



ASIC

Australian Securities & Investments Commission

ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813

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

Date: 22 September 2016

Stephen Yen

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Part 1—Preliminary

1 Name of legislative instrument

This is the *ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813*.

2 Commencement

This instrument commences on the same day as the *ASIC Corporations (Repeal) Instrument 2016/810*.

3 Authority

This 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*.

4 Definitions

In this instrument:

ACNC means the Australian Charities and Not-for-profits Commission.

Act means the *Corporations Act 2001*.

associate, in relation to a charitable investment fundraiser, means any of the following:

- (a) a body constituted by or under the authority of a decision of the charity or which is controlled by the charity;
- (b) a person or body that constituted the charity or under whose authority the charity was constituted or that controls the charity;
- (c) a charity with a charitable purpose (*related charitable purpose*) which is the same as or similar to the charity;
- (d) a person acting as a trustee of a trust for the charity or a charity with a related charitable purpose;
- (e) a member of clergy, employee or voluntary staff member who works for a person mentioned in any of paragraphs (a) to (d);
- (f) a person undertaking training or education to enable them to be a person mentioned in paragraph (e) who receives money or money's worth from a person mentioned in any of paragraphs (a) to (e).

charitable investment fundraiser means a charity, or a trustee of a charity, that raises funds to support the charitable purposes of the charity through the issue of:

- (a) debentures; or

(b) interests in a managed investment scheme.

charitable purpose has the meaning given by the *Charities Act 2013*.

charity has the meaning given by the *Charities Act 2013*.

corresponding relief means, in relation to an exemption in a provision of this instrument, an exemption in any of the following:

- (a) ASIC Class Order [CO 02/184] (as continued in force by section 8 and as in force at any time before commencement of this instrument);
- (b) ASIC Instrument 04/0024 dated 15 January 2004 (as continued in force by section 9 and as in force at any time before commencement of this instrument).

identification statement: see paragraph 5(3)(a).

measurement requirement means a requirement in an accounting standard that is relevant to working out the cost or other value to be attributed to an asset, liability, revenue, expense or other item that is covered by a recognition requirement.

offer includes, in relation to the issue of a financial product, inviting applications for the issue of the financial product.

offer document means any document which contains an offer for the issue of interests in a managed investment scheme or debentures in connection with a charitable investment fundraiser.

recognition requirement means a requirement in an accounting standard that an asset, liability, revenue, expense or other item is to be expressly reported on, or incorporated in amounts expressly reported on, in a financial statement to which the standard relates.

reporting entity has the same meaning as in Accounting Standard AASB 1053 *Application of Tiers of Australian Accounting Standards*.

retail client in relation to:

- (a) an interest in a managed investment scheme has the same meaning as in section 761A of the Act; and
- (b) a debenture means a person to whom the offer of the debenture would not need disclosure under Part 6D.2 of the Act, other than because of subsection 708(1) or 708(14) of the Act.

retail, associated client means, in relation to a charitable investment fundraiser, a retail client which is also an associate of the charitable investment fundraiser.

retail charitable investment fundraiser means a charitable investment fundraiser that is not a wholesale charitable investment fundraiser.

retail, non-associated client means, in relation to a charitable investment fundraiser, a retail client who is not an associate of the charitable investment fundraiser.

short-term investment product means a debenture or interest in a managed investment scheme issued by a charitable investment fundraiser that:

- (a) has a fixed term of less than 31 days; or
- (b) has a fixed term at the end of which it is not required that the amount owing in relation to the debenture or interest be paid to the holder unless, if not paid, the debenture or interest will:
 - (i) be subject to a further fixed term of at least 31 days; or
 - (ii) be payable only on a request that provides at least 31 days' notice; or
- (c) gives the holder the right to require repayment or redemption (in full or in part) of the debenture or interest by giving less than 31 days' notice.

sponsor means an entity that:

- (a) has entered into and given to ASIC a deed poll:
 - (i) in favour of each holder of a debenture or interest in a managed investment scheme issued by each charitable investment fundraiser for which the sponsor has accepted for the purposes of this instrument an identification statement; and
 - (ii) under which the sponsor covenants to guarantee the performance by the charitable investment fundraiser of its obligations under any debenture or interest in a managed investment scheme to which the identification statement relates, except any debentures or interest issued after revocation of the acceptance for the purposes of this instrument; and
- (b) ASIC has not subsequently notified in writing is no longer a sponsor for the purposes of this instrument unless ASIC has revoked the notification in writing.

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.

Part 2—Exemptions

5 Charitable investment fundraiser

Fundraising, managed investments and debentures exemption for charitable investment fundraiser

- (1) A charitable investment fundraiser does not have to comply with any of the following:
- (a) subsection 601ED(5) of the Act in relation to the operation of a managed investment scheme;
 - (b) Parts 6D.2 and 6D.3 of the Act in relation to an offer for the issue of a debenture;
- Note: This also means that the charitable investment fundraiser will not be required to enter into a trust deed under section 283AA of the Act.
- (c) section 992AA of the Act in relation to an interest in a managed investment scheme;
 - (d) Divisions 2 and 4 of Part 7.9 and sections 1017B and 1017G of the Act in relation to an interest in a managed investment scheme.

Licensing exemption for wholesale charitable investment fundraiser

- (2) A charitable investment fundraiser that is a wholesale charitable investment fundraiser does not have to comply with subsection 911A(1) of the Act for the provision of any of the following financial services:
- (a) issuing a debenture or an interest in a managed investment scheme;
 - (b) dealing (other than by way of issue) in financial products where the dealing is:
 - (i) on behalf of any holder of an interest in a managed investment scheme issued by the charitable investment fundraiser; and
 - (ii) in the course of operating the scheme;
 - (c) providing a custodial or depository service where the service is provided:
 - (i) by holding a financial product, or a beneficial interest in a financial product on trust for or on behalf of any holder of an interest in a managed investment scheme issued by the charitable investment fundraiser; and
 - (ii) in the course of operating the scheme;

- (d) providing general advice that is included in an offer document for debentures or interests in a managed investment scheme.

Note: *ASIC Corporations (Effect of Licensing Exemptions) Instrument 2015/1115* provides relief from subsection 911B(1) of the Act to a person who provides financial services on behalf of a person who does not need an Australian financial services licence because of an exemption under section 926A of the Act.

Where the exemptions apply

- (3) The exemptions in subsections (1) and (2) apply to a charitable investment fundraiser where the following requirements are satisfied:

Acceptance requirement for identification statement

- (a) the fundraiser has had accepted, for the purposes of this instrument, a statement (***identification statement***) that relates to the debenture or interest in the managed investment scheme by:
 - (i) ASIC, and ASIC has not notified the fundraiser in writing that ASIC has revoked the acceptance; or
 - (ii) a sponsor, and the sponsor has not notified the fundraiser in writing that it has revoked the acceptance;

Breach reporting requirement

- (b) if the fundraiser becomes aware of a matter that gives it reason to believe that it has failed or is likely to fail to comply with a condition in section 7:
 - (i) the fundraiser has given full particulars of the matter to ASIC in writing within 15 business days of becoming aware of it; or
 - (ii) the charitable investment fundraiser has received written notification from ASIC that the exemptions in subsections (1) and (2) continue to apply despite the fundraiser not having given ASIC full particulars of the matter in accordance with subparagraph (i); or
 - (iii) the fundraiser has been notified in writing by ASIC that breaches of that kind need not be notified under subparagraph (i), and ASIC has not revoked that notification in writing.

6 People who advise on charitable fundraisers etc

Recommendations to acquire and offers to arrange

- (1) A person who is not a charitable investment fundraiser does not have to comply with sections 1012A or 1012B of the Act in relation to a recommendation to acquire, or an offer to arrange the issue of, an interest

in a managed investment scheme that is to be issued by a charitable investment fundraiser.

Where exemption applies

- (2) The exemption in subsection (1) applies to a person unless the person is aware, or ought reasonably to be aware, that the requirements in subsection 5(3) are) are not satisfied in relation to the charitable investment fundraiser.

7 Conditions

- (1) This section applies to a charitable investment fundraiser that relies on an exemption in section 5 in relation to debentures or interests in a managed investment scheme.

Identification statement condition

- (2) The charitable investment fundraiser must ensure that the identification statement in relation to the debentures or interests includes the following information and statements:
 - (a) the identity of the charitable investment fundraiser, including:
 - (i) its full name and ABN (if any); and
 - (ii) particulars of its corporate status (if any), including the legislation under which the fundraiser was incorporated and its incorporation number (if any); and
 - (iii) if the charitable investment fundraiser is a natural person, their full name and date of birth; and
 - (iv) its address;
 - (b) information identifying which exemptions under section 5, ASIC Class Order [CO 02/184] (as continued in force by section 8) or ASIC Instrument 04/0024 (as continued in force by section 9) the charitable investment fundraiser intends to rely on and demonstrating how the charitable investment fundraiser meets, or may be expected to meet, all the conditions of the relevant exemptions;
 - (c) whether the charitable investment fundraiser will issue debentures or interests in a managed investment scheme or both, together with a clear identification of any managed investment scheme;
 - (d) if the charitable investment fundraiser proposes to issue:
 - (i) debentures—the financial year for the charitable investment fundraiser; and

- (ii) interests in a managed investment scheme—the financial year that is to apply for the managed investment scheme;
- (e) whether the charitable investment fundraiser is or will be required to hold an Australian financial services licence and, if it holds an Australian financial services licence, the licence number for that licence;
- (f) the charitable purpose of the charitable investment fundraiser, a statement that the issue of the debentures or interests will promote that charitable purpose and information as to how the charitable purpose will be promoted by the issue;
- (g) the key terms of the debentures or interests, including how each of the following will be determined:
 - (i) any rate of return or distribution;
 - (ii) any fees and costs payable by the holder;
 - (iii) in the case of interests in a managed investment scheme, any fees and costs payable from the assets of the scheme;
- (h) to whom and through what means the debentures or interests will be offered, including whether any offers are to be made to:
 - (i) people as retail, non-associated clients; or
 - (ii) people as retail, associated clients and whether this may include people who are associates because they are voluntary staff members and, if so, what criteria will be applied in determining if a person is to be treated as a voluntary staff member for the purpose of relying on that person being an associate; or
 - (iii) people who will not acquire the debentures or interests as retail clients and are not associates of the charitable investment fundraiser;
- (i) whether the charitable investment fundraiser will be required to lodge with the ACNC:
 - (i) audited financial statements for the fundraiser; and
 - (ii) if the fundraiser will issue interests in a managed investment scheme—audited financial statements for the managed investment scheme;
- (j) if a person other than the charitable investment fundraiser will provide a guarantee for the benefit of, or owe an obligation to, holders of the debentures or interests—the identity of the person and a description of the guarantee or obligation;

- (k) the types of assets that the charitable investment fundraiser will hold, or that will be held under any managed investment scheme, and particulars of the extent to which any of those assets are or will be held outside Australia;
 - (l) if the identification statement is, or is to be, accepted for the purposes of this instrument by a sponsor, a statement to that effect, identifying the sponsor, and where a copy of the deed poll for the sponsor can be found.
- (3) The charitable investment fundraiser must maintain, or arrange for an associate to maintain, a website on which it makes readily publicly accessible the identification statement, as accepted for the purposes of this instrument by ASIC or a sponsor, for 5 years after the last time when the charitable investment fundraiser relied or purported to rely on the acceptance for the purposes of this instrument of that identification statement.
- (4) The charitable investment fundraiser must take all reasonable steps to ensure that the information in the identification statement is up to date, complete and not misleading at all times.

Note: This may require the charitable investment fundraiser to give to ASIC or the sponsor (as relevant) an identification statement that replaces the original identification statement.

Restriction on allowing short term repayment

- (5) The charitable investment fundraiser must ensure that:
- (a) on and after 1 January 2017, it does not issue a short-term investment product to any person as a retail, non-associated client; and
 - (b) on and after 1 January 2018, no person holds a short-term investment product:
 - (i) that is issued by the fundraiser; and
 - (ii) if it were issued to the holder on or after that date, it would be issued to the holder as a retail, non-associated client.

Paragraph (b) applies to short-term investment products issued before and after the commencement of this subsection.

- (6) If the charitable investment fundraiser is a retail charitable investment fundraiser, it must ensure that all debentures and interests in a managed investment scheme that it has issued are held on terms that they may only be repaid or redeemed:
- (a) if the charitable investment fundraiser has reasonable grounds to believe that if:

- (i) all repayments and redemptions that it may be required to pay on that day were made; and
 - (ii) all repayments and redemptions that may reasonably be expected to be due on each future day were made on that future day;
- all holders of debentures and interests would be repaid or redeemed on that day and on each future day in accordance with holders' entitlements; or
- (b) in the case of a holder of a debenture or an interest that is an individual—if the charitable investment fundraiser is satisfied that the repayment or redemption would alleviate financial hardship that the holder is suffering or would suffer; or
 - (c) on a winding up of:
 - (i) in the case of a debenture—the charitable investment fundraiser; and
 - (ii) in the case of an interest—the managed investment scheme.
- (7) The charitable investment fundraiser must only repay or redeem a debenture or interest in accordance with paragraphs (6)(a) to (c).

Restriction on payment facilities

- (8) The charitable investment fundraiser must ensure that an entitlement of a person as a retail, non-associated client to be paid or repaid an amount in relation to a debenture or an interest may only be discharged by:
- (a) a transfer to an account of the person with an Australian ADI; or
 - (b) a cheque payable only to the person.

Restriction on use of terms

- (9) A retail charitable investment fundraiser, must not refer to any debenture or interest in a managed investment scheme issued in reliance on an exemption in section 5 as being 'at-call' or on 'deposit' or any other word or expression that is of like import to those terms.

Requirements for disclosure

- (10) The charitable investment fundraiser must ensure that it does not cause, authorise or permit the issue of any promotional material or offer document that states or implies that any of the following has been approved or examined by ASIC:
- (a) the charitable investment fundraiser;

- (b) the debentures or interests;
- (c) any promotional material or offer document.

Additional disclosure requirements for retail clients

(11) The charitable investment fundraiser must not:

- (a) issue a debenture or interest in a managed investment scheme to a person as a retail client; or
- (b) accept an additional investment from the holder of a debenture or an interest in a managed investment scheme that was offered or issued in reliance on an exemption in section 5 or corresponding relief;

unless the charitable investment fundraiser has disclosed the following in writing to the person that is to hold the debenture or interest:

- (c) how the investment funds will be used to support the charitable purpose of the charitable investment fundraiser;
- (d) where the identification statement may be viewed;
- (e) that that the charitable investment fundraiser is required by law to notify investors that the debenture or interest and their offering is not subject to the usual protections for investors under the Corporations Act or regulation by ASIC;
- (f) if the charitable investment fundraiser does not hold an Australian financial services licence, a statement of that fact.

(12) The charitable investment fundraiser must ensure that each offer document and all promotional material that it provides, or causes, authorises or permits to be provided, to a person as a retail client in connection with:

- (a) the issue of a debenture or interest in a managed investment scheme; or
- (b) the acceptance of an additional investment from the holder of a debenture or an interest in a managed investment scheme that was offered or issued in reliance on an exemption in section 5 or corresponding relief;

contain a prominent statement that the charitable investment fundraiser is required by law to notify investors that:

- (c) the investment is only intended to attract investors whose primary purpose for making their investment is to support the relevant charitable purpose; and

- (d) investors may be unable to get some or all of their money back when the investor expects or at all; and
- (e) the investment is not comparable to investments with banks, finance companies or fund managers.

Duties to ensure investor understanding

(13) The charitable investment fundraiser must not:

- (a) issue a debenture or interest in a managed investment scheme in reliance on an exemption in section 5 to a person as a retail, non-associated client; or
- (b) accept an additional investment from a person as a retail, non-associated client from the holder of a debenture or an interest in a managed investment scheme that was offered or issued in reliance on an exemption in section 5 or corresponding relief;

unless the person has signed and provided a statement (separate to any other statement provided, or agreement entered into, by the person) to the charitable investment fundraiser stating that the person understands the disclosures required by subsections (11) and (12).

(14) For the purposes of subsection (13), a person is taken to sign a statement if the person would be taken to sign the statement under section 10 of the *Electronic Transactions Act 1999* if it applied to that subsection.

Requirement to prepare financial statements and obtain an auditor's report

(15) The charitable investment fundraiser must, within 6 months after the end of the financial year for:

- (a) if it has issued debentures in reliance on an exemption in section 5—the charitable investment fundraiser (***relevant entity***); and
- (b) if it has issued interests in a managed investment scheme in reliance on an exemption in section 5—the managed investment scheme (***relevant entity***);

prepare financial statements for the financial year.

(16) The charitable investment fundraiser must ensure that:

- (a) if the relevant entity is a reporting entity, the financial statements comply with the accounting standards; and
- (b) if the relevant entity is not a reporting entity, the financial statements comply with all the recognition requirements and measurement requirements that apply to reporting entities and all

other requirements of the accounting standards that apply to non-reporting entities.

- (17) The charitable investment fundraiser must, within 6 months after the end of the financial year:
- (a) have a registered company auditor audit the financial statements and provide an auditor's report; and
 - (b) give the audited financial statements and auditor's report to ASIC, unless it is required by law to give the audited financial statements and auditor's report to the ACNC; and
 - (c) publish, and maintain for at least 3 years, the audited financial statements and auditor's report at a web address accessible by a direct link from the web address where the relevant identification statement is or was most recently published.

Part 3—Transitional

8 ASIC Class Order [CO 02/184]

(1) ASIC Class Order [CO 02/184] (the *old class order*) as in force immediately before its repeal continues to apply until 31 December 2017, subject to the following:

- (a) the condition referred to in paragraph 4 of the old class order does not apply to a charitable investment fundraiser in relation to debentures or interests in a managed investment scheme if the charitable investment fundraiser has had an identification statement accepted for the purposes of this instrument in relation to the debentures or interests;

Note: A charitable investment fundraiser that has had accepted for the purposes of this instrument an identification statement under this instrument will be required to comply with subsections 7(1) to (4) in relation to the identification statement: see subsection (6).

- (b) the exemptions specified in the First Exemption (within the meaning of the old class order) apply as if the First Exemption were amended by:

- (i) omitting “for so long as the following conditions are met” and substituting “subject to the following conditions”; and
- (ii) omitting “where the conditions referred to above are met” and substituting “subject to the conditions referred to above”;

Note: The effect of this is that an exemption will not cease to apply merely because a related condition (including a condition referred to in paragraph (cc)) is not or has not previously been satisfied.

- (c) in addition to the conditions specified in the old class order, the exemptions set out in the First Exemption (within the meaning of the old class order) are also subject to the conditions in subsections (5) and (6);

- (d) each exemption (including any related conditions) in the old class order from the requirement to hold an Australian financial services licence that is expressed to be made under paragraph 911A(2)(l) of the Act has effect under section 926A of the Act instead;

Note: *ASIC Corporations (Effect of Licensing Exemptions) Instrument 2015/1115* provides relief from subsection 911B(1) of the Act to a person who provides financial services on behalf of a person who does not need an Australian financial services licence because of an exemption under section 926A of the Act.

- (e) the condition in paragraph 5 of the old class order continues to apply after 31 December 2017 in respect of a financial year ending on or before 31 December 2017.

Where old class order continues to apply

- (2) Until 28 February 2017, the old class order continues to apply as specified in subsection (1) in relation to a charitable investment fundraiser in relation to debentures or interests in a managed investment scheme if:
 - (a) ASIC has registered an identification statement under the old class order that applied to the charitable investment fundraiser in relation to the debentures or interests and not revoked that registration; or
 - (b) the charitable investment fundraiser has had accepted an identification statement for the purposes of this instrument that relates to the debentures or interests with:
 - (i) ASIC, and ASIC has not notified the charitable investment fundraiser in writing that ASIC has revoked the acceptance; or
 - (ii) a sponsor, and the sponsor has not notified the charitable investment fundraiser in writing that the sponsor has revoked the acceptance.
- (3) Between 1 March 2017 and 31 December 2017, the old class order continues to apply as specified in subsection (1) in relation to a charitable investment fundraiser in relation to debentures or interests in a managed investment scheme if the requirements referred to in paragraph (2)(b) are met in relation to the debentures or interests.
- (4) The old class order continues to apply as specified in subsection (1) in relation to a person other than a charitable investment fundraiser in relation to debentures or interests in a managed investment scheme if the requirements in subsection (2) or (3) (as applicable) appear to the person to be met in relation to the charitable investment fundraiser and the debentures or interests.

Conditions

- (5) The charitable investment fundraiser must ensure that:
 - (a) on and after 1 January 2017, it does not issue a short-term investment product to any person as a retail, non-associated client; and
 - (b) on and after 1 January 2018, no person holds a short-term investment product:
 - (i) that is issued by the fundraiser; and
 - (ii) if it were issued to the holder on or after that date, it would be issued to the holder as a retail, non-associated client.

Paragraph (b) applies to short-term investment products issued before and after the commencement of this subsection.

- (6) The charitable investment fundraiser must comply with subsections 7(1) to (4) in relation to any identification statement accepted by ASIC or a sponsor for the purposes of this instrument.

9 ASIC Instrument 04/0024

- (1) ASIC Instrument 04/0024 (the *old instrument*) as in force immediately before its repeal continues to apply until 31 December 2017, subject to the following:

- (a) the exemptions specified in the First exemption (within the meaning of the old instrument) apply as if the First exemption were amended by:
- (i) omitting “for as long as the following conditions are met” and substituting “subject to the following conditions”; and
 - (ii) omitting “where the conditions referred to above are met” and substituting “subject to the conditions referred to above”;

Note: The effect of this is that an exemption will not cease to apply merely because a related condition (including a condition referred to in paragraph (b)) is not or has not previously been satisfied.

- (b) in addition to the conditions specified in the old instrument, the exemptions set out in the First exemption (within the meaning of the old instrument) are also subject to the conditions in subsections (4) and (5);
- (c) each exemption (including any related conditions) in the old instrument from the requirement to hold an Australian financial services licence that is expressed to be made under paragraph 911A(2)(l) of the Act has effect under section 926A of the Act instead.

Note: *ASIC Corporations (Effect of Licensing Exemptions) Instrument 2015/1115* provides relief from subsection 911B(1) of the Act to a person who provides financial services on behalf of a person who does not need an Australian financial services licence because of an exemption under section 926A of the Act.

Where old instrument continues to apply

- (2) Until 28 February 2017, the old instrument continues to apply as specified in subsection (1).
- (3) Between 1 March 2017 and 31 December 2017, the old instrument continues to apply as specified in subsection (1):
- (a) in relation to a charitable investment fundraiser in relation to debentures or interests in a managed investment scheme if:
 - (i) CDPF Limited ACN 067 995 448 (*CDPF*) is a sponsor; and

- (ii) the charitable investment fundraiser has had accepted for the purposes of this instrument an identification statement that relates to the debentures or interests with CDPF and CDPF has not notified the charitable investment fundraiser in writing that CDPF has revoked the acceptance.
- (b) in relation to a person other than a charitable investment fundraiser in relation to debentures or interests in a managed investment scheme if the requirements in paragraph (a) appear to the person to be met in relation to the charitable investment fundraiser and the debentures or interests.

Conditions

- (4) The charitable investment fundraiser must ensure that:
 - (a) on and after 1 January 2017, it does not issue a short-term investment product to any person as a retail, non-associated client; and
 - (b) on and after 1 January 2018, no person holds a short-term investment product:
 - (i) that is issued by the fundraiser; and
 - (ii) if it were issued to the holder on or after that date, it would be issued to the holder as a retail, non-associated client.

Paragraph (b) applies to short-term investment products issued before and after the commencement of this subsection.

- (5) The charitable investment fundraiser must comply with subsections 7(1) to (4) in relation to any identification statement accepted by CDPF for the purposes of this instrument.