax purposes.

27. According to the double-tax treaty between Australia and the US (US Convention[1]) an entity will satisfy the definition of a company if the entity is treated as a company or body corporate for tax purposes.

28. Further, Article 10(6) of the US Convention defines the term 'dividend' to mean:

> … income from shares, as well as other amounts which are subjected to the same taxation treatment as income from shares by the law of the State [in this case the US] of which the company making the distribution is a resident for the purposes of its tax.

29. Therefore, any distributions made by the Fund flowing to the Depositary Nominee will be treated as distributions made by a company and will have the same character as dividends. Accordingly, distributions from the Fund will be treated as dividends which will comprise the net income of each trust estate relating to the CDIs and will be assessable to the investor as the holder of those CDIs under section 97 of the ITAA 1936.

[1] *Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* [1983] ATS 16.

Status: **not legally binding**

Application of capital gains tax provisions on disposal of CHESS depositary interests

Section 108-5 – CGT asset

30. Under subsection 108-5(1) a CGT asset is any kind of property, or a legal or equitable right that is not property. A CDI is a CGT asset under subsection 108-5(1).

Section 104-10 – CGT event A1

31. The disposal of the CDIs by the investor gives rise to a CGT event A1 in respect of the investor (section 104-10). The investor will make a capital gain from this CGT event if the capital proceeds from the disposal of the CDIs are more than the CDIs' cost base or, alternatively, a capital loss from this CGT event if those capital proceeds are less than the CDIs' reduced cost base (subsection 104-10(4)).

32. The investor's capital proceeds under section 116-20 will be the amount they receive from the disposal of the CDIs on the AQUA market.

33. The cost base or the reduced cost base of the investor's CDIs will be the acquisition cost of the CDIs plus any incidental costs incurred by the investor in acquiring the CDIs (sections 110-25 and 110-55). The cost base or the reduced cost base of the investor's CDIs will be reduced by the amount of any distribution to the extent it is not treated as a dividend for US federal income tax purposes. If those distributions exceed the investor's existing cost base in their CDIs, a capital gain equal to the excess will arise.

Section 115-5 – discount capital gains

34. Division 115 allows a taxpayer a discount on capital gains in certain circumstances. In accordance with section 115-5, any capital gain realised by the investor as a result of the disposal of the CDIs will be treated as a discount capital gain where the investor has held those CDIs for at least 12 months (excluding the days of acquisition and disposal).

35. To be a discount capital gain the capital gain must be made by an investor that is either an individual, a complying superannuation entity, or a trust (section 115-10).

Division 770 – foreign income tax offset

36. Division 770 allows a non-refundable tax offset for an income year for foreign income tax paid where that amount of foreign income tax is paid in respect of an amount that is included in your assessable income for the year.

37. To the extent that the investor has paid, or is deemed to have paid, foreign income tax (such as withholding tax at source):

(a) The foreign taxes paid by the investor will be regarded as foreign income tax for the purposes of section 770-15.

(b) Where those foreign taxes are paid by the Depositary Nominee (or a custodian of the Depositary Nominee), the foreign income tax will be deemed, under section 770-130, to have been paid by the investor.

(c) Subject to the foreign income tax offset limit in section 770-75 the investor will be entitled to a non-refundable foreign income tax offset in an income year for the foreign income tax the investor paid, or is deemed to have paid, on amounts that are included in the investor's assessable income that year.

Status: **not legally binding**

Subsection 159GP(1) of the ITAA 1936 – qualifying security

38. A 'qualifying security' is defined in subsection 159GP(1) of the ITAA 1936. For the purposes of determining whether an arrangement is a qualifying security, that arrangement must be a 'security', also defined in subsection 159GP(1) of the ITAA 1936 to mean:

(a) stock, a bond, debenture, certificate of entitlement, bill of exchange, promissory note or other security;

(b) a deposit with a bank or other financial institution;

(c) a secured or unsecured loan; or

(d) any other contract, whether or not in writing, under which a person is liable to pay an amount or amounts, whether or not the liability is secured.

39. CDIs acquired by the investor do not fall within paragraphs (a), (b), (c) or (d) of the definition of security in subsection 159GP(1) of the ITAA 1936. Therefore, the CDIs are not qualifying securities under subsection 159GP(1) of the ITAA 1936.

Division 230 – taxation of financial arrangements

40. Division 230 sets out the tax treatment of gains or losses from a 'financial arrangement'.

41. Where an arrangement is not a qualifying security for the purposes of Division 16E of the ITAA 1936 and an election under section 230-455 to have Division 230 apply to financial arrangements has not been made, then pursuant to section 230-455, Division 230 does not apply in relation to gains or losses from a financial arrangement held by:

- an individual
- a superannuation entity (or other superannuation fund), a managed investment scheme or an entity substantially similar to a managed investment scheme under foreign law with assets of less than $100 million
- an authorised deposit-taking institution, a securitisation vehicle or other financial sector entity with an aggregated turnover of less than $20 million, or
- another entity with an aggregated turnover of less than $100 million, financial assets of less than $100 million and assets of less than $300 million.

Status: **not legally binding**

References

Legislative references:

- ITAA 1936 97
- ITAA 1936 Div 16E
- ITAA 1936 159GP(1)
- ITAA 1936 Pt IVA
- ITAA 1997 104-10
- ITAA 1997 104-10(4)
- ITAA 1997 108-5
- ITAA 1997 108-5(1)
- ITAA 1997 110-25
- ITAA 1997 110-55
- ITAA 1997 Div 115
- ITAA 1997 115-5
- ITAA 1997 115-10
- ITAA 1997 116-20
- ITAA 1997 Div 230
- ITAA 1997 230-455
- ITAA 1997 Div 770
- ITAA 1997 770-15
- ITAA 1997 770-75
- ITAA 1997 770-130
- ITAA 1997 770-140
- SISA 1993
- Investment Company Act 1940 (US)

Other references:

- Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income [1983] ATS 16
- ASX Operating Rules

ATO references

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