

**EXPLANATORY STATEMENT for**  
**ASIC CORPORATIONS (OFFER INFORMATION STATEMENTS)**  
**INSTRUMENT 2016/76**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (**ASIC**) makes ASIC Corporations (Offer Information Statements) Instrument 2016/76 under section 741 of the *Corporations Act 2001* (the *Act*).

Section 741 of the Act provides that ASIC may exempt – either unconditionally or subject to specified conditions – all persons, specified persons or a specified class of persons from all or specified provisions of Chapter 6D of the Act, or ASIC may declare that Chapter 6D applies to all persons, specified persons or a specified class of persons, as if specified provisions were omitted, modified or varied as specified in the declaration. Such an exemption or declaration may relate to all securities, specified securities or a specified class of securities and or any other matter generally or as specified.

## **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.

The statutory regime applying to fundraising through the offer of securities for issue or sale was substantially rewritten in March 2000 by the *Corporate Law Economic Reform Program Act 1999* (the **CLERP Act**). The CLERP Act amended the *Corporations Law* (the **Law**) by repealing Part 7.12—which previously contained the fundraising provisions—and inserting new Chapter 6D. Chapter 6D of the Law was retained in substantially the same form with the enactment of the Act in 2001.

The CLERP Act inserted into Chapter 6D the ability for a company to use an offer information statement when raising limited amounts of money in certain circumstances. These new provisions were aimed at facilitating fundraising in the small-medium enterprise space (CLERP Bill Explanatory Memorandum, paragraphs 2.5 and 8.6).

Since the implementation of the CLERP Act, ASIC has made a number of exemptions from, and modifications to, the fundraising provisions in Chapter 6D with a view to addressing certain technical issues and anomalies in relation to their operation. One of these class orders is ASIC Class Order [CO 00/172] *Offer Information Statements: relief in relation to financial statements*.

ASIC has recently reviewed the policy underlying Class Order [CO 00/172] 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 00/172] in ASIC Corporations (Offer Information Statements) Instrument 2016/76.

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 00/172], 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 00/172] — 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 00/172] effective from the date that ASIC Corporations (Offer Information Statements) Instrument 2016/76 commences.

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

The purpose of this legislative instrument is to provide minor and technical relief to enable the period for the financial report included in an offer information statement to be longer or shorter than 12 months by up to seven days.

An offer of securities for issue or sale needs - unless a relevant statutory exception applies - disclosure under Chapter 6D of the Act. Under Chapter 6D, a body can make an offer in relation to an issue of securities by preparing an offer information statement. As an offer information statement is a specific measure aimed at facilitating fundraising by small-to-medium size enterprises, it requires a lower level of disclosure than a full-length prospectus under s710 and therefore is less onerous to prepare. To balance that concession with an adequate level of investor protection, the amount of money that can be raised under an OIS is currently limited to \$10 million, and an OIS is required to have accompanying warnings that independent advice should be sought. An offer information statement must also contain specified financial information to ensure that investors have current, audited financial information to assist in making their investment decision.

Section 715 of the Act sets out the information requirements for an offer information statement. Subsection 715(1)(i) requires an offer information statement to include a copy of a financial report for the body. Subsection 715(2) states that the financial report must:

- (a) be a report for a 12 month period and have a balance date that occurs within the last six months before the securities are first offered under the statement;
- (b) be prepared in accordance with the accounting standards; and
- (c) be audited.

The commentary that accompanies the release of the offer information statement provisions states that the financial report requirements in section 715 are intended to impose the same obligations as Chapter 2M of the Act (CLERP Bill Explanatory Statement, paragraph 8.8).

Under Part 2M.3 of the Act, disclosing entities, public companies, large proprietary companies and registered schemes are required to prepare an audited financial report each financial year. In accordance with subsection 323D(2) of the Act, a financial year can be 12 months long, or can be shorter or longer than 12 months but not by more than seven days.

The effect of paragraph 715(2)(a) is that a financial report included in an offer information statement in accordance with subsection 715(1)(i) must be for a 12 month period, and there is no ability under paragraph 715(2)(a) for the period of the financial report to be shorter or longer than 12 months by not more than seven days. Accordingly, if a body wanted to issue securities under an offer information statement and had prepared an annual financial report under Chapter 2M that was for a period shorter or longer than 12 months by not more than seven days, that financial report would technically not meet the requirements in subsection 715(2)(a). As a result, the body would be required to prepare another audited financial report that met the 12 month period requirement in subsection 715(2)(a).

To remove any unintended inconsistencies with the annual financial reporting requirements of Chapter 2M of the Act, specifically subsection 323D(2), this instrument enables the period for a financial report included in an offer information statement to be longer or shorter than 12 months by up to seven days.

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

This instrument replaces paragraph 715(2)(a) of the Act with a provision which requires a financial report that is included in an offer information statement prepared under Chapter 6D of the Act:

- (a) to be a report for a 12 month period, or a period shorter or longer than 12 months but not by more than seven days, and have a balance date that occurs within the last six months before the securities are first offered under the statement;
- (b) be prepared in accordance with the accounting standards; and
- (c) be audited by a registered company auditor.

### **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 00/172]) 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 (Offer Information Statements) Instrument 2016/76 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 (Offer Information Statements) Instrument 2016/76**

ASIC Corporations (Offer Information Statements) Instrument 2016/76 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 addresses discrete minor and technical issues arising in relation to the content requirements for an offer information statement under subsection 715(2) of the *Corporations Act 2001*, to enable the period for the financial report included in an offer information statement to be longer or shorter than 12 months by up to seven days.

#### **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**