

EXPLANATORY STATEMENT for
ASIC CORPORATIONS (SALE OFFERS BY CONTROLLERS)
INSTRUMENT 2016/81

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (*ASIC*) makes ASIC Corporations (Sale Offers By Controllers) Instrument 2016/81 (*Instrument*) under sections 741 and 1020F of the *Corporations Act 2001* (the *Act*).

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

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

1. Background

Regulation of sale offers under Chapter 6D

Chapter 6D regulates the making of offers for the issue or sale of securities. It provides a disclosure and liability regime so as to ensure adequate investor protection in circumstances where an investor may not know all the information needed to make a decision whether to accept an offer of securities.

In addition to requiring disclosure for the issue of securities, the provisions set out when an offer for the sale of securities needs disclosure to investors. The following sale offers need disclosure under Chapter 6D (unless an exemption applies):

- (a) an offer of a body's securities for sale by the body's controller where the securities are either not quoted or not offered for sale in the ordinary course of trading on a relevant financial market;
- (b) an offer of a body's securities for sale within 12 months after their issue without disclosure where either the body issued the securities, or the person to whom they were issued acquired them, with the purpose of the securities being on-sold; and
- (c) an offer of a body's securities for sale within 12 months after their sale without disclosure by the body's controller where the securities were at the time of sale by the controller either not quoted or not offered for sale in the ordinary course of trading on a relevant financial market and either the controller sold the securities, or the person to whom they were sold acquired them, with the purpose of the securities being on-sold.

Section 708A allows some sale offers to be made without disclosure. Its scope was extended by the *Corporations Legislation Amendment (Simpler Regulatory System) Act 2007 (SRS Act)* to cover certain sale offers made within 12 months after a controller sale.

The exemption applying to sale offers made within 12 months after a controller sale has various conditions that relate to the issue of the relevant securities. The nature of these conditions means that it is more appropriate to apply them with reference to the controller sale rather than the issue of the securities.

For example, the conditions require a “cleansing notice” to be given to the relevant market operator within 5 business days after the issue of the securities. However, the securities may have been issued a number of years before the controller sale and before the relevant company was listed or a controller sale contemplated. The condition operates more effectively if the notice must be given within 5 business days after the controller sale since the 12 month period during which the exemption may be relied on commences at the time of the controller sale rather than the time the securities were issued.

Another example is that both the body whose securities are being sold and the controller are responsible for giving the cleansing notice to the relevant market operator, but only the body is liable for a defective notice. The condition operates more effectively if both the body and the controller may be liable for the defective notice.

Regulation of sale offers under Part 7.9

Part 7.9 regulates the making of offers for the issue or sale of financial products (other than securities). It requires disclosure for sale offers of financial products in similar circumstances to those applying to sale offers of securities under Chapter 6D.

Section 1012DA allows some sale offers to be made without disclosure. Its scope was also extended by the SRS Act to cover certain sale offers made within 12 months after a controller sale. The disclosure exemption applying to these sale offers has various conditions that relate to the issue of the relevant financial products. As with the corresponding exemption under section 708A, the nature of these conditions means that it is more appropriate to apply them with reference to the controller sale rather than the issue of the financial products.

Previous relief

Class Order [CO 08/25] *Sale offers within 12 months after controller sales* provides relief to ensure the effective operation of the exemptions under section 708A and 1012DA for sale offers made within 12 months of a controller sale.

ASIC has recently reviewed the policy underlying Class Order [CO 08/25] as part of a wider review of class orders relating to the fundraising provisions in Chapter 6D and considers that the relief in this class order is still both necessary and appropriate. Accordingly, ASIC has decided to reissue the relief underlying Class Order [CO 08/25] in ASIC Corporations (Sale Offers By Controllers) Instrument 2016/81.

The *Legislation Act 2003* (the **LA**) provides for the periodic expiry of legislative instruments (‘sunsetting’) to ensure that they are kept up to date and only remain in force for as long as

they are needed. Class Order [CO 08/25], being a legislative instrument, was scheduled to eventually expire under the sunset provisions of the LA.

ASIC's review of the policy underlying Class Order [CO 08/25] — and subsequent decision to reissue the relief — has provided an opportunity to deal with this imminent expiry and ensure that the relevant relief will continue to be available.

Under ASIC Corporations (Repeal) Instrument 2016/171, ASIC has revoked Class Order [CO 08/25] effective from the date that ASIC Corporations (Sale Offers By Controllers) Instrument 2016/81.

2. Purpose of the instrument

ASIC Corporations (Sale Offers By Controllers) Instrument 2016/81 remakes the relief provided by Class Order [CO 08/25]. The Instrument provides relief to ensure the effective operation of the exemptions under sections 708A and 1012DA for sale offers made within 12 months of a controller sale.

3. Operation of the instrument

The Instrument modifies section 708A, so that various conditions of the exemption in that section for sale offers of securities made within 12 months of a controller sale relate to the controller sale rather than the issue of the securities. The instrument makes similar modifications to the corresponding exemption for sale offers of financial products in section 1012DA.

The Instrument also makes technical amendments to subsection 707(5) and paragraph 1012C(9)(b) to clarify, and give effect to, the intended operation of those provisions.

4. Consultation

On 17 September 2015 ASIC released CP 239 Disclosure documents: Update to ASIC instruments and guidance (*CP 239*) seeking feedback on proposals to update and consolidate a number of regulatory guides relating to Chapter 6D of the Act. CP 239 also sought feedback on proposals to reissue the legislative instruments associated with ASIC's updated guidance (including Class Order [CO 08/25]) and to make legislative instruments addressing some discrete policy issues. The consultation period closed on 27 November 2015.

ASIC received four submissions in response to CP 239. Details of the submissions are contained in REP 473 *Response to submissions on CP 239 Disclosure documents: updates to ASIC instruments and guidance* which is available on ASIC's website at www.asic.gov.au.

Notwithstanding ASIC's consultation, ASIC Corporations (Sale Offers By Controllers) Instrument 2016/81 is of a minor or machinery nature and does not substantially alter existing arrangements.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Sale Offers By Controllers) Instrument 2016/81

ASIC Corporations (Sale Offers By Controllers) Instrument 2016/81 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

The Instrument makes minor and technical modifications to sections 707, 708A, 1012C and 1012DA of the Act, to ensure the effective operation of the exemptions under sections 708A and 1012DA for sale offers made within 12 months of a controller sale.

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