

EXPLANATORY STATEMENT for ASIC Corporations (Offers over the internet) Instrument 2017/181

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes *ASIC Corporations (Offers over the internet) Instrument 2017/181* (**the Instrument**) under subsection 1020F(1) of the *Corporations Act 2001* (**Act**).

Subsection 1020F(1) provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.9 of the Act and may declare that Part 7.9 of the Act applies in relation to a person or a class of persons as if specified provisions were omitted, modified or varied.

1. Background

Division 2 of Part 7.9 of the Act outlines circumstances in which a person is required to provide Product Disclosure Statement to retail clients in connection with the issue of financial products.

Division 4 of Part 7.9 of the Act provides that advertising or other promotional material for a financial product that is available for acquisition by a retail client must refer to the Product Disclosure Statement.

In 2002, ASIC issued Class Order [CO 02/246] *Offers of securities on the internet* ([**CO 02/246**]) to provide relief for persons making offers of financial products over the internet from complying with Division 2 of Part 7.9, Division 4 of Part 7.9 and subsection 992A(3) of the Act.

[CO 02/246] was issued to address concerns that offers of financial products over the internet may give rise to uncertainty about the application of laws in jurisdictions where such offers can be accessed. Accordingly, the purpose of [CO 02/246] was to ensure that:

- offers to which the exemption applies are only issued in Australia incidentally to their issue in foreign jurisdictions where those offers can be lawfully made; and
- such offers are not intended to result in applications for investments being made by persons in Australia.

In this way, [CO 02/246] was intended for the benefit of foreign offerors that make offers of financial products to persons outside of Australia.

2. Purpose of the instrument

The purpose of the Instrument is to continue the relief in [CO 02/246] beyond its sunset date of 1 April 2017 in substantially the same form. But for the Instrument, the relief in [CO 02/246] would cease to have effect from 1 April 2017 under the *Legislation Act 2003*.

In continuing this relief under the Instrument, the following minor and technical changes have been made:

- the drafting has been simplified to give greater clarity; and
- legislative references have been updated.

3. Operation of the instrument

Part 1—Preliminary

Paragraph 1 provides that the name of the legislative instrument is to be *ASIC Corporations (Offers over the internet) Instrument 2017/181*.

Paragraph 2 provides that the instrument commences on the day after it is registered on the Federal Register of Legislation.

Paragraph 3 provides that the instrument is made under subsection 1020F(1) of the Act.

Paragraph 4 outlines relevant definitions for key terms used in the instrument. 'Act' is defined as meaning the *Corporations Act 2001*. 'Offer' is defined as including an invitation to make an offer.

Part 2—Exemptions

Paragraph 5(1) provides that a person does not have to comply with Divisions 2 or 4 of Part 7.9 of the Act when making an offer of financial products to people outside of this jurisdiction on or through the internet in such a way that the offer is made available to, or received by, people in this jurisdiction.

Paragraph 5(2) states that the exemption in paragraph 5(1) only applies where all of the following apply:

- a) the receipt of the offer in this jurisdiction is merely incidental to the making of the offer outside of Australia; and
- b) the person takes reasonable steps to ensure that people in Australia are excluded from accepting the offer; and
- c) the offer is not made in Australia by any other means, unless the *ASIC Corporations (Foreign Securities—Incidental Advertising) Instrument 2015/360* applies to the making of the offer.

Paragraph 5(2)(a) reflects ASIC's general intention not to regulate offers, invitations and advertisements of securities that are accessible in Australia on the internet if:

- the offer, invitation or advertisement is not targeted at retail clients in Australia; and
- the offer, invitation or advertisement has little or no impact on Australian retail investors; and
- there is no misconduct.

Paragraph 5(2)(b) replaces what was conditions (a), (b), (c) and (e) under [CO 02/246] with a general requirement to take reasonable steps to ensure that people in Australia are excluded from accepting offers of financial products that are made through the internet that and intended for people outside of Australia. Conditions (a), (b), (c) and (e) under [CO 02/246] previously required offerors to:

- (a) take 'a variety of precautions' designed to exclude offers being accepted by persons in Australia; and
- (b) ensure that offers were not made in a manner or in locations that are calculated to draw them to the attention of persons in Australia; and
- (c) ensure that offers did not contain material that was specifically relevant to persons in Australia; and
- (e) ensure that offers contain a statement to the effect that the offer or invitation to which it relates is not available to persons in Australia.

In reviewing [CO 02/246], ASIC formed the view that a general reasonable steps requirement under paragraph 5(2)(b) better balances:

- the need to avoid breaches, inadvertent or otherwise, of Australian laws that are designed to protect investors and consumers in Australia; and

- the need to avoid imposing an unnecessary burden on foreign offerors that make offers to foreign persons over the internet.

Paragraph 5(2)(c) recognises ASIC's existing relief in *ASIC Corporations (Foreign Securities—Incidental Advertising) Instrument 2015/360* from subsection 734(2) and section 1018A of the Act for authors and publishers who publish an advertisement or statement relating to foreign securities outside of Australia that is only incidentally published in Australia. This relief covers statements published in print media, radio and television broadcasts and electronic services operated on a commercial basis that are similar to newspapers, magazines or broadcasts.

4. Consultation

As part of its review of [CO 02/246], ASIC released Consultation Paper 271 *Remaking and repealing ASIC class orders on internet offers, hawking and PDS obligations (CP 271)*. A draft of the Instrument was attached to CP 271. ASIC did not receive any submissions in response to CP 271.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Offers over the internet) Instrument 2017/181

ASIC Corporations (Offers over the internet) Instrument 2017/181 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

ASIC Corporations (Offers over the internet) Instrument 2017/181 provides conditional exemption from Divisions 2 and 4 of Part 7.9 of the Act when making an offer of financial products to people outside of this jurisdiction on or through the internet in such a way that the offer is made available to, or received by, people in this jurisdiction.

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