

# EXPLANATORY STATEMENT for ASIC Corporations (Amendment and Repeal) Instrument 2017/65

Prepared by the Australian Securities and Investments Commission

## *Corporations Act 2001*

The Australian Securities and Investments Commission (**ASIC**) makes *ASIC Corporations (Amendment and Repeal) Instrument 2017/65* (the **Amendment and Repeal Instrument**) under subsections 283GA(1), 601QA(1), 673(1), 741(1), 926A(2), 951B(1), 992B(1) and 1020F(1) of the *Corporations Act 2001* (the **Act**).

Subsection 283GA(1) of the *Act* provides that ASIC may exempt a person from a provision of Chapter 2L of the *Act* or declare that Chapter 2L applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

Subsection 601QA(1) of the *Act* provides that ASIC may exempt a person from a provision of Chapter 5C of the *Act* or declare that the Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

Subsection 673(1) of the *Act* provides that ASIC may:

- (a) exempt a person or a class of persons from all or specified provisions of Part 6C of the *Act*; or
- (b) declare that Part 6C of the *Act* applies in relation to a person or a class of persons, as if specified provisions were omitted, modified or varied as specified in the declaration.

Subsection 741(1) of the *Act* provides that ASIC may exempt a person from a provision of Chapter 6D of the *Act* or declare that the Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

Subsection 926A(2) of the *Act* provides that ASIC may:

- (a) exempt a person or financial product or a class of persons or financial products from all or specified provisions of Part 7.6 (other than Divisions 4 and 8) of the *Act*; or

- (b) declare that Part 7.6 (other than Divisions 4 and 8) of the *Act* applies in relation to a person or financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.

Paragraph 951B(1)(a) of the *Act* provides that ASIC may exempt a person or a class of persons from all or specified provisions of Part 7.7 of the *Act*.

Subsection 992B(1) of the *Act* provides that ASIC may:

- (a) exempt a person or financial product or a class of persons or financial products from all or specified provisions of Part 7.8 of the *Act*; or
- (b) declare that Part 7.8 of the *Act* applies in relation to a person or financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.

Subsection 1020F(1) of the *Act* provides that ASIC may:

- (a) exempt a person or financial product or a class of persons or financial products from all or specified provisions of Part 7.9 of the *Act*; or
- (b) declare that Part 7.9 of the *Act* applies in relation to a person or financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.

The *Amendment and Repeal Instrument* amends a number of existing ASIC class orders and legislative instruments and repeals one class order. 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**

### **ASIC Class Order [CO 03/578] (*JCO 03/578*)**

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.

[CO 03/578] exempts Australian financial services (*AFS*) licensees and their authorised representatives from the requirement to provide a Financial Services Guide (*FSG*) in relation to the provision of a financial service that consists of making a market for a financial product through a licensed market.

[CO 03/578] was made in reliance on the legal view that, on a licensed market:

- (a) the clients of a person who makes a market under section 766D of the Act would include those persons who formed the reasonable expectation that they will be able to regularly effect transactions at the prices stated by that ‘market maker’—regardless of whether or not the ‘client’ actually enters into any transactions with that ‘market maker’;
- (b) though a person may not be able to identify who the ‘market maker’ is, at the time that the relevant prices are being stated, that person may still be a ‘client’ if they:
  - (i) have reason to believe that some entity is regularly stating prices; and
  - (ii) may reasonably expect to be able to effect transactions at the stated prices; and
- (c) as a result of (a) and (b), the clients of a person who makes a market on a licensed market under section 766D would always potentially include retail clients to whom an FSG would need to be given as required by section 941A.

This view was based on ASIC’s interpretation of the effect of section 766D.

[CO 03/578] was made to address the difficulty in ascertaining, on a licensed market:

- (a) whether any person has the requisite expectation under section 766D;
- (b) the identity of that person; and
- (c) whether that person was a retail client.

[CO 03/578] provided certainty that an FSG would not be needed.

ASIC has reconsidered its view on whether the Act requires a market maker on a licensed market to be given an FSG, in the absence of relief. We now think the better view is that an FSG is not required. The definition of ‘makes a market’ in subsection 766D(1) does not inform the identity of a market maker’s client on a licensed market. We see little basis in the Act for the view that the clients of a market maker on a licensed market includes unidentified retail clients who may transact with a market maker. We have reached the view that [CO 03/578] is no longer required.

## **Other Instruments**

ASIC has a number of ASIC Class Orders and ASIC Legislative Instruments in operation. ASIC has identified that some of these have minor errors, including typographical errors and required points of clarification.

## **2. Purpose of the instrument**

The purpose of the Amendment and Repeal Instrument is to repeal [CO 03/578].

*The Amendment and Repeal Instrument* also makes amendments to other ASIC instruments to fix identified errors.

## **3. Operation of the instrument**

### **Part 1—Preliminary**

#### Section 1 – Name of the legislative instrument

This section provides that the title of the Instrument is the *ASIC Corporations (Amendment and Repeal) Instrument 2017/65*.

#### Section 2 – Commencement

This section provides that the Instrument commences on the day after it is registered on the Federal Register of Legislative Instruments.

#### Section 3 – Authority

This section provides that the Instrument is made under subsections 283GA(1); 601QA(1); 673(1); 741(1); 926A(2); 951B(1); 992B(1); and 1020F(1) of the *Corporations Act 2001*.

#### Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the instrument has effect according to its terms.

#### Section 5 – Definitions

This section provides definitions that inform the content of the instrument.

Act is defined to mean the *Corporations Act 2001*

### **Schedule 1—Amendments**

#### Item 1 – ASIC Class Order [CO 09/425]

Item 1 modifies *ASIC Class Order [CO 09/425]* at subparagraph 14(a) (definition of custodian, subparagraph (b)(ia)) to omit references to a series of now repealed ASIC Class Orders and replace those references with a reference to the instrument which continued their effect— the *ASIC Corporations (Repeal and Transitional) Instrument 2016/396*, or any non-legislative instrument made by ASIC in terms similar to those now repealed ASIC Class Orders.

Item 2 – *ASIC Class Order [CO 11/272]*

Item 2 modifies *ASIC Class Order [CO 11/272]* at paragraph 5 (notional subsection 609(10C) of the Act, definition of service provider, subparagraph (b)(ii)) to omit references to a series of now repealed ASIC Class Orders and replace those references with a reference to the instrument which continued their effect— the *ASIC Corporations (Repeal and Transitional) Instrument 2016/396*, or any non-legislative instrument made by ASIC in terms similar to those now repealed ASIC Class Orders.

Item 3 – *ASIC Class Order [CO 13/656]*

Item 3 modifies *ASIC Class Order [CO 13/656]* at subparagraph 4(a) by inserting the word “not” before the words “making an offer”. This change clarifies the meaning of the subparagraph.

Item 4 – *ASIC Class Order [CO 13/760]*

Item 4 modifies *ASIC Class Order [CO 13/760]* at paragraph 4 (notional subsection 912AA(11) of the Act, definition of special custody assets, paragraph (e)) by correcting the spelling of the word “assign”.

Item 5 – *ASIC Class Order [CO 13/1410]*

Item 5 modifies *ASIC Class Order [CO 13/1410]* at paragraph 5 (notional paragraph 912AAD(4)(a) of the Act) by omitting “financial services licensee or its associates”, and substituting “sub-custodian or its associates”. This ensures consistency of approach with other ASIC instruments such as *ASIC Class Orders [CO 13/763]* and *[CO 13/1409]* and does not change the operation of the instrument.

Items 6—11 *ASIC Class Order [CO 14/1252]*

Item 6 modifies *ASIC Class Order [CO 14/1252]* at sub-subparagraph 6(f)(ib) by omitting the words “not otherwise” and substituting “otherwise”. This clarifies the operation of the instrument.

Item 7 modifies *ASIC Class Order [CO 14/1252]* at sub-subparagraph 8(b)(ii) by inserting the word “and”. This helps readability and does not change the operation of the instrument.

Item 8 inserts a note into *ASIC Class Order [CO 14/1252]* after paragraph 8 which explains when certain provisions of the instrument commenced in operation.

Item 9 modifies *ASIC Class Order [CO 14/1252]* at subparagraph 8D(b) omits “statements” and substitutes “each statement referred to in paragraph 8D(b) in relation to the responsible person for the Statement has been”. This clarifies the statements to which the subparagraph relates. It does not change the operation of the instrument.

Item 10 modifies *ASIC Class Order [CO 14/1252]* at subparagraph 8D(c) by correcting the word “manage” to “managed”.

Item 11 repeals paragraph 8B inserted by item 21 of Schedule 1 to *ASIC Corporations (Amendment and Repeal) Instrument 2015/876* because that paragraph is no longer necessary. The note inserted by Item 8 contains the information previously provided by this paragraph.

#### Items 12—13 – *ASIC Corporations (Compromises or Arrangements) Instrument 2015/358*

Item 12 modifies *ASIC Corporations (Compromises or Arrangements) Instrument 2015/358*, changing the numbering of the subsection of section 7 to facilitate Item 13.

Item 13 modifies *ASIC Corporations (Compromises or Arrangements) Instrument 2015/358* by providing subsection 7(2). Subsection 7(1) modified subsection 708(17) so that “approved at a meeting held” was read as “approved at a meeting held, or to be considered at a meeting to be held”, capturing future meetings. Subsection 708(17) relates to circumstances under which an offer to buy securities does not require disclosure to be given.

The new subsection 7(2) ensures the instrument similarly modifies subparagraph 1019D(1)(d)(iii) which relates to offers of financial products, not just securities. It ensures that offers to purchase financial products are treated similarly to offers to purchase securities.

#### Item 14 – *ASIC Corporations (Securitisation Special Purpose Vehicles) Instrument 2016/272*

Item 14 modifies *ASIC Corporations (Securitisation Special Purpose Vehicles) Instrument 2016/272* at sub-subparagraph 5(2)(a)(ii)(B) to omit references to a series of now repealed ASIC Class Orders and replace those references with a reference to the instrument which continued their effect— the *ASIC Corporations (Repeal and Transitional) Instrument 2016/396*.

#### Item 15 – *ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813*

Item 15 amends the definition of retail client at paragraph (b), contained in the *ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813*, to ensure that the definition operates appropriately in relation to offers of debentures. The

modification clarifies the operation of the instrument and is consistent with its original policy intention.

Item 16 – ASIC Corporations (Managed Investment Schemes: Interests Not For Money) Instrument 2016/1107

Item 16 modifies the definition of interests not for money scheme, contained in the *ASIC Corporations (Managed Investment Schemes: Interests Not For Money) Instrument 2016/1107*, to clarify that the relief does not apply to a managed investment scheme where all interests are issued in circumstances that do not require a Product Disclosure Statement. The modification clarifies the operation of the instrument and is consistent with its original policy intention.

**Schedule 2—Repeal**

Schedule 2 of the *Amendment and Repeal Instrument* repeals [CO 03/578].

**4. Consultation**

On 5 December 2016, ASIC released Consultation Paper 275 *Repealing ASIC class order on FSG exemption for market-making services on a licensed market: [CO 03/578]*.

We received 1 submission in response to CP 275. The submission supported ASIC's proposal to repeal [CO 03/578].

ASIC did not consult on the technical amendments as ASIC's view is that none involve a change in policy.

## **Statement of Compatibility with Human Rights**

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

### **ASIC Corporations (Amendment and Repeal) Instrument 2017/65**

ASIC Corporations (Amendment and Repeal) Instrument 2017/65 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**

This instrument will repeal *ASIC Class Order [CO 03/578]* - Financial Services Guide exemption for market-making services on a licensed market.

*[CO 03/578]* exempts an Australian financial services licensee and its authorised representatives from having to give an FSG in relation to the provision of a financial service that consists of making a market for a financial product through a licensed market.

ASIC has reconsidered its earlier view as to whether the Act requires a market maker on a licensed market to be given an FSG in the absence of relief. ASIC considers there is little basis in the Act for the view that the clients of a market maker on a licensed market include unidentified retail clients who may transact with a market maker. As such, we have reached the view that *[CO 03/578]* is no longer required.

The instrument amends a series of ASIC Class Orders and legislative instruments to fix minor errors such as typographical errors to necessary points of clarification.

#### **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**