

ASIC CORPORATIONS (GENERAL ADVICE WARNING) INSTRUMENT 2015/540

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes ASIC Corporations (General Advice Warning) Instrument 2015/540 under subsection 951B of the *Corporations Act 2001* (the **Act**).

Subsection 951B(1)(a) 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. Subsection 951B(1)(c) of the Act provides that ASIC may declare that Part 7.7 of the Act applies as if specified provisions were omitted, modified or varied as specified in the declaration.

1. Background

Subsection 949A(2) of the Act provides that when an Australian financial services (**AFS**) licensee or their authorised representative provides general advice to a retail client, they must give a warning that conveys the following messages:

- (a) the advice has been prepared without taking account of the client's objectives, financial situation or needs;
- (b) because of that, the client should, before acting on the advice, consider the appropriateness of the advice, having regard to the client's objectives, financial situation and needs; and
- (c) if the advice relates to the acquisition, or possible acquisition, of a particular financial product, the client should obtain a Product Disclosure Statement (**PDS**) relating to the product and consider the PDS before making any decision about whether to acquire the product.

Under the Act this warning must be given whether the advice is given in writing or orally.

The Australian Government's proposals paper *Refinements to Financial Services Regulation*¹ states, at *Refinement Proposal 5.1*, that ASIC will:

...provide further guidance to develop simple General Advice Warnings conveying the substance of the legislative requirements, instead of relying on the precise wording of the Corporations Act. ASIC will also use its powers to provide relief, where appropriate.

In making this proposal it was noted that:

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

*It is the substance of the General Advice Warning (GAW) that is important.
The form of the GAW should be modified to suit the circumstances.*

In November 2005, ASIC responded to proposal 5.1 by releasing Class Order [CO 05/1195] *Simplified warning for oral general advice* to simplify the general advice warning required where oral general advice is provided to a retail client.

[CO 05/1195] exempts AFS licensees and their representatives that are authorised to provide general advice from the obligation under s949A(2) to give a general advice warning for oral general advice on the condition that a simplified oral warning is given by the advice provider, which conveys that:

- (a) the advice is general and
- (b) the advice may not be appropriate for the client.

Advice providers may use their own words to convey the simpler warning.

Review of [CO 05/1195]

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 05/1195] is due to sunset on 1 April 2016. 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 05/1195] in a new legislative instrument, ASIC Corporations (General Advice Warning) Instrument 2015/540. This instrument has been drafted using ASIC’s current style and format, while preserving the effect of [CO 05/1195]. The instrument also varies s949A(4)(a) to substitute the reference to ‘personal advice’ with ‘general advice’ to correct the minor drafting error in s949A(4)(a).

2. Purpose of the legislative instrument

The purpose of the legislative instrument is to enable general advice providers to give a shorter, simpler general advice warning when they provide oral general advice. The legislative instrument is intended to make the general advice warning more easily understood by retail clients and to reduce the regulatory burden on general advice providers and their representatives.

3. Operation of the legislative instrument

The legislative instrument exempts an AFS licensee or its authorised representative from the requirement under s949A(2) of the Act to provide a general advice warning for oral general advice provided that a simplified oral warning is given by the advice provider which conveys that:

- (a) the advice is general advice; and
- (b) the advice may not be appropriate for the client.

The legislative instrument also:

- (a) varies s949A(4) to amend the references to subsection (1) and replace with subsection (2); and
- (b) varies s949A(4)(a) to amend the reference to ‘personal advice’ and replace with ‘general advice’.

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 05/1195] 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 (General Advice Warning) Instrument 2015/540

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 (General Advice Warning) Instrument 2015/540 gives relief to advice providers from the requirement under s949A(2) of the Act to provide a general advice warning for oral general advice provided that a simplified oral warning is given by the advice provider which conveys that:

- (c) the advice is general advice; and
- (d) the advice may not be appropriate for the client.

The legislative instrument also:

- (c) varies s949A(4) to amend the references to subsection (1) and replace with subsection (2); and
- (d) varies s949A(4)(a) to amend the reference to ‘personal advice’ and replace with ‘general advice’.

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.