

EXPLANATORY STATEMENT for

ASIC Corporations (Application Form Requirements) Instrument 2017/241

ASIC Corporations (Capital Reductions and Reconstructions – Technical Disclosure Relief) Instrument 2017/242

and

ASIC Corporations (Repeal) Instrument 2017/240

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes the following instruments:

- *ASIC Corporations (Application Form Requirements) Instrument 2017/241* (**Application Form Requirements Instrument**),
- *ASIC Corporations (Capital Reductions and Reconstructions – Technical Disclosure Relief) Instrument 2017/242* (**Capital Reductions and Reconstructions Instrument**), and
- *ASIC Corporations (Repeal) Instrument 2017/240* (**Repeal Instrument**)

under subsections 741(1) and 1020F(1) of the *Corporations Act 2001* (the **Corporations Act**).

Subsection 741(1) of the Corporations Act provides that ASIC may exempt a person from a provision of Chapter 6D of the Corporations Act or declare that Chapter 6D applies to a person as if specified provisions were omitted, modified or varied.

Subsection 1020F(1) of the Corporations Act provides that ASIC may exempt a person or a financial product or class of persons or financial products from all or specified provisions of Part 7.9 of the Corporations Act and may declare that Part 7.9 of the Corporations Act applies in relation to a person or a class of persons as if specified provisions were omitted, modified or varied.

Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force as at 1 January 2005 and as applicable to the relevant power because of section 5C of the Corporations 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.

The Application Form Requirements Instrument remakes the following class orders/instruments which are due to sunset as stated below:

1. ASIC Class Order [CO 02/260] *Product Disclosure Statements: Application forms created by a licensee* (due to sunset on 1 April 2017);
2. ASIC Class Order [CO 02/262] *Applications to switch managed investment products* (due to sunset on 1 April 2017);
3. ASIC Class Order [CO 02/437] *Eligible applications: Relief from s1016A for managed investment products* (due to sunset on 1 October 2017); and
4. ASIC Class Order [CO 07/10] *Technical disclosure relief for reconstructions and capital reductions* (paragraphs 4 and 8) (due to sunset on 1 April 2017);
5. ASIC Class Order [CO 14/26] *Personalised or Australian financial services licensee created application forms* (due to sunset on 1 April 2024); and
6. *ASIC Corporations (Options: Bonus Issues) Instrument 2016/77* (due to sunset on 1 April 2026)

(together, the **Instruments**).

The Instruments are repealed by *ASIC Corporations (Repeal) Instrument 2017/240*.

The Capital Reductions and Reconstructions Instrument remakes paragraph 9 of ASIC Class Order [CO 07/10].

As mentioned, ASIC Class Order [CO 07/10] is repealed by *ASIC Corporations (Repeal) Instrument 2017/240*.

1. Background

Application Form Requirements Instrument

The Application Form Requirements Instrument remakes the Instruments that provide relief from Corporations Act requirements in relation to the use of application forms for the issue of financial products to retail clients.

In particular:

- a) [CO 02/260] permits responsible entities of registered managed investment schemes to issue a financial product to retail clients using an application form prepared and partly completed by an Australian Financial Services (AFS) licensee, if the responsible entity has ‘reasonable grounds’ to believe that the form was distributed or made available *with a PDS* for the interest.
- b) [CO 14/26], similar to [CO 02/260], allows offerors of securities to issue or transfer securities in response to an application form that has been personalised by an AFS licensee for an applicant or created by an AFS licensee.

- c) [CO 02/262] allows a responsible entity to issue an interest in a scheme without complying with s1016A if a member of a scheme redeems an interest in the scheme and uses the proceeds to acquire interests in another scheme, where both schemes are operated by the same responsible entity (also known as ‘switching’).
- d) [CO 07/10], paragraphs 4 and 8, permit the issue or transfer of securities without satisfying the requirements under subsections 723(1), 734(2) and 1016A(2) and any advertisement referring to the securities does not need to state that an application form is required in the context of a reconstruction.
- e) [CO 02/437] exempts a responsible entity from s1016A(2)(a), in relation to reg 7.9.74(1)(b) of the *Corporations Regulations 2001*, to the extent that the eligible application form to subscribe for an interest in a scheme must include the applicant’s date of birth, provided that the application form states that the person is at least 18 years of age.
- f) ASIC Corporations (*Options: Bonus Issues*) Instrument 2016/77 gives relief from subsection 723(1) to a body in relation to a pro-rata bonus offer of options of the body to the extent that it only permits an issue of the options in response to an application form included in or accompanied by a disclosure document.

Capital Reductions and Reconstructions Instrument

The Capital Reductions and Reconstructions Instrument provides relief from the Product Disclosure Statement labelling (s1013B) and delivery (s1015C) requirements of the Corporations Act in relation to reconstructions and capital reductions.

The Capital Reductions and Reconstructions Instrument aims to prevent confusion and technical breaches of the Corporations Act where an entity issues a PDS for an offer of interests to effect a reconstruction or capital reduction.

2. Purpose of the Application Form Requirements Instrument, the Capital Reductions and Reconstructions Instrument and the Repeal Instrument

The purpose of *ASIC Corporations (Application Form Requirements) Instrument 2017/241* is to continue the substantive effect of the relief granted by ASIC Class Orders [CO 02/260], [CO 02/262], [CO 02/437], and [CO 07/10] (paragraphs 4 and 8), (**Sunsetting Class Orders**) and to consolidate the relief in the Sunsetting Class Orders with ASIC Class Order [CO 14/26] and *ASIC Corporations (Options: Bonus Issues) Instrument 2016/77*.

The purpose of *ASIC Corporations (Capital Reductions and Reconstructions – Technical Disclosure Relief) Instrument 2017/242* is to continue the substantive effect of the relief granted by ASIC Class Order [CO07/10] *Technical disclosure relief for reconstructions and capital reductions* (paragraph 9).

The purpose of ASIC Corporations (Repeal) Instrument 2017/240 is to repeal ASIC Class Orders [CO 02/260], [CO 02/262], [CO 02/437], [CO 07/10], and [CO 14/26] and ASIC Corporations (Options: Bonus Issues) Instrument 2016/77.

3. Operation of the Application Form Requirements Instrument, the Capital Reductions and Reconstructions Instrument and the Repeal Instrument

Application Form Requirements Instrument

Part 2 provides exemptions regarding switching applications, application forms for reconstructions and capital reductions, and bonus issues of options.

Applications to switch between schemes operated by the same RE

Subsection 5(1) provides an exemption for an RE of a registered scheme from the requirement to comply with s1016A of the Corporations Act in relation to switching arrangements, in certain circumstances.

Subsection 5(2) sets out when the exemption will apply, including that the RE has taken reasonable steps to ensure that it gave a PDS and information about the switch to the member at the appropriate time.

Application forms for reconstructions and capital reductions

Subsection 6(1) exempts a person from complying with subsection 723(1) of the Corporations Act where the person makes an offer of securities for issue or sale, on condition that the offer:

- (a) is made under an eligible reconstruction; or
- (b) is a Part 2J.1 capital reduction offer; or
- (c) is a foreign capital reduction offer.

Subsection 6(2) exempts a person from complying with subsection 1016A(2) of the Corporations Act where the the issue or sale results from an offer of the financial product that:

- (a) is made under an eligible reconstruction; or
- (b) is a Part 2J.1 capital reduction offer; or
- (c) is a foreign capital reduction offer.

Bonus issues of options

Subsection 7(1) exempts a body from the requirement to comply with subsection 723(1) of the Corporations Act regarding the pro-rata bonus offer of options over shares of the body.

Subsection 7(2) exempts a responsible entity of a registered scheme from the requirement in subsection 1016A(2) of the Corporations Act in relation to the pro-rata bonus offer of options over interests in the scheme where:

- (a) the interests form part of stapled securities; and
- (b) shares in a body also form part of the stapled securities.

Subsection 7(3) exempts a body from the requirement to comply with subsection 734(2) of the Corporations Act regarding an advertisement or publication of a statement about a pro-rata bonus offer of options of the body provided the advertisement or publication:

- (a) where it is published before the disclosure document for the offer of options is lodged – includes a statement that a disclosure document will be made available when the options are offered;
- (b) where it is published after the disclosure document for the offer of options is lodged – includes a statement that the offers of options will be made in or accompanied by the disclosure document.

Part 3 contains declarations regarding advertising and publicity for reconstructions and capital reductions, application forms created by licensees, an applicant's date of birth, and application forms where no PDS is required.

Advertising and publicity for reconstructions and capital reductions

Section 8 modifies section 734 of the Corporations Act regarding advertising and publicity for reconstructions and capital reductions by removing the requirement for an advertisement or publication (whether before or after the disclosure document is lodged) to include a statement that anyone who wants to acquire the securities will need to complete an application form accompanying the disclosure document.

Application forms created by licensees

Section 9 modifies section 723 of the Corporations Act by inserting subsection 1A and 1B headed "Licensee personalised application forms". These provisions give relief to allow issuers and transferors to issue or transfer securities in response to an application form:

- (a) partly completed by the licensee; or
- (b) that was copied or directly derived by the licensee from an application form included in or accompanied by a disclosure document distributed by the issuer or transferor; or
- (c) created by the licensee.

The relief under subsection 9(1) is available if:

- (a) the issuer or transferor has reasonable grounds to believe that the applicant received, at the same time they received the application form, the disclosure document; and
- (b) the application included:
 - a. information on the identity of the issuer, the nature of the securities being offered, the price of the securities, and the issue date and expiry date of the disclosure document ; or
 - b. a prominent statement to the effect that:
 - i. there is a disclosure document with information about investing in the securities; and
 - ii. it is advisable to read the disclosure document before applying for the securities.

Subsection 9(2) modifies s1016A of the Corporations Act to allow issuers and sellers of financial products to issue or sell a financial product in response to an application form distributed by the licensee, provided that:

- (a) the issuer or seller has reasonable grounds to believe that a PDS has been given or made available by nominated electronic means to the applicant and was not defective at the time of the application; and
- (b) the application form included:
 - a. the identity of the issuer, the nature of the financial products being offered and the date of the PDS; and
 - b. a prominent statement to the effect that the applicant should have been given or made available to them by electronic means a PDS that is required by law to enable the applicant to make an informed decision about acquiring the financial product.

Requirement to include applicant's date of birth in the application form

Section 10 modifies paragraph 7.9.74(1)(b) of the *Corporations Regulations 2001* to give relief to allow the application form to include either an applicant's date of birth or a statement that the applicant is at least 18 years of age..

Application forms where no PDS required

Section 11 modifies the definition of "restricted issue" in section 1016A of the Corporations Act by carving out from the definition:

- (a) an issue in a situation or pursuant to an offer made in a situation where the regulated person does not have to give the client a PDS because of an exemption under subsection 1020F(1); and
- (b) a rights issue to which a PDS is not required under subsection 1012DAA; and
- (c) an issue made in a situation to which section 1012DA (sale amounting to indirect issue) applies.

Also, section 11 modifies the definition of "restricted sale" in section 1016A of the Corporations Act by carving out from the definition:

- (a) an issue in a situation where the regulated person does not have to give the client a Product Disclosure Statement because of an exemption under subsection 1020F(1); and
- (b) an issue made in a situation to which section 1012DA (sale amounting to indirect issue) applies.

Capital Reductions and Reconstructions Instrument

Section 5 modifies Part 7.9 of the Corporations Act in relation to a financial product that is being offered under an eligible reconstruction or is the subject of a capital reduction offer by:

- (a) removing the requirement in subsection 1013B(1) to include the title "Product Disclosure Statement" on the cover, or at or near the front of, a Product Disclosure Statement; and
- (b) inserting subsection 1015C(6) clarifying the requirement in subparagraph 1015C(1)(a)(ii) regarding to what address a Product Disclosure Statement should be sent. Under subsection 1015C(6), where a Product Disclosure Statement is in or accompanies a notice of meeting of members of a company, foreign company or registered scheme, each member of the company or scheme is taken to have nominated the address shown in:
 - a. in the case of a company or registered scheme – the register of members maintained by the company or responsible entity of the scheme under Chapter 2C; or
 - b. in the case of a foreign company – the register of members kept by the company under the law of its place of origin.

Repeal Instrument

ASIC Corporations (Repeal) Instrument 2017/240 repeals ASIC Class Orders [CO 02/260], [CO 02/262], [CO 02/437], [CO 07/10] and [CO 14/26] and ASIC Corporations (Options: Bonus Issues) Instrument 2016/77.

4. Consultation

ASIC consulted with industry stakeholders on its proposals to remake without significant changes ASIC Class Orders [CO 02/260], [CO 02/262], [CO 02/437] and [CO 07/10], and to consolidate the relief in these class orders with ASIC Class Order [CO 14/26] and *ASIC Corporations (Options: Bonus Issues) Instrument 2016/77* into one instrument.

The feedback received in response to ASIC Consultation Paper CP 274 *Remaking ASIC class orders on application form requirements* and ASIC Consultation Paper CP 255 *Remaking ASIC class orders on financial services disclosure requirements*

supported the proposals to issue new instruments to continue the effect of the relief granted under these class orders.

As these class orders are considered to be operating effectively and efficiently and are being remade or otherwise continued without significant changes, no Regulatory Impact Statement (RIS) is required.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Application Form Requirements) Instrument 2017/241

ASIC Corporations (Capital Reductions and Reconstructions – Technical Disclosure Relief) Instrument 2017/242

and

ASIC Corporations (Repeal) Instrument 2017/240

ASIC Corporations (Application Form Requirements) Instrument 2017/241, ASIC Corporations (Capital Reductions and Reconstructions – Technical Disclosure Relief) Instrument 2017/242 and ASIC Corporations (Repeal) Instrument 2017/240 are 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 (Application Form Requirements) Instrument 2017/241 continues the effect of ASIC Class Orders [CO 02/260], [CO 02/262], [CO 02/437], [CO 07/10] (paragraphs 4 and 8) and [CO 14/26] and consolidates the relief formerly contained in *ASIC Corporations (Options: Bonus Issues) Instrument 2016/77* into one legislative instrument.

ASIC Corporations (Capital Reductions and Reconstructions – Technical Disclosure Relief) Instrument 2017/242 continues the effect of ASIC Class Order [CO 07/10] paragraph 9.

ASIC Corporations (Repeal) Instrument 2017/240 repeals ASIC Class Orders [CO 02/260], [CO 02/262], [CO 02/437], [CO 07/10], and [CO 14/26] and *ASIC Corporations (Options: Bonus Issues) Instrument 2016/77*.

Human rights implications

These legislative instruments do not engage any of the applicable rights or freedoms.

Conclusion

These legislative instruments are compatible with human rights as they do not raise any human rights issues.

Australian Securities and Investments Commission