

Explanatory Statement for ASIC Corporations (Repeal) Instrument 2016/994

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes ASIC Corporations (Repeal) Instrument 2016/994 under paragraphs 283GA(1)(a) and 741(1)(a) of the *Corporations Act 2001* (the *Act*).

Paragraph 283GA(1)(a) provides that ASIC may exempt a person from a provision of Chapter 2L of the Act. Paragraph 283GA(2)(b) provides that the exemption may apply to all persons, specified persons, or a specified class of persons.

Paragraph 741(1)(a) provides that ASIC may exempt a person from a provision of Chapter 6D of the Act. Paragraph 741(2)(b) provides that the exemption may apply to all persons, specified persons or a specified class of persons.

Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of the Act), where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

1. Background

[CO 00/231] provides relief from Parts 2L.1-2L.5 and sections 718, 727(2) and 736 of the Act to corporations that deal in the short-term money market in the ordinary course of their business. The relief is only available when offering a highly rated short-term money market facility to depositors who regularly deal in the short-term money market or invest in securities in the ordinary course of their business.

The class order was originally made under s260MA(1) and 741(1) of the Corporations Law and continues in force under section 1399 of the Act. The class order refers to provisions of

the Corporations Law, which under section 1407 of the Act are taken to include a reference to the corresponding provision of the Act. When the Act replaced the Corporations Law on 15 July 2001, the clauses comprising Chapter 2L of the Corporations Law were renumbered as sections 283AA to 283I (see the Explanatory Memorandum to the Corporations Bill 2001 at [6.16]). Accordingly, the reference to s260MA(1) of the Corporations Law in [CO 00/231] is taken to include a reference to s283GA(1) of the Act, which is the corresponding provision.

2. Purpose of the instrument

The purpose of ASIC Corporations (Repeal) Instrument 2016/994 is to repeal ASIC Class Order [CO 00/231]. Under the *Legislative Instruments Act 2003*, legislative instruments cease automatically, or ‘sunset’, after 10 years, unless action is taken to exempt or preserve them. Where a legislative instrument no longer serves a regulatory purpose, ASIC will repeal the instrument rather than allow it to sunset so that industry is certain of our intentions and confident that, where instruments are removed, this was our intention.

ASIC Class Order [CO 00/231] no longer serves a regulatory purpose. The principal circumstances contemplated by the class order are not likely to trigger the operation of Chapters 6D or 2L of the Act. These circumstances mainly relate to the activities of professional or sophisticated investors dealing in the short-term money market, which is a wholesale market.

The provisions of the Act from which [CO 00/231] provides relief would only be triggered if the relevant offers to accept deposits constituted offers of debentures. This is because:

- (a) section 700 of the Act provides that chapter 6D only applies to offers of securities. If the relevant offers to accept deposits are not debentures, those offers will fall outside the definition of securities in section 92 of the Act; and
- (b) section 283AA of the Act provides that Ch 2L only applies to offers of debentures.

However, the definition of debentures in section 9 of the Act specifically excludes an undertaking by an Australian authorised deposit-taking institution (*ADI*) to repay money deposited with it, or lent to it, in the ordinary course of its banking business. The persons most likely to be offering highly rated short-term money market facilities to depositors are also likely to be Australian ADIs operating in the ordinary course of their banking business.

Accordingly, because offers to accept deposits by these persons are excluded from the definition of debentures and therefore are not subject to Chapters 6D or 2L, these persons would not need to rely on the relief in [CO 00/231].

Further, the relief only applies to offers to accept deposits of more than \$100,000 from persons whose ordinary business is or includes the investment of funds on the short-term

money market or investment in securities. Offers to such persons are likely to fall under existing exceptions to the disclosure, securities hawking and debenture provisions in Chapters 6D and 2L, such as:

- (a) subsection 708(8), which provides an exception to the disclosure requirements in Chapter 6D for certain offers of securities to sophisticated investors;
- (b) subsection 708(11), which provides an exception to the disclosure requirements in Chapter 6D for certain offers of securities to professional investors;
- (c) subsection 708(19), which provides an exception to the disclosure requirements in Chapter 6D for offers of debentures by Australian ADIs and bodies registered under section 21 of the *Life Insurance Act 1995*;
- (d) subsection 736(2), which provides an exception to the securities hawking prohibition in Chapter 6D for, among other things, certain offers to sophisticated or professional investors; and
- (e) paragraph 283AA(1)(a), which excludes the operation of Chapter 2L for offers of debentures that do not require disclosure under Chapter 6D (except where disclosure is not required because of s708A or 708(14)).

Where the relevant offer falls under one of these exceptions, the relief in [CO 00/231] would not be necessary. An offer of the type contemplated by [CO 00/231] would very rarely not fall within one of the above exceptions and any residual need for the relief provided by the class order is more appropriately considered on a case-by-case basis by application to ASIC.

3. Operation of the instrument

ASIC Corporations (Repeal) Instrument 2016/994 repeals [CO 00/231] as it no longer forms a necessary and useful part of the regulatory framework.

4. Consultation

ASIC undertook public consultation in relation to its proposal to repeal [CO 00/231] in Consultation Paper 261: *Remaking and repealing ASIC class orders on rights issue notifications and money market deposits*. ASIC received one submission, which was in support of the proposals outlined in the paper.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

ASIC Corporations (Repeal) Instrument 2016/994

ASIC Corporations (Repeal) Instrument 2016/994 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview

ASIC Corporations (Repeal) Instrument 2016/994 repeals ASIC Class Order [CO 00/231] as it is no longer required.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

Australian Securities and Investments Commission