

**EXPLANATORY STATEMENT for
ASIC Corporations (Records—Dealings on Foreign Markets) Instrument
2016/889**

and

ASIC Corporations (Repeal) Instrument 2016/890

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes the following legislative instruments under subsection 992B(1) of the *Corporations Act 2001* (the **Act**):

- (a) *ASIC Corporations (Records—Dealings on Foreign Markets) Instrument 2016/889* (the **principal instrument**);
- (b) *ASIC Corporations (Repeal) Instrument 2016/890* (the **repeal instrument**).

Subsection 992B(1) of the Act provides that ASIC may, among other things, exempt a person or a class of persons from all or specified provisions of Part 7.8 of the Act. Subsection 992B(4) provides that an exemption must be in writing and ASIC must publish notice of it in the *Gazette*.

Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of the Act), where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

1. Background

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 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.

ASIC Class Order [CO 03/826] exempts Australian financial services (AFS) licensees from the requirement to keep market-related records for transactions under regulation 7.8.19 of the *Corporations Regulations 2001* (the **Regulations**) when dealing with foreign wholesale clients on overseas markets. This instrument is due to sunset on 1 April 2017. ASIC has reviewed its policy underlying the class order. In light of this review and following public consultation, ASIC considers that this class order relief is necessary, fit for purpose and

relevant. As such, ASIC has decided to reissue the relief underlying the instrument by making the principal instrument.

2. Purpose of the legislative instruments

The purpose of the principal instrument is to ensure regulatory neutrality between Australian and overseas-based entities and to remove inappropriate regulatory obligations arising from the way in which overseas entities conduct business in Australia. ASIC considers that without this relief, the record-keeping obligations in relation to dealings on financial markets operating outside Australia would be too broad and that the regulatory burden associated with complying with such a broad obligation would significantly outweigh any associated regulatory benefit.

The purpose of the repeal instrument is to discontinue ASIC Class Order [CO 03/826], which will be superseded by the principal instrument.

3. Operation of the legislative instruments

The principal instrument exempts AFS licensees from having to comply with regulation 7.8.19 of the Regulations in relation to an instruction to deal in financial products received by the licensee. This relief only applies in relation to an instruction which is from or on behalf of a wholesale client who is not in this jurisdiction and for a dealing through a financial market that is not operated in this jurisdiction.

The repeal instrument repeals ASIC Class Order [CO 03/826]. AFS licensees can now rely on the principal instrument.

4. Consultation

The relief given in the principal instrument was the subject of Consultation Paper 262 *Remaking and repealing ASIC class orders on markets and securities (CP 262)*. CP 262 was published in July 2016. ASIC did not receive any feedback opposing the making of the principal instrument. The Office of Best Practice Regulation advised that a Regulatory Impact Statement is not required in order to make the principal instrument.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Records—Dealings on Foreign Markets) Instrument 2016/889 ASIC Corporations (Repeal) Instrument 2016/890

The following legislative instruments are 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*:

- *ASIC Corporations (Records—Dealings on Foreign Markets) Instrument 2016/889*;
- *ASIC Corporations (Repeal) Instrument 2016/890*.

Overview

ASIC Corporations (Records—Dealings on Foreign Markets) Instrument 2016/889 exempts Australian financial services licensees from certain record keeping obligations under the *Corporations Regulations 2001* in circumstances where the licensee receives instructions from or on behalf of wholesale clients who are not in Australia and the dealing through which the financial market would be made is not operated in Australia.

ASIC Corporations (Repeal) Instrument 2016/890 discontinues ASIC Class Order [CO 03/826], being the instrument that gave effect to ASIC's previous policy, and which will be superseded by *ASIC Corporations (Records—Dealings on Foreign Markets) Instrument 2016/889*.

Human rights implications

The legislative instruments do not engage any of the applicable rights or freedoms.

Conclusion

The legislative instruments are compatible with human rights as they do not raise any human rights issues.

Australian Securities and Investments Commission