

EXPLANATORY STATEMENT for
ASIC Corporations (Charitable Investment Fundraising) Instrument
2016/813

and

ASIC Corporations (Repeal) Instrument 2016/810

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes:

- ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813 (the ***Instrument***); and
- ASIC Corporations (Repeal) Instrument 2016/810 (the ***Class Order Repeal Instrument***).

The Instrument is made under paragraphs 283GA(1)(a), 601QA(1)(a), 741(1)(a), 926A(2)(a), 992B(1)(a) and 1020F(1)(a) of the *Corporations Act 2001* (Act).

The Class Order Repeal Instrument revokes ASIC class order [CO 02/184] *Charitable investment schemes – fundraising*. The Class Order Repeal Instrument is made under paragraphs 283GA(1)(a), 601QA(1)(a), 741(1)(a), 926A(2)(a), 992B(1)(a) and 1020F(1)(a) of the Act.

Paragraph 283GA(1)(a) of the Act provides that ASIC may exempt a person from all or specified provisions of Chapter 2L of the Act.

Paragraph 601QA(1)(a) of the Act provides that ASIC may exempt a person from all or specified provisions of Chapter 5C of the Act.

Paragraph 741(1)(a) of the Act provides that ASIC may exempt a person from all or specified provisions of Chapter 6D of the Act.

Paragraph 911A(2)(l) of the Act provides that a person is exempt from the requirement to hold an Australian financial services (AFS) licence for a financial service they provide covered by the exemption specified by ASIC in writing and published in the *Gazette*.

Paragraph 926A(2)(a) of the Act provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.6, other than Divisions 4 and 8 of Part 7.6 of the Act.

Paragraph 992B(1)(a) of the Act provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.8 of the Act.

Paragraph 1020F(1)(a) provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.9 of the Act.

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

The term '*charitable investment fundraiser*' is defined in the Instrument and is used to describe a charity, or person acting on behalf of a charity, that raises funds to support its purposes by issuing debentures (other than by way of certain limited offers), and/or interests in a managed investment scheme.

Charitable investment fundraisers are likely to be subject to provisions in the Act including:

- (a) the debenture provisions, set out in Parts 2L.1 – 2L.5;
- (b) the managed investment provisions, set out in Chapter 5C;
- (c) the fundraising provisions, set out in Parts 6D.2 - 6D.3, sections 992A and 992AA, Divisions 2 and 4 of Part 7.9, and sections 1017B and 1017G (together, the **fundraising, managed investment and debenture provisions**); and
- (d) the requirement to hold an AFS licence, set out in section 911A of the Act (the **licensing provisions**).

ASIC has provided two types of conditional relief from the licensing, fundraising, managed investment and debenture provisions to charitable investment fundraisers:

- (a) relief provided to individual charitable investment fundraisers referred to as the '**individual charities exemption**', available upon lodgement by the charitable investment fundraiser of an identification statement with ASIC and its acceptance for registration by ASIC. This relief was provided in [CO 02/184]; and
- (b) relief provided to sponsored bodies (or sponsored charitable investment fundraisers) and their officers, employees and trustees referred to as the '**group charities exemption**'. This relief was available for groups of charities with common or related charitable objectives with a 'sponsor' that applied to ASIC to become a sponsor and entered into a deed poll in the form of Pro Forma [PF 96] *Sponsor deed poll*. The term '**sponsor**' is defined in the

Instrument. Relief provided to sponsored bodies and their officers, employees and trustees of CDPF Limited ACN 067 995 448 is contained in Instrument 04/0024.

ASIC relief provided under [CO 02/184] and the group charities exemption (including under Instrument 04/0024) was available for so long as certain lodgement, disclosure and reporting conditions are met.

ASIC conducted a review of the exemptions that applied to charitable investment fundraisers and released Consultation Paper 207 *Charitable investment fundraisers* (CP 207) in 2013.

[CO 02/184] is due to expire on 1 October 2016. ASIC has reviewed the operation of [CO 02/184] and the group charities exemption and as a result of that review, made:

- (a) the Instrument;
- (b) the Class Order Repeal Instrument, which repeals [CO 02/184] before its statutory sunset in 2016; and
- (c) the Group Charities Relief Repeal Instrument which repeals Instrument 04/0024.

ASIC has also:

- (a) updated ASIC Regulatory Guide 87 *Charitable investment schemes and school enrolment deposits* (RG 87);
- (b) remade ASIC Class Order [CO 02/151]: *School enrolment deposits* into a new ASIC instrument, ASIC Corporations (School Enrolment Deposits) Instrument 2016/812, to preserve its effect beyond its sunset date of 1 October 2016; and
- (c) issued a repeal instrument, ASIC Corporations (Repeal) Instrument 2016/819, to repeal [CO 02/151].

2. Purpose of the instruments

The purpose of the Instrument is to continue to provide charitable investment fundraisers relief from the:

- (a) fundraising, managed investment and debenture provisions; and
- (b) licensing provisions, if the charitable investment fundraiser is a wholesale charitable investment fundraiser

subject to additional or modified requirements and conditions of relief. The term '*wholesale charitable investment fundraiser*' is defined in the Instrument.

The purpose of the Class Order Repeal Instrument is to discontinue relief from the licensing, fundraising, managed investment and debenture provisions provided by [CO 02/814].

ASIC instrument 16/0941 will discontinue relief from the licensing, fundraising, managed investment and debenture provisions provided by Instrument 04/0024.

The Instrument operates from the day after it is registered under the *Legislation Act 2003*.

3. Operation of the instruments

Fundraising, managed investments and debentures exemption

Subsection 5(1) of the Instrument exempts a charitable investment fundraiser from the requirement to comply with certain fundraising, managed investment and debenture provisions of the Act, subject to meeting the requirements in subsection 5(3) and the conditions in section 7 of the Instrument. Subsection 5(1) of the Instrument continues the exemptions provided under [CO 02/184] and Instrument 04/0024.

Licensing

Subsection 5(2) of the Instrument exempts a wholesale charitable investment fundraiser from the requirement to hold an AFS licence for the provision of the financial services set out in paragraphs 5(2)(a) to 5(2)(d), subject to meeting the requirements in subsection 5(3) and the conditions in section 7 of the Instrument.

The exemption provided in subsection 5(2) of the Instrument does not apply to retail charitable investment fundraisers, unlike exemptions provided under [CO 02/184] and Instrument 04/0024.

The term '**retail charitable investment fundraiser**' is defined in the Instrument as a charitable investment fundraiser that is not a wholesale charitable investment fundraiser. The term '**wholesale charitable investment fundraiser**' means a charitable investment fundraiser in relation to which no person holds a debenture or interest in a managed investment scheme issued to them after 31 December 2016 as a 'retail, non-associated client'. A retail charitable investment fundraiser can become a wholesale charitable investment fundraiser when it repays or redeems all investments held by retail, non-associated clients.

The term '**retail, non-associated client**' is defined in the Instrument to mean a retail client who is not an associate.

The term '**associate**' is defined in the Instrument and includes bodies that control or are controlled by the charity, a charity with a related charitable purpose, or a trustee of the charity's trust. It also includes a member of the clergy, employee or voluntary staff member who works for one of these bodies or a person undertaking training or education for these positions.

Retail charitable investment fundraisers with pre-existing relief under [CO 02/184] or Instrument 04/0024 immediately before their repeal will not need to hold an AFS licence for the provision of the financial services set out in paragraphs 5(2)(a) to 5(2)(d) until 1 January 2018. In order to get the benefit of the transitional provisions, these retail charitable investment fundraisers must also:

- (a) meet the requirement in paragraph 5(3)(a) of the Instrument before 1 March 2017; and
- (b) continue to meet this requirement after 1 March 2017.

Recommendations to acquire and offers to arrange

Subsection 6(1) of the Instrument exempts a person who is not a charitable investment fundraiser from the requirement to provide a product disclosure statement where they give personal advice recommending the acquisition of, or offer to arrange the issue of an interest in a managed investment scheme issued by a charitable investment fundraiser. This exemption is available unless that person is aware, or ought reasonably to be aware that the charitable investment fundraiser has failed to lodge an identification statement or failed to report certain breaches required under subsection 5(3) of the Instrument.

Requirements

Subsection 5(3) of the Instrument sets out the requirements which must be met for the exemptions in subsection 5(1) and (2) of the Instrument to apply.

Failure by a charitable investment fundraiser to meet a requirement in subsection 5(3) of the Instrument will mean that:

- (a) relief under the Instrument will not be available;
- (b) relief under the Instrument will not become available again until a new application to register an identification statement for the charitable investment fundraiser has been accepted by ASIC or the sponsor; and
- (c) upon acceptance of the new identification statement, the requirements and conditions that apply to the relief under the Instrument will apply immediately.

Acceptance requirement for identification statement

Paragraph 5(3)(a) of the Instrument requires the charitable investment fundraiser to have had an identification statement accepted for the purposes of the Instrument with ASIC or the sponsor, and to have not been notified by ASIC or the sponsor that this acceptance has been revoked.

Charitable investment fundraisers with pre-existing relief under [CO 02/184] or Instrument 04/0024 immediately before their repeal must meet the requirement in paragraph 5(3)(a) before 1 March 2017 and must continue to meet this requirement

after this date to have the benefit of the transitional provisions in sections 8 and 9 of the Instrument.

Breach reporting

Paragraph 5(3)(b) of the Instrument requires the charitable investment fundraiser to report to ASIC, within 15 business days, breaches of the conditions in section 7 of the Instrument, subject to certain exceptions. This requirement allows ASIC to monitor charitable investment fundraisers more effectively.

Charitable investment fundraisers with pre-existing relief under [CO 02/184] or Instrument 04/0024 immediately before their repeal will not need to meet the requirement in paragraph 5(3)(b) until 1 January 2018. In order to get the benefit of the transitional provisions, these charitable investment fundraisers must also:

- (a) meet the requirement in paragraph 5(3)(a) of the Instrument before 1 March 2017; and
- (b) continue to meet this requirement after 1 March 2017.

Conditions

Section 7 of the Instrument sets out the conditions that apply to a charitable investment fundraiser relying on the exemptions in subsections 5(1) and 5(2) of the Instrument.

Charitable investment fundraisers with pre-existing relief under [CO 02/184] or Instrument 04/0024 immediately before their repeal will not need to meet:

- (a) the condition in subsection 7(5) of the Instrument until 1 January 2017; and
- (b) the remaining conditions in section 7 of the Instrument (other than subsection 7(5) of the Instrument) until 1 January 2018.

In order to get the benefit of the transitional provisions, these charitable investment fundraiser must also:

- (a) meet the requirement in paragraph 5(3)(a) of the Instrument before 1 March 2017; and
- (b) continue to meet this requirement after 1 March 2017.

Identification statement

Subsection 7(2) of the Instrument requires charitable investment fundraisers, or where there is a sponsor accepted by ASIC, the sponsor, to ensure that the identification statement lodged with ASIC contains the information set out in subsection 7(2).

Subsection 7(3) of the Instrument requires the charitable investment fundraiser to publish the identification statement on a website.

Subsection 7(4) of the Instrument requires the charitable investment fundraiser to lodge an updated identification statement, if it becomes aware that the information is not or will not be up to date, complete or not misleading.

Restrictions on allowing short term repayment

Subsection 7(5) of the Instrument requires charitable investment fundraisers to ensure they do not issue any short-term investment product to a retail, non-associated client.

The term '**short-term investment product**' is defined in the Instrument and broadly means a product that has a fixed term of 31 days or less, or that can be repaid or redeemed within that period.

Subsection 7(6) of the Instrument restricts retail charitable investment fundraisers from issuing short-term investment products to any wholesale investors or associates unless such investment products may only be repaid or redeemed:

- (a) if the charitable investment fundraiser reasonably believes that all holders would be repaid or redeemed in accordance with their entitlements;
- (b) in the case of an individual, to alleviate financial hardship; and
- (c) on a winding up.

Restriction on payment facilities

Subsection 7(8) of the Instrument requires retail charitable investment fundraisers to ensure that the entitlements of retail, non-associated clients may only be discharged by a transfer to an account of the person with an Australian ADI or a cheque payable only to the person.

Restricted terms

Subsection 7(9) of the Instrument prohibits retail charitable investment fundraisers from using the terms 'at call' and 'deposit', or derivatives of these terms, to describe products.

Disclosure

Subsection 7(10) of the Instrument sets out the disclosure requirements for charitable investment fundraisers.

Additional disclosure for retail investors

Subsections 7(11) and 7(12) of the Instrument set out additional disclosure requirements that must be met with retail clients. These disclosure requirements must also be met with retail clients who are associates.

Subsection 7(12) of the Instrument requires charitable investment fundraisers to make clear and prominent disclosure to retail investors in offer documents and

promotional material that retail investors may not be able to get some or all of their original investment back, among other matters.

Investor acknowledgement

Subsection 7(13) of the Instrument prohibits the issue of investment products to any retail, non-associated client of the charitable investment fundraiser, unless the charitable investment fundraiser receives a written statement indicating that the retail, non-associated client understands the disclosures prescribed in subsections 7(11) and 7(12) of the Instrument.

Subsection 7(14) of the Instrument allows an investor to provide an electronic signature in accordance with section 10 of the *Electronic Transaction Act 1999*, to sign a statement for the purposes of subsection 7(13) of the Instrument.

Financial reporting

Subsection 7(15) of the Instrument requires charitable investment fundraisers to:

- (a) prepare financial statements;
- (b) obtain an audit report about the financial statements within 6 months after the end of their financial year; and
- (c) lodge the financial statements and audit report with the Australian Charities and Not for profits Commission (ACNC) if required by law to do so, or otherwise with ASIC.

Transitional provisions

Section 8 of the Instrument sets out the transitional operation of the relief under [CO 02/184]. Section 9 of the Instrument sets out the transitional operation of the relief provided under Instrument 04/0024.

Sections 8 and 9 of the Instrument provides that the relief provided in [CO 02/184] and Instrument 04/0024 respectively continue in force until 31 December 2017 notwithstanding their repeal, subject to the modification and conditions in sections 8 and 9 of the Instrument.

This means that charitable investment fundraisers which have pre-existing relief under [CO 02/184] or Instrument 04/0024 immediately before their repeal may continue to rely on the relief provided in [CO 02/184] or Instrument 04/0024, subject to the modification and conditions in sections 8 and 9 of the Instrument.

In order to get the benefit of the transitional provisions, these charitable investment fundraisers must also:

- (a) meet the requirement in paragraph 5(3)(a) of the Instrument before 1 March 2017; and
- (b) continue to meet this requirement after 1 March 2017.

Charitable investment fundraisers which do not have pre-existing relief under [CO 02/184] or Instrument 04/0024 immediately before their repeal will not get the benefit of the transitional provisions.

After 1 January 2018, all retail charitable investment fundraisers must hold an AFS licence and all charitable investment fundraisers must meet the requirements in section 5 and the conditions in section 7 of the Instrument for the exemptions in subsection 5(1) and (2) of the Instrument to apply.

4. Consultation

In preparing the Instrument, we conducted the following public consultation:

- (a) a formal public consultation by issuing CP 207 on 20 May 2013 and
- (b) a targeted consultation in January – February 2016, only to those entities that had provided a submission in response to CP 207; and
- (c) a final targeted consultation in relation to consultation drafts of RG 87 and the Instrument with those entities referred to in (b) above.

Details of the submissions to CP 207 are contained in REP 000 *Response to submissions on CP 207 Charitable investment fundraisers* which is available on ASIC's website at www.asic.gov.au.

We consulted internally and with the Commonwealth Department of the Treasury, Australian Prudential Regulation Authority (APRA) and the ACNC.

We have assessed that a Regulation Impact Statement is required, as the proposed changes are likely to increase the compliance costs of charitable investment fundraisers and potentially restrict their fund raising activities.

5. Documents incorporated by reference

We have incorporated two documents by reference:

- (a) the former [CO 02/184] that was in force until the day after the Class Order Repeal Instrument was registered on the Federal Register of Legislation, which was repealed by the Class Order Repeal Instrument, and is available as ASIC superseded class order [SCO 02/184] *Charitable investment schemes – fundraising* on the Federal Register of Legislation; and
- (b) Instrument 04/0024 that was in force until the day after ASIC Instrument 16/0941 was registered with ASIC and is available in the *Gazette* (No. ASIC 03/04, Tuesday, 20 January 2004 at pages 33-35).

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

ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813

and

ASIC Corporations (Repeal) Instrument 2016/810

ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813 (the *Instrument*) and ASIC Corporations (Repeal) Instrument 2016/810 (the *Class Order Repeal Instrument*) 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*.

Overview of the legislative instruments

The Instrument creates a new regulatory framework for charitable investment fundraisers with stronger protection for retail investors, and in particular retail investors that are not 'associates' of the charitable investment fundraiser (or 'retail, non-associated clients').

A 'charitable investment fundraiser' for the purposes of the Instrument is a charity or person acting on behalf of a charity that issues debentures or operates or promotes a charitable investment scheme. The Instruments provides relief for charitable investment fundraisers from certain licensing, fundraising, managed investment and debenture provisions of the Corporations Act requirements, subject to various requirements and conditions.

The Class Order Repeal Instrument repeals ASIC Class Order [CO 02/184] *Charitable investment schemes – fundraising*. [CO 02/184] also provided relief from the provisions referred to above but subject to different conditions.

The relief provided to sponsored bodies and their officers, employees and trustees of CDPF Limited ACN 067 995 445 contained in ASIC Instrument [04/0024] (Instrument 04/0024). Instrument 04/0024 provided similar relief to the relief provided in [CO 02/184] in relation to CDPF and its related, sponsored bodies. This instrument will be repealed by ASIC Instrument 16/0941

Human rights implications

The Instrument requires that a charitable investment fundraiser which relies on the relief in the Instrument must prepare an identification statement containing certain specified information in relation to the debentures or managed investment scheme interests that are being offered for investment by the charitable investment fundraiser. This identification statement must be made publicly available on a website.

Among other things, where the charitable investment fundraiser is a natural person (e.g. a trustee of a charitable investment fundraiser that is a natural person), the identification statement must include the person's name, date of birth and address. The Instrument may therefore engage the human right to privacy under Article 17 of the *International Covenant on Civil and Political Rights*. That Article prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence.

ASIC considers that the Instrument is compatible with the right in Article 17. The right in Article 17 is not absolute. The right has implied limitations ('unlawful' and 'arbitrary') and may be subject to a permissible limitation where that limitation aims to achieve a legitimate objective, there is a rational connection between the limitation and the objective and the limitation is reasonable, necessary and proportionate. Any limitation imposed on the right by the Instrument has a clear legal basis, in that it:

- (a) *Aims to achieve a legitimate objective* –The objective of ASIC in requiring the information to be made public is to:
 - (i) ensure that ASIC is aware of the identity of each charitable investment fundraiser (including a natural person) which relies on the Instrument to facilitate appropriate supervision of the investment activities of the charitable investment fundraiser; and
 - (ii) provide some protection to investors and prospective investors in the charitable investment fundraiser by identifying the charitable investment fundraiser (including in the case of natural persons). We consider that transparency at the investment entity level will encourage compliance with the applicable obligations.
- (b) *Is reasonable, necessary and proportionate* –The information is required to enable ASIC, investors and prospective investors to identify each charitable investment fundraiser which seeks to rely on the relief in the Instrument. Requiring the name, address and date of birth of a natural person who is a charitable investment fundraiser is necessary and proportionate to this objective. The Corporations Act requires equivalent information to be made publicly available by a person who is a director or secretary of a company.

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

Conclusion

The Instrument is compatible with human rights. Any interference with the human right to privacy is incidental to its primary operation. Where that interference occurs, it is reasonable, necessary and proportionate in order for the charitable investment fundraiser to be transparent in its operations, for there to be an appropriate contact at the charitable investment fundraiser, and for investors and prospective investors to understand and identify the charitable investment fundraiser in which they are investing or proposing to invest.