

# **EXPLANATORY STATEMENT for**

## **ASIC Corporations (Amendment) Instrument 2017/359**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (ASIC) makes ASIC Corporations (Amendment) Instrument 2017/359 (the ***Amendment Instrument***) 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)*.

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 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 *ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813* 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] expired on 1 October 2016. ASIC reviewed the operation of [CO 02/184] and the group charities exemption and as a result of that review, made:

- (a) the ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813;
- (b) the ASIC Corporations (Repeal) Instrument 2016/810, 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 sunseting date of 1 October 2016; and
- (c) issued a repeal instrument, ASIC Corporations (Repeal) Instrument 2016/819, to repeal [CO 02/151].

*ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813* extended relief provided under ASIC Class Order [CO 02/184] subject to additional conditions until 28 February 2017 for charitable investment fundraisers who have previously had identification statements registered under ASIC Class Order [CO 02/184].

*ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813* extended transitional relief for the period 1 March 2017 to 31 December 2017 if the charitable investment fundraiser has had accepted by ASIC (or the sponsor), an identification statement under *ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813* by 28 February 2017.

Charitable investment fundraisers who did not have an identification statement accepted by ASIC (or the sponsor) by 28 February 2017 were not given transitional relief for the period 1 March 2017 to 31 December 2017.

*ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813* did not contain provisions with regard to late acceptance of identification statements after 28 February 2017.

In recognition of the charitable purpose of charitable investment fundraisers, ASIC has determined that denial of transitional relief for charitable investment fundraisers who have not had identification statements accepted by 28 February 2017 may have overly severe consequences.

As a result, the *Amendment Instrument* amends provisions in *ASIC Instrument (Charitable Investment Fundraising) Instrument 2016/813* to allow for transitional relief to be provided to charitable investment fundraisers who have an identification statement accepted after 28 February 2017. However such charitable investment fundraisers will only have the benefit of transitional relief from the date of acceptance (of the identification statement) to 31 December 2017. This means that a charitable investment fundraiser which has previously relied on [CO 02/184] will not have the benefit of the transitional relief between 1 March 2017 and the date on which the

charitable investment fundraiser has an identification statement accepted for the purposes of *ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813* with ASIC (or the sponsor).

Charitable investment fundraisers which do not have pre-existing relief under [CO 02/184] 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 *ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813* for the exemptions in subsection 5(1) and (2) of the *ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813* to apply.

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

The purpose of the *Amendment Instrument* is to make amendments to *ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813* to allow for transitional relief to be provided to charitable investment fundraisers who have an identification statement accepted after 28 February 2017, however such charitable investment fundraisers will only have the benefit of transitional relief from the date of acceptance (of the identification statement) to 31 December 2017.

## **3. Operation of the instruments**

### **Part 1—Preliminary**

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

This section provides that the title of the *Amendment Instrument* is the *ASIC Corporations (Amendment) Instrument 2017/359*.

#### Section 2 – Commencement

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

#### Section 3 – Authority

This section provides that the *Amendment Instrument* is made under subsections 283GA(1)(a), 601QA(1)(a), 741(1)(a), 926A(2)(a), 992B(1)(a) and 1020F(1)(a) 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 as set out in the applicable items in the Schedule concerned.

## **Schedule 1—Amendments**

### Item 1 – Transitional relief for charitable investment fundraisers who have an identification statement accepted after 28 February 2017

Item 1 modifies *ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813* subparagraph 8(3) (old class order relief to apply if identification statement is accepted per paragraph 2(b)) by omitting “Between 1 March 2017 and 31 December 2017, the old class order continues to apply” and substituting with “Until 31 December 2017, the old class order applies”. Subparagraph 8(3) is further modified by omitting “paragraph 2(b)” and substituting with “paragraphs 2(a) and (b)”. The effect of these modifications allow transitional relief to apply to charitable investment fundraisers from the date of acceptance of an identification statement accepted by ASIC or the sponsor until 31 December 2017, if the charitable investment fundraiser has had an identification statement previously registered under the old class order, being ASIC Class Order [CO 02/184]. This means that a charitable investment fundraiser who has not had an identification statement previously registered under ASIC Class Order [CO 02/184] will not be eligible for transitional relief.

### Item 2 – Transitional relief for person other than the charitable investment fundraiser

Item 2 modifies *ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813* at subparagraph 8(4) (transitional relief for person other than the charitable investment fundraiser) by omitting “continues to apply” and substituting with “applies”. This has the effect of allowing the relief outlined in subsection 8(1) to apply to a person other than a charitable investment fundraiser if the charitable investment fundraiser has had an identification statement accepted as per subparagraph 8(2) or subparagraph 8(3).

The removal of the words “continues to apply” is a reflection of the fact that transitional relief as per the exemptions and modifications of the old class order, as specified in subsection 8(1) of *ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813*, does not apply continuously for charitable investment fundraisers who have a transitional relief identification statement accepted after 28 February 2017. This means that a charitable investment fundraiser which has previously relied on [CO 02/184] will not have the benefit of the transitional relief between 1 March 2017 and the date on which the charitable investment fundraiser has an identification statement accepted for the purposes of *ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813* with ASIC.

## **4. Consultation**

ASIC has not consulted on the making of this instrument. The instrument is of a technical nature and consultation would be unnecessary.

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

**ASIC Corporations (Amendment) Instrument 2017/359**

ASIC Corporations (Amendment) Instrument 2017/359 (the *Amendment Instrument*) 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 of the legislative instrument**

The *ASIC Instrument (Charitable Investment Fundraising) Instrument 2016/813* provides relief to charitable investment fundraisers from various provisions in the Corporations Act relating to debentures, managed investment schemes and fundraising. It also contains a transitional regime that continues the effect of previous ASIC relief until 31 December 2017. It is a requirement of the transitional relief that an identification statement relating to the charitable investment fundraiser be accepted by ASIC or a sponsor.

The *Amendment Instrument* amends the *ASIC Instrument (Charitable Investment Fundraising) Instrument 2016/813* to enable the transitional relief to be provided to charitable investment fundraisers who have an identification statement accepted after 28 February 2017. However, such charitable investment fundraisers will only have the benefit of transitional relief from the date of acceptance of the identification statement to 31 December 2017.

**Human rights implications**

The *Amendment Instrument* does not engage any of the applicable rights or freedoms.

**Conclusion**

The *Amendment Instrument* is compatible with human rights as it does not adversely affect any human rights issues.