

**EXPLANATORY STATEMENT for**  
**ASIC CORPORATIONS (SALE OFFERS: SECURITIES ISSUED ON**  
**CONVERSION OF CONVERTIBLE NOTES) INSTRUMENT 2016/82**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (**ASIC**) makes ASIC Corporations (Sale Offers: Securities Issued on Conversion of Convertible Notes) Instrument 2016/82 under s741 and s1020F of the Corporations Act 2001 (the **Act**).

Paragraph 741(1)(b) 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. Paragraph 1020F(1)(c) 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**

Chapter 6D of the Act establishes the statutory regime applying to fundraising through the offer of securities for issue or sale in Australia. It addresses the circumstances in which a person offering securities for issue or sale must lodge a disclosure document with ASIC and the relevant form, content and procedural requirements applying to that disclosure document. Chapter 6D also sets out certain prohibited conduct in relation to fundraising activity and outlines the circumstances in and extent to which persons may be liable for defective disclosure documents. Chapter 6D also provides certain statutory remedies for investors.

Class Order [CO 10/322] *On-sale for convertible notes issued to wholesale investors* provides relief in relation to offers of convertible notes that do not require a prospectus (for example, because they are only marketed to wholesale or institutional investors), so that the underlying quoted securities issued on conversion can be freely on-sold without a prospectus or PDS.

ASIC has recently reviewed the policy underlying Class Order [CO 10/322] 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 10/322] in ASIC Corporations (Sale Offers: Securities Issued on Conversion of Convertible Notes) Instrument 2016/82.

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 10/322], being a legislative instrument, was scheduled to eventually expire under the sunsetting provisions of the LA.

ASIC's review of the policy underlying Class Order [CO 10/322] — 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 10/322] effective from the date that ASIC Corporations (Sale Offers: Securities Issued on Conversion of Convertible Notes) Instrument 2016/82 commences.

## **2. Purpose of the instrument**

ASIC Corporations (Sale Offers: Securities Issued on Conversion of Convertible Notes) Instrument 2016/82 incorporates the relief previously provided in [CO 10/322]. The instrument grants relief from the on-sale provisions of the Act so that the quoted securities underlying convertible notes can be on-sold without a prospectus if a cleansing notice containing prospectus-like disclosure is provided to the relevant market operator at the time the convertible notes are issued.

In the absence of relief, an issuer's ability to issue convertible notes to institutional investors is limited by the fact that the underlying securities may generally only be on-sold within 12 months if the issuer provides:

- (a) a transaction-specific prospectus in relation to the convertible notes; or
- (b) a cleansing notice on each conversion.

The need to prepare a specific prospectus so that the underlying quoted securities can be on-sold may act as an impediment to entities that wish to raise funds by issuing convertible notes to wholesale investors or in circumstances that would not otherwise require prospectus disclosure.

ASIC considers that relief facilitates entities issuing convertible notes without undermining protection for retail investors. This is because no relief is provided in relation to the issue or on-sale of convertible notes—it is only the underlying quoted securities for which on-sale relief is provided. In addition, as the issuer will be subject to continuous disclosure obligations, and there will be prospectus-like disclosure at the time the convertible notes are issued, the market should receive sufficient information about the convertible notes and the underlying quoted securities.

## **3. Operation of the instrument**

ASIC Corporations (Sale Offers: Securities Issued on Conversion of Convertible Notes) Instrument 2016/82 modifies the Act so that persons who have been issued convertible notes will not be required to prepare a prospectus or PDS where they on-sell the underlying quoted securities (once converted), where certain requirements are met, including:

- (a) the underlying securities are continuously quoted securities, and were issued by reason of the conversion of convertible notes;

- (b) trading in the relevant class of underlying securities has not been suspended for more than five days in the 12 months prior to the first issue of the convertible notes;
- (c) prior to the issue of the convertible notes, the issuer of the convertible notes gives the relevant market operator a notice that contains certain information, including prospectus-like disclosures for the convertible notes and the underlying quoted securities; and
- (d) ASIC has not made certain determinations to prevent an issuer from relying on its relief.

In the period that the convertible notes are on issue, the issuer's annual financial reports will be required to include information on: the number of underlying securities issued during the financial year as a result of conversion and the average conversion price paid for those securities; the number of convertible notes that remain on issue at the end of the year (and the issuer's remaining liability to make payments on those securities); and any other matters relating to the notes that holders of the issuer's enhanced disclosure securities would reasonably require to make an informed assessment of the issuer's financial position and its prospects for future financial years. The annual report may omit material that would otherwise need to be included in relation to the issuer's prospects for future financial years if it is likely to result in unreasonable prejudice to the issuer.

#### **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 Ch 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 10/322]) 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](http://www.asic.gov.au).

Notwithstanding ASIC's consultation, ASIC considers that ASIC Corporations (Sale Offers: Securities Issued on Conversion of Convertible Notes) Instrument 2016/82 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: Securities Issued on Conversion of Convertible Notes) Instrument 2016/82**

ASIC Corporations (Sale Offers: Securities Issued on Conversion of Convertible Notes) Instrument 2016/82 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 legislative instrument modifies s9, 708A and 1012DA of the *Corporations Act 2001* so that the quoted securities underlying convertible notes can be on-sold without a prospectus if a cleansing notice containing prospectus-like disclosure is provided to the relevant market operator at the time the convertible notes are issued.

#### **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**