
**EXPLANATORY STATEMENT for
ASIC Corporations (Securities and Managed Investment Scheme Hawking
Relief) Instrument 2016/184**

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes the *ASIC Corporations (Securities and Managed Investment Scheme Hawking Relief) Instrument 2016/184* under subsection 992B(1) of the *Corporations Act 2001* (the Act).

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

1. Background

What is hawking?

Under the Act, a person (the offeror) must not offer financial products for issue or sale in the course of, or because of, an unsolicited meeting or telephone call. An offer includes inviting an application for their issue or sale. An offeror includes issuers and sellers of financial products, as well as their agents and representatives. Offering financial products for issue or sale in the course of, or because of, an unsolicited meeting or telephone call is commonly known as ‘hawking’.

How does the legislation currently operate?

The Act prohibits hawking. The hawking prohibitions are set out in the following sections:

- (a) s 736 — for securities (eg shares and debentures);
- (b) s 992AA — for managed investments (eg units in trusts); and
- (c) s 992A — for other financial products (eg superannuation, life and general insurance, derivatives and deposit products).

The hawking prohibitions aim to prevent pressure selling of financial products to retail clients (eg “badgering” and “boiler room” practices).

Existing relief

The existing relief provided by ASIC Class Order [CO 02/641] ([CO 02/641]) is technical in nature. It provides that:

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1. securities and interests in managed investment schemes are exempt from s992A(3) of the Act; and
 2. interests in managed investment schemes that are no managed investment products are exempt from s 992A(1).

The relief is required because, in its absence, securities and registered and unregistered interests in managed investment schemes would be subject to two differing hawking prohibitions. The relief provides certainty of obligation.

s 992A(3) provides that a person must not make an offer to issue or sell a financial product in the course of or because of, a series of unsolicited circumstances. Securities and interests in managed investment schemes (both financial products) are provided with relief from this provision because both have hawking prohibition provisions that specifically relate to them (s 736 in the case of securities and s 992AA in the case of managed investment products).

s 992A(1) provides that a person must not offer financial products for issue or sale in the course of, or because of, an unsolicited meeting with another person. s 992A(2) provides that s 992A(1) does not apply to securities and managed investment products because they have separate anti-hawking provisions, detailed above. This does not apply to interests in unregistered managed investment schemes as ‘managed investment product’ relates only to registered schemes: s 764A(1)(b).

s 992AA *Prohibition of hawking of managed investment products*, despite its title, prohibits hawking ‘interests in managed investment schemes’ rather than ‘managed investment products’. ‘Interests in managed investment schemes’ includes both registered and unregistered scheme interests. Accordingly without the exemption unregistered managed investment scheme interests would be required to comply with both s 992AA and s 992A.

Under the *Legislation 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 its sunset date.

[CO 02/641] is scheduled to cease on 1 April 2017 unless ASIC takes action to remake it.

2. Purpose of the instrument

The purpose of the *ASIC Corporations (Securities and Managed Investment Scheme Hawking Relief) Instrument 2016/184* is to provide relief from hawking prohibitions. This relief has been granted to address concerns about the disproportionate burden that would be placed on entities should they be required to comply with multiple anti-hawking provisions when offering one financial product for issue or sale.

ASIC Corporations (Securities and Managed Investment Scheme Hawking Relief) Instrument 2016/184 will continue the relief provided by [CO 02/641] in a new legislative instrument that reflects current drafting practice, without any significant changes.

3. Operation of the instrument

Part 1—Preliminary

Paragraph 1 provides that the name of the legislative instrument is to be *ASIC Corporations (Securities and Managed Investment Scheme Hawking Relief) Instrument 2016/184*.

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 s 992B(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*.

Part 2—Exemptions

Relief for unregistered managed investment schemes

Paragraph 5(1) of the instrument provides relief from the operation of s 992A(1) of the Act to offerings of interests in managed investment schemes that are not managed investment products.

Relief for securities and interests in managed investment schemes

Paragraph 5(2) of the instrument provides relief from the operation of s 992A(3) of the Act so that it does not apply to securities and interests in managed investment schemes.

4. Consultation

In November 2016 ASIC released ASIC Consultation Paper 271 Remaking and repealing ASIC class orders on internet offers, hawking and PDS obligations (**CP 271**), which consulted on remaking [CO 02/246] and [CO 02/641] and repealing [CO 02/286]. 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 (Securities and Managed Investment Scheme Hawking Relief) Instrument 2016/184

ASIC Corporations (Securities and Managed Investment Scheme Hawking Relief) Instrument 2016/184 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

We have provided relief from certain hawking provisions to issuers and sellers of particular financial products where those issuers or sellers must comply with one other hawking provision in the Corporations Act: see *ASIC Corporations (Securities and Managed Investment Scheme Hawking Relief) Instrument 2016/184*.

ASIC Corporations (Securities and Managed Investment Scheme Hawking Relief) Instrument 2016/184 remakes ASIC Class Order [CO 02/641]. It will continue the relief given by [CO 02/641] in a new legislative instrument that reflects current drafting practice, without any significant changes.

Human rights implications

The legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

The legislative instrument is compatible with human rights and does not raise any human rights issues.

Australian Securities and Investments Commission