



**ASIC**

Australian Securities & Investments Commission

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## **ASIC Corporations (Horse Schemes) Instrument 2016/790**

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I, Stephen Yen PSM, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Date: 25 August 2016

Stephen Yen

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## Part 1—Preliminary

### 1 Name of legislative instrument

This is the *ASIC Corporations (Horse Schemes) Instrument 2016/790*.

### 2 Commencement

This instrument commences at the same time as the commencement of the *ASIC Corporations (Repeal) Instrument 2016/791*.

Note: The register may be accessed at <http://www.legislation.gov.au>.

### 3 Authority

This instrument is made under subsections 601QA(1), 926A(2), 992B(1) and 1020F(1) of the *Corporations Act 2001* (the *Act*).

### 4 Definitions

(1) In this instrument:

***financial statement***, in relation to a horse racing syndicate, means a true and fair profit and loss account and statement of assets and liabilities for the syndicate.

***financial year***, in relation to a horse racing syndicate, means a period of 12 months that ends on 30 June or any other day that is specified in any agreement between the manager and the lead regulator of the syndicate as the day on which the financial year for the syndicate will end.

***horse racing syndicate*** means a managed investment scheme that has the principal purpose of racing one or more horses and distributing prizemoney won by the horse or horses to the participants in the scheme.

***lead regulator***, in relation to a horse racing syndicate, means a body that:

- (a) is responsible for the administration of thoroughbred racing or harness racing in a State or Territory in this jurisdiction; and
- (b) has entered into memorandum of understanding with ASIC that ASIC is satisfied meets the requirements of subsection (2); and
- (c) is approved in writing by ASIC for the purposes of this paragraph.

***manager***:

- (a) in relation to a horse racing syndicate, means the person:
  - (i) holding office as manager under the syndicate agreement; or

- (ii) otherwise holding office as manager of the horse racing syndicate with the approval of the lead regulator; and
- (b) in relation to a private stallion scheme, means the person named as manager in the stallion scheme agreement.

**offer** includes an invitation to make an offer or an application.

**offeree** means a person who is offered an interest in a horse racing syndicate or a private horse breeding scheme.

**participant** means a person who holds a beneficial interest in a horse racing syndicate or private horse breeding scheme whether jointly or otherwise.

**personal offer:**

- (a) in relation to a private broodmare scheme, means a personal offer within the meaning of subsection 1012E(5) of the Act; and
- (b) in relation to a private stallion scheme, means a personal offer within the meaning of subsection 1012E(5) of the Act that is accompanied by a copy of the proposed stallion scheme agreement.

**private broodmare scheme** means a managed investment scheme to which all of the following apply:

- (a) the principal purpose of the scheme is to breed horses out of broodmares to which the scheme relates; and
- (b) each interest in the scheme is issued as the result of either:
  - (i) acceptance of a personal offer; or
  - (ii) an offer which does not need a Product Disclosure Statement (other than because of section 6); and
- (c) none of the offers of interests in the scheme results in the operator of the scheme, together with any associates of the operator, having issued or sold in a 12 month period more than 20 interests in managed investment schemes, the principal purpose of which is to breed horses.

**private horse breeding scheme** means a private broodmare scheme or a private stallion scheme.

**private stallion scheme** means a managed investment scheme to which all of the following apply:

- (a) the principal purpose of the scheme is to acquire a stallion and provide stud services of the stallion;

- (b) each interest in the scheme is only able to be acquired under a stallion scheme agreement and is issued as the result of either:
  - (i) acceptance of a personal offer; or
  - (ii) an offer which does not need a Product Disclosure Statement (other than because of section 6);
- (c) none of the offers of interests in the scheme results in the operator of the scheme, together with any associates of the operator, having issued or sold in a 12 month period more than 40 interests in managed investment schemes, the principal purpose of which is to breed horses;
- (d) each promoter of the scheme holds either:
  - (i) an Australian financial services licence; or
  - (ii) at least 10% fully paid of all interests in the scheme.

**standard form**, a finance lease agreement is in a standard form in relation to a horse racing syndicate if the terms of the agreement have been approved for use in relation to the syndicate by the lead regulator with whom the promoter of the syndicate is registered.

**stallion**, in relation to a stallion scheme agreement, means the stallion identified in the stallion scheme agreement.

**stallion scheme agreement**, in relation to a private stallion scheme, means a written agreement which includes provisions to the effect of all of the following:

- (a) requiring that the scheme relates to one stallion and no other horse or investment;
- (b) requiring that the stallion stand at stud only in this jurisdiction for the first three full stud seasons from the date the stallion is acquired for the scheme;
- (c) providing that participants will, as tenants in common, own the whole of the legal and equitable title to the stallion free of encumbrances;
- (d) prohibiting the financing of the purchase of the stallion other than from the proceeds of the issue of interests;
- (e) providing that offerees receive a full refund of application money on written request received by the person responsible for accepting payment of the money within 3 days after payment of the money;

and that contains all of the following:

- (f) details of reporting requirements to participants in the financial statements and the stallion return and associated documents required to be lodged with the Australian Stud Book for each applicable reporting period;
- (g) a statement of risks associated with the scheme and the speculative nature of investment in horse breeding schemes;
- (h) details of fees and expenses payable to the manager, the basis of their calculation and disclosure in the financial statements;
- (i) details of insurance of, and the veterinary examinations schedule of, the stallion;
- (j) details of the obligations of the stud in relation to the stallion;
- (k) a statement that this instrument is being relied on by the operator of the scheme.

**syndicate agreement**, in relation to a horse racing syndicate, means an agreement governing the horse racing syndicate that is approved by the lead regulator and that is legally enforceable as between the manager of the horse racing syndicate and the participants in the horse racing syndicate.

- (2) For the purpose of paragraph (b) of the definition of **lead regulator**, the requirements are that the memorandum of understanding between ASIC and the lead regulator contains provisions to the effect that the lead regulator will:
  - (a) maintain a register of all promoters of horse racing syndicates registered by the lead regulator for the purposes of this instrument; and
  - (b) remove from the register any promoter who does not comply with the lead regulator's rules relating to the operation of horse racing syndicates including their promotion; and
  - (c) advise ASIC of the name of any promoter who has been removed from the register; and
  - (d) have in place adequate arrangements for:
    - (i) approving Product Disclosure Statements for a horse racing syndicate where the lead regulator is satisfied that the Product Disclosure Statement is accurate and contains:
      - (A) the information required by subsection 5(3); and
      - (B) sufficient other information to allow prospective participants in the syndicate to make an informed

decision as to whether to acquire an interest in the syndicate; and

- (ii) reviewing Product Disclosure Statements within a reasonable time after they are submitted to the lead regulator for approval; and
  - (iii) ensuring that the promoter of a horse racing syndicate provides to the lead regulator all relevant documents in relation to the horse racing syndicate in accordance with subsection 5(7); and
  - (iv) dealing with complaints and disputes received by the lead regulator about the conduct of promoters, managers or the operation of horse racing syndicates; and
  - (v) regularly monitoring advertising of horse racing syndicates for inappropriate, misleading or deceptive content; and
  - (vi) regularly monitoring compliance by promoters and managers of horse racing syndicates with the applicable conditions of this instrument, the promoter's Australian financial services licence and the manager's Australian financial services licence (if any); and
- (e) notify ASIC if the lead regulator identifies conduct by a promoter or manager of a horse racing syndicate that may involve breaches of Chapter 7 of the Act, in addition to taking any action against the promoter or manager in relation to that conduct that it is appropriate for the lead regulator to take; and

Note: Breaches of the Act include breaches of the applicable conditions of this instrument and breaches of an Australian financial services licence.

- (f) ensure that all employees and associates of a promoter that is registered with the lead regulator have agreed to be bound by the rules and requirements of the lead regulator relating to horse racing syndicates; and
- (g) lodge with ASIC an annual report of the lead regulator's performance of the functions set out in paragraphs (a) to (f).

## Part 2—Exemptions

### 5 Horse racing syndicates

#### *Exemption*

- (1) A person that is a promoter or a manager of a horse racing syndicate does not have to comply with subsection 601ED(5) of the Act in relation to the operation of the syndicate.

*Where exemption applies*

- (2) The exemption in subsection (1) applies in relation to a horse racing syndicate where all of the following are satisfied:
- (a) the promoter of the syndicate:
    - (i) holds an Australian financial services licence authorising the promoter to provide financial services in relation to the syndicate; and
    - (ii) is registered by a lead regulator as the promoter of the syndicate;
  - (b) there are no more than 50 participants in the syndicate;
  - (c) the total amount raised from the issue of interests in the syndicate does not exceed \$500,000;
  - (d) each Product Disclosure Statement given in relation to interests in the syndicate:
    - (i) contains the information and statements required by subsection (3); and
    - (ii) has been approved by the lead regulator;
- Note: Because a reference to a Product Disclosure Statement is taken to:
- (a) include the information and statements contained in any Supplementary Product Disclosure Statement (section 1014D of the Corporations Act); and
  - (b) be a reference to any Replacement Product Disclosure Statement (section 1014J of the Act);
- any Supplementary or Replacement Product Disclosure Statement for the syndicate must meet the requirements of paragraph (d).
- (e) if:
    - (i) applications for the minimum number of interests in the syndicate are not received; or
    - (ii) the minimum amount for the syndicate has not been raised, within 6 months after the date on which the Product Disclosure Statement in respect of the syndicate is approved by the lead regulator all money received from any person who applied to participate in the syndicate, together with interest (if any) which accrued in respect of that money, is repaid within 10 business days after the end of that 6 month period;
  - (f) from 45 days after:



- (i) applications for the minimum number of interests in the syndicate are received; or
- (ii) the minimum amount for the syndicate has been raised, the syndicate is registered with the lead regulator;
- (g) the syndicate agreement for the horse racing syndicate includes the terms referred to in subsection (4), unless these terms are excluded, modified or varied with the written agreement of all participants in the syndicate.

*Product Disclosure Statement requirements*

- (3) For the purposes of subparagraph (2)(d)(i), the information and statements required in the Product Disclosure Statement are all of the following:
- (a) the information required by Subdivision C of Division 2 of Part 7.9 of the Act;
  - (b) the name of the horse or horses to which the syndicate relates;
  - (c) the name of the promoter of the syndicate;
  - (d) the name of the manager of the syndicate;
  - (e) an undertaking by the promoter that the promoter will, within 45 days after:
    - (i) applications for the minimum number of interests in the syndicate are received; or
    - (ii) the minimum amount for the syndicate has been raised;register the syndicate with the lead regulator;
  - (f) a statement that the manager will be required to manage the syndicate in accordance with the syndicate agreement and any rules, regulations or guidelines made by the lead regulator in relation to such manager or management;
  - (g) details of fees and costs in relation to the syndicate
    - Note: Fees and costs in relation to the syndicate would include fees paid by the promoter or manager to trainers or suppliers and costs related to the promoters' business such as administration and legal costs.
  - (h) details of any actual or perceived conflict of interest of the promoter or manager in relation to the syndicate;
  - (i) for each horse to which the syndicate relates, the name and contact details of each owner of the horse's sire and dam;

- (j) for each horse to which the syndicate relates, a statement as to whether the promoter was entitled to a free service to its sire;
- (k) for each horse to which the syndicate relates, the purchase price and, where applicable, the passed-in price of the horse;
- (l) for each horse to which the syndicate relates:
  - (i) if the participants in the syndicate are to have unencumbered title to the whole of the horse:
    - (A) a copy of the letter (***vendor release statement***) from the vendor or auction house confirming that the horse has been devolved to the syndicate or participants in the syndicate with unencumbered title, or confirmation by the promoter that the vendor release statement will be provided to the lead regulator before or on registration of the syndicate with the lead regulator; and
    - (B) a statutory declaration made by the promoter that:
      - (1) the promoter has a legally enforceable right to possession of the horse or that the promoter will, before or on registration of the horse racing syndicate with the lead regulator, have a legally enforceable right to possession of the horse; and
      - (2) the promoter will, before or on registration of the syndicate with the lead regulator, ensure that the participants in the syndicate will have unencumbered title to the horse; and
    - (C) confirmation that any personal property security interest registered against the title to the horse has been released or will be released and that the promoter will, before or on registration of the syndicate with the lead regulator, confirm to the lead regulator that the personal property security interest has been released; or
  - (ii) if the participants in the syndicate lease the whole of the horse under a finance lease agreement in a standard form:
    - (A) a copy of the standard form of finance lease agreement; and
    - (B) a statutory declaration made by the promoter that the promoter will, before or on registration of the syndicate with the lead regulator, ensure that participants in the horse racing syndicate lease the horse under a finance lease agreement in that standard form;

- (m) a notice that a participant may elect to have a horse tested for a prohibited substance under the Australian Rules of Racing, with the cost of testing to be borne by all participants (whether or not they elected to have the horse tested).

*The role of the manager*

- (4) For the purposes of paragraph (2)(g), the terms of the syndicate agreement are:
  - (a) the manager of the horse racing syndicate must manage the syndicate in accordance with the terms of the syndicate agreement throughout its duration unless that person:
    - (i) retires after being given written consent by the majority of the participants of the syndicate not associated with the retiring manager;
    - (ii) is removed in accordance with the terms of the agreement; or
    - (iii) otherwise retires or is removed after being given written consent by the lead regulator; and
  - (b) if the manager of the syndicate retires or is removed in accordance with paragraph (a), a new manager will be appointed and that manager will become subject to the terms of the syndicate agreement.

*Conditions of the exemption*

- (5) A manager that relies on the exemption in subsection (1) in relation to a horse racing syndicate must:
  - (a) keep accounting records that correctly record and explain the transactions and financial position of the syndicate and that would enable financial statements to be prepared in respect of the syndicate from time to time; and
  - (b) in respect of each financial year, prepare financial statements in respect of the syndicate; and
  - (c) lodge the financial statements in respect of the horse racing syndicate with the lead regulator within 90 days after the end of each financial year; and
  - (d) if ASIC asks the manager in writing for a copy of the financial statements in respect of the syndicate, give the copy of those statements to ASIC within 14 days; and
  - (e) keep a separate account with an Australian bank in respect of the syndicate and use that account for the deposit and payment of all money relating to the operation of the syndicate.

- (6) A promoter that relies on the exemption in subsection (1) in relation to a horse racing syndicate must comply with the conditions in subsections (7) to (14) in relation to the syndicate.
- (7) The promoter must provide the lead regulator with a copy of all of the following in relation to the horse racing syndicate:
  - (a) the syndicate agreement and any changes to the syndicate agreement—promptly after the syndicate agreement is entered into or the changes are made;
  - (b) any finance lease agreement and any changes to the finance lease agreement—promptly after the finance lease agreement is entered into or the changes are made;
  - (c) any other agreement (*relevant agreement*):
    - (i) establishing or affecting the syndicate; or
    - (ii) that relates to the syndicate and to which a participant in the syndicate is a party,  
  
and any changes to a relevant agreement—promptly after the relevant agreement is entered into or the changes have been made;
  - (d) each Product Disclosure Statement, before it is given to an offeree;
  - (e) any other information to be provided by the promoter to an offeree in relation to the syndicate—before providing the information to the offeree;
  - (f) any advertisement for interests in the syndicate or statement that is reasonably likely to induce people to acquire interests in the syndicate—before it is published.
- (8) The promoter must not give an offeree with a Product Disclosure Statement unless the promoter has received the approval of the Statement from the lead regulator.
- (9) The promoter must not, without the approval of the lead regulator, advertise interests in the horse racing syndicate or publish any statement that is reasonably likely to induce people to acquire interests in the syndicate.
- (10) The promoter must provide to the lead regulator any assistance or information reasonably required by the lead regulator in relation to the promoter or the horse racing syndicate.
- (11) The promoter must not engage in acts or omissions in relation to the horse racing syndicate unless the promoter reasonably believes those acts or

omissions are in compliance with any rules, regulations or guidelines made by the lead regulator that apply to the promoter in relation to the syndicate.

- (12) The promoter must provide to ASIC any assistance or information reasonably required by ASIC in relation to the promoter or the horse racing syndicate.
- (13) The promoter must, before or on registration of the horse racing syndicate with the lead regulator, ensure that either:
  - (a) the participants in the horse racing syndicate have unencumbered title to the whole of the horse racing syndicate horses; or
  - (b) the participants in the horse racing syndicate lease the whole of the horse racing syndicate horses under a finance lease agreement in standard form.
- (14) The promoter must comply with section 1017D of the Act as if interests in the horse racing syndicate were a managed investment product.

## 6 Horse Breeding Schemes

### *Registration relief*

- (1) An operator of a private horse breeding scheme does not have to comply with subsection 601ED(5) of the Act in relation to the operation of the scheme.

### *Licensing relief*

- (2) An operator of a private horse breeding scheme does not have to comply with the requirement in subsection 911A(1) of the Act to hold an Australian financial services licence covering the provision of financial services in relation to interests in the scheme.
- (3) A person (other than a person to whom subsection (2) applies) does not have to comply with the requirement in subsection 911A(1) of the Act to hold an Australian financial services licence covering the provision of financial services in relation to interests in a managed investment scheme which appears to meet the definition of ***private horse breeding scheme*** except where the person is aware, or ought reasonably to be aware, that the scheme does not meet that definition.

Note: For a managed investment scheme to be a private stallion scheme to which this instrument applies, each promoter must at all times hold either an Australian financial services licence or 10% fully paid of all interests in the scheme: definition of ***private stallion scheme***.

*Hawking relief*

- (4) An operator of a private horse breeding scheme does not have to comply with section 992AA of the Act in relation to an offer of an interest in the private horse breeding scheme to a person in the course of, or because of:
- (a) an unsolicited meeting with the person; or
  - (b) an unsolicited telephone call to the person,
- if at the commencement of the meeting or call, the person was a person to whom a personal offer of the interest within the meaning of subsection 1012E(5) of the Act could have been made.

*Financial product disclosure relief*

- (5) An operator of a private horse breeding scheme does not have to comply with Part 7.9 of the Act (other than sections 1017E, 1017F, 1020D and 1021O) in relation to any of the following:
- (a) a recommendation to acquire an interest in the scheme;
  - (b) an offer to issue or sell an interest in the scheme;
  - (c) the issue or sale of interests in the scheme.
- (6) A person (other than a person to whom subsection (5) applies) does not have to comply with Part 7.9 of the Act in relation to either of the following:
- (a) a recommendation to acquire an interest in a managed investment scheme;
  - (b) an offer to arrange the issue of an interest in a managed investment scheme,

which appears to meet the definition of *private horse breeding scheme* except where the person is aware, or ought reasonably to be aware, that the scheme does not meet that definition.

## Part 3—Savings and transitional

### 7 Horse racing syndicates

*Application of this instrument and ASIC Class Order [02/319]*

- (1) ASIC Class Order [CO 02/319] continues to apply, despite its repeal, until 31 December 2016.

*Promoters and managers relying on ASIC Class Order [02/319]*

- (2) Where a person was an existing promoter or existing manager of an existing exempt scheme immediately before the transition time, that person may rely on the relief in this instrument in relation to the scheme in the case set out in subsection 5(2) and subject to the conditions set out in subsections 5(7) to (14), with the following modifications:
- (a) paragraph 5(2)(d), subsection 5(3) and subsection 5(8) do not apply in relation to the Product Disclosure Statement for the existing exempt scheme;
  - (b) paragraph 5(2)(e) does not apply;
  - (c) paragraph 5(2)(g) does not apply;
  - (d) subsection 5(7) does not apply to the extent the promoter has provided the existing lead regulator with a copy of the relevant document in relation to the existing exempt scheme;
  - (e) subsection 5(9) does not apply to the extent the promoter received approval from the existing lead regulator for the advertisement or publication in relation to the scheme before the transition time;
  - (f) subsection 5(13) does not apply in relation to the existing exempt scheme;
  - (g) if the existing lead regulator of the scheme is not approved as a lead regulator under this instrument as at the transition time, the promoter must ensure that both the promoter and the scheme are registered with a lead regulator approved under this instrument within 6 months of the transition time.
- (3) A lead regulator approved under this instrument must, in registering an existing exempt scheme for the purposes of paragraph (2)(g), take into account the operation of paragraphs (2)(a) to (f) in relation to the scheme.
- (4) In this section:

***existing exempt scheme*** means an existing scheme in relation to which the existing manager and existing promoter were entitled to rely on the exemption in the repealed instrument immediately before the transition time and which was registered with an existing lead regulator at that time.

***existing scheme*** means a scheme of the kind described in Schedule B to the repealed instrument.

***existing lead regulator*** means a lead regulator (within the meaning of the repealed instrument) that was a lead regulator of an existing scheme immediately before the transition time.

***existing manager*** means a manager of an existing scheme.

***existing promoter*** means a promoter (within the meaning of Schedule A to the repealed instrument) of an existing scheme.

***repealed instrument*** means ASIC Class Order [CO 02/319] as applying on 31 December 2016 because of the operation of subsection (1).

***transition time*** means the time ASIC Class Order [CO 02/319] ceases to apply in accordance with subsection (1).

## 8 Horse breeding schemes

### *Existing private stallion scheme agreements*

Paragraph (k) of the definition of ***stallion scheme agreement*** in subsection 4(1) is satisfied in relation to a stallion scheme agreement entered into before the commencement of this instrument, if the stallion scheme agreement included a provision to the effect that ASIC Class Order [CO 02/178] was being relied on by the operator and the operator was entitled to rely on [CO 02/178] immediately before the commencement of this instrument.