

ASIC CORPORATIONS (ADVERTISING BY PRODUCT ISSUERS) INSTRUMENT 2015/539

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (*ASIC*) makes ASIC Corporations (Advertising by Product Issuers) Instrument 2015/539 under subsections 926A(2) and 951B(1) of the *Corporations Act 2001* (the *Act*).

Subsection 926A(2) of the Act provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.6 of the Act.

Subsection 951B(1) of the Act provides that ASIC may exempt a person or a class of persons from all or specified provisions of Part 7.7 of the Act.

1. Background

Subsection 949A(2) of the Act provides that Australian financial services (*AFS*) licensees and their authorised representatives must give a general advice warning to a retail client when they give general financial product advice to that client. The general advice warning makes it clear to the client the advice is not tailored to the client's specific objectives, financial situation and needs.

Under certain circumstances, the Act permits product issuers who hold an AFS licence to issue a shorter general advice warning in their advertising. The ability to provide a shorter general advice warning does not apply for unlicensed product issuers.

The discrepancy meant that, unlike licensed product issuers, unlicensed product issuers were required to provide a full general advice warning with all forms of advertising. Product issuers raised concerns that as a result, for some types of advertising, the disclosure requirements for unlicensed product issuers were overly burdensome while providing minimal regulatory benefit.

For example, unlicensed product issuers who advertised in the media or on billboards or posters would need to provide the full general advice warning, despite the fact that it was unlikely retail clients would read the full general advice warning on the advertisement.

The discrepancy was recognised in the Australian Government's proposals paper, *Refinements to Financial Services Regulation*¹, which noted that '[t]he General

¹ Treasury, *Refinements to Financial Services Regulation*, proposal paper, 2 May 2005, p.14.

Advice Warning requirements do not apply consistently to different types of advertisers'. The proposal paper states, at *Refinement Proposal 5.2*, that ASIC will:

...provide further guidance and/or relief to promote consistent and simple compliance with the General Advice Warning requirements by unlicensed and licensed product issuers.

In August 2005, ASIC issued Class Order [CO 05/835] *General advice in advertising* to address this anomaly. [CO 05/835] provides:

- (a) an exemption to issuers of financial products from the requirement under s911A(1) to hold an AFS licence for providing financial advice, where they provide general financial product advice in advertisements in the media or on a billboard or poster; and
- (b) an exemption to licensed issuers from the requirement to give a Financial Services Guide (*FSG*) in accordance with s941A(1) and the requirement to give a general advice warning under s949A(2), where they provide general financial product advice on an offer or intended offer of their securities in advertisements in the media or on a billboard or poster.

[CO 05/835] grants this relief on the condition that those issuers of financial products or securities include a statement in their advertisement that a person should consider whether the financial product or securities are appropriate for them.

Review of [CO 05/835]

Under the *Legislative Instruments Act 2003*, legislative instruments cease automatically, or 'sunset', after 10 years, unless action is taken to exempt or preserve them.

To preserve its effect, a legislative instrument, such as a class order, must be remade before the sunset date. The purpose of sunset is to ensure that instruments are kept up to date and only remain in force while they are fit for purpose, necessary and relevant.

[CO 05/835] is due to sunset on 1 October 2015. ASIC has reviewed its policy underlying the relief. In light of this review and following public consultation, ASIC considers that the class order relief is necessary, fit-for-purpose and relevant.

As such, ASIC has decided to reissue the relief underlying [CO 05/835] in a new legislative instrument, ASIC Corporations (Advertising by Product Issuers) Instrument 2015/539. This instrument has been drafted using ASIC's current style and format, while preserving the effect of [CO 05/835]. In the new legislative instrument, the restrictions on the form of advertising that the relief in [CO 05/835] applied to have been removed in order to accommodate contemporary forms of advertising.

2. Purpose of the legislative instrument

The purpose of the legislative instrument is to:

- (a) create parity between the advertising disclosure requirements that apply to licensed and unlicensed issuers providing general financial product advice in advertisements; and
- (b) ensure that retail clients receive important information in a simpler and more consistent manner.

The legislative instrument also reduces the regulatory burden on issuers of financial products and securities by allowing them to give general financial product advice in advertisements without needing to provide an FSG or a general advice warning, provided that they include a statement in their advertisement that a person should consider whether the financial product or securities are appropriate for them.

3. Operation of the legislative instrument

The legislative instrument:

- (a) exempts issuers of financial products from the requirement under s911A(1) to hold an AFS licence for providing financial advice, where they provide general financial product advice in advertisements; and
- (b) exempts AFS licensees from the requirement to give an FSG under s941A(1) and the requirement to give a general advice warning under s949A(2), where they provide general financial product advice on an offer or intended offer of their securities in advertisements.

The relief in the legislative instrument is granted on the condition that those issuers of financial products or securities include a statement in their advertisement that a person should consider whether the financial product or securities are appropriate for them. The relief is not restricted to a particular form of advertising.

4. Consultation

On 11 December 2014, ASIC released Consultation Paper 226 *Remaking ASIC class orders on secondary services and general advice (CP 226)* seeking feedback on proposals to remake, without significant changes, [CO 05/835] in a new legislative instrument. In CP 226, ASIC also proposed to remake other class orders without significant changes. The consultation period closed on 9 February 2015.

ASIC received two written submissions in response to CP 226 from industry associations. Details of the non-confidential submission received are available on ASIC's website at www.asic.gov.au.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Advertising by Product Issuers) Instrument 2015/539

This legislative instrument 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 of the legislative instrument

ASIC Corporations (Advertising by Product Issuers) Instrument 2015/539 gives relief to:

- (a) issuers of financial products from the requirement under s911A(1) to hold an AFS licence for providing financial advice, where they provide general financial product advice in advertisements; and
- (b) AFS licensees from the requirement to give an FSG under s941A(1) and the requirement to give a general advice warning under s949A(2), where they provide general financial product advice on an offer or intended offer of their securities in advertisements.

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.