
EXPLANATORY STATEMENT for ASIC Corporations (Amendment) Instrument 2017/821

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes *ASIC Corporations (Amendment) Instrument 2017/821* (**the amendment instrument**) under subsections 926A(2), and 1020F(1) of the *Corporations Act 2001* (Act).

Paragraph 926A(2)(c) of the Act provides that ASIC may declare that Part 7.6 (other than Divisions 4 and 8) 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 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 applies in relation to a person or a 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 instrument amends ASIC Class Order [CO 13/762] (**[CO 13/762]**), ASIC Class Order [CO 13/763] (**[CO 13/763]**) and *ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156* (together, **the principal instruments**).

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

On 28 March 2017, Parliament enacted the *Corporations Amendment (Crowd-sourced Funding) Act 2017* (the CSF Act), which amends the *Corporations Act 2001* (the Act), and made minor amendments to the *Australian Securities and Investments Commission Act 2001* (ASIC Act), to provide a framework for crowd-sourced funding (CSF) in Australia.

From 29 September 2017, the CSF regime will come into effect. The CSF regime facilitates a new form of fundraising that allows a large number of individuals to make small equity investments in a company. To ensure investor protection, Parliament envisaged that public companies seeking to raise funds through crowd-sourced funding will need to do so through a platform operated by an intermediary (the CSF intermediary), who would be required to hold an Australian Financial Services licence with authorisation to provide the new financial service, namely the crowd-funding service.

The CSF intermediary's role and obligations help ensure that investors are only offered investments in public companies that are eligible to raise funds under the CSF regime and that are seeking to do so for legitimate purposes, and that investors have certain information and protections in relation to CSF offers.

Investor directed portfolio service (IDPS) operators and responsible entities of registered managed investment schemes that are IDPS-like schemes (together, 'platform operators'), and nominee and custody services operators, acquire financial products on the instructions of clients. This may include shares acquired through a CSF offer.

Retail clients of IDPSs, registered managed investment schemes that are IDPS-like schemes, and nominee and custody services, may give instructions to accept a CSF offer that are acted on by the platform operator or service operator, with the equivalent benefits of accepting CSF offers through a CSF intermediary's platform. This ensures that the retail client protections provided under the Act are not excluded for acquisitions through these forms of custodial arrangement.

2. Purpose of the instrument

The purpose of the amendment instrument is to amend the principal instruments to ensure that retail clients for whom securities offered under a CSF offer are held through a platform or a nominee and custody service have equivalent rights and protections as if they had acquired the shares directly.

3. Operation of the instrument

Commencement

Section 2 of the amendment instrument provides that the instrument commences on the later of:

- (a) the day after it is registered on the Federal Register of Legislation; and
- (b) the date of commencement of Schedule 1 to the *Corporations Amendment (Crowd-sourced Funding) Act 2017*, being 29 September 2017.

Schedule

Section 4 of the amendment instrument provides that each of the instruments specified in a Schedule to the instrument (being the principal instruments) is amended as set out in the Schedule. The amendment instrument has one Schedule.

Amendments

The amendments made to each of the principal instruments, as set out in Schedule 1 of the amendment instrument, are similar.

ASIC Class Order [CO 13/762]

Items 1, 2 and 3 of Schedule 1 modify notional section 1013DAB (as inserted by subparagraph 6(c) of [CO 13/762]).

Item 1 of Schedule 1 modifies paragraph 1013DAB(8)(a) so that for an acquisition of shares resulting from a CSF offer, the responsible entity of an IDPS-like scheme must not, and must ensure that any

custodian acting on its behalf does not, acquire those shares under a direction of a member as part of the scheme, unless subsection 1013DAB(8H) is satisfied.

Item 2 of Schedule 1 inserts new subsection 1013DAB(8H). In order for s1013DAB(8H) to be satisfied, the responsible entity must reasonably believe that:

- (a) the member would have acquired the shares as a wholesale client if the member had acquired the shares directly under the CSF offer; or
- (b) the member
 - (i) has accessed the platform of a CSF intermediary containing the CSF offer document for the CSF offer and the responsible entity has no reason to believe the document is defective as at the time of the acquisition of the shares; and
 - (ii) has completed the acknowledgement that would be required under paragraph 738ZA(3)(b) if the member had applied as a retail client; and
 - (iii) was able to use the relevant communication facility for the CSF offer provided under subsection 738ZA(5); and
 - (iv) was able to withdraw the direction within 5 business days after it was made; and
 - (v) has not been provided with financial assistance in relation to the CSF offer by any of the following:
 - (A) a person referred to in subsection 738ZE(1);
 - (B) the responsible entity;
 - (C) an associate of the responsible entity that is not an Australian ADI; and
 - (vi) has not in total paid for, or become liable to pay for, or given directions under an IDPS, an IDPS-like scheme or a nominee and custody service for the acquisition of, shares under a CSF offer of the company making the CSF offer that together exceed the cap on investment in paragraph 738ZC(1)(b).

Item 3 of Schedule 1 modifies the definition of 'defective' in s1013DAB(19) by incorporating the meaning of 'defective' under section 738U of the Act.

ASIC Class Order [CO 13/763]

Items 4, 5 and 6 of Schedule 1 modify notional section 912AD (as inserted by paragraph 6 of [CO 13/763]).

Item 4 of Schedule 1 modifies paragraph 912AD(26)(a) so that for an acquisition of shares resulting from a CSF offer, the operator must not, and must ensure that any custodian acting on its behalf does not, acquire those shares for a client under a direction, unless subsection 912AD(26H) is satisfied.

Item 5 of Schedule 1 inserts new subsection 912AD(26H). In order for s912AD(26H) to be satisfied, the operator must reasonably believe that:

- (a) the client would have acquired the shares as a wholesale client if the client had acquired the shares directly under the CSF offer; or
- (b) the client:
 - (i) has accessed the platform of a CSF intermediary containing the CSF offer document for the CSF offer and the licensee has no reason to believe is defective as at the time of the acquisition of the shares; and
 - (ii) has completed the acknowledgement that would be required under paragraph 738ZA(3)(b) if the client had applied as a retail client; and
 - (iii) was able to use the relevant communication facility for the CSF offer provided under subsection 738ZA(5); and
 - (iv) was able to withdraw the direction within 5 business days after it was made; and

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- (v) has not been provided with financial assistance in relation to the CSF offer by any of the following:
 - (A) a person referred to in subsection 738ZE(1); or
 - (B) the licensee; or
 - (C) an associate of the licensee that is not an Australian ADI; and
 - (vi) has not in total paid for, or become liable to pay for, or given directions under an IDPS, an IDPS-like scheme or a nominee and custody service for the acquisition of, shares under a CSF offer of the company making the CSF offer that together exceed the cap on investment in paragraph 738ZC(1)(b).

Item 6 of Schedule 1 modifies the definition of 'defective' in s912AD(42) by incorporating the meaning of 'defective' under section 738U of the Act.

ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156

Items 7, 8 and 9 of Schedule 1 modify notional section 912AE (as inserted by section 8 of ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156.

Item 7 of Schedule 1 modifies paragraph 912AE(3) so that for an acquisition of shares resulting from a CSF offer, the licensee must not, and must ensure that any custodian acting on its behalf does not, acquire those shares for a client under a direction, unless subsection 912AE(3A) is satisfied.

Item 8 of Schedule 1 inserts new subsection 912AE(3A). In order for s912AE(3A) to be satisfied, the licensee must reasonably believe that:

- (a) the client would have acquired the shares as a wholesale client if the client had acquired the shares directly under the CSF offer; or
- (b) the client:
 - (i) has accessed the platform of a CSF intermediary containing the CSF offer document for the CSF offer and the licensee has no reason to believe the document is defective as at the time of the acquisition of the shares; and
 - (ii) has completed the acknowledgement that would be required under paragraph 738ZA(3)(b) if the client had applied as a retail client; and
 - (iii) was able to use the relevant communication facility for the CSF offer provided under subsection 738ZA(5); and
 - (iv) was able to withdraw the direction within 5 business days after it was made; and
 - (v) has not been provided with financial assistance in relation to the CSF offer by any of the following:
 - (A) a person referred to in subsection 738ZE(1); or
 - (B) the licensee; or
 - (C) an associate of the licensee that is not an Australian ADI; and
 - (vi) has not in total paid for, or become liable to pay for, or given directions under an IDPS, an IDPS-like scheme or a nominee and custody service for the acquisition of, shares under a CSF offer of the company making the CSF offer that together exceed the cap on investment in paragraph 738ZC(1)(b).

Item 9 of Schedule 1 modifies the definition of 'defective' in s912AE(10) by incorporating the meaning of 'defective' under section 738U of the Act.

4. Consultation

On 22 June 2017, ASIC released Consultation Paper 289 *Crowd-sourced funding: Guide for intermediaries* (CP 289) seeking feedback on the proposed amendment to the principal instruments. The public consultation period closed on 3 August 2017.

ASIC considers that the amendment instrument is of a minor or machinery nature.

Statement of Compatibility with Human Rights

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

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The 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

The instrument amends ASIC Class Order [CO 13/762], ASIC Class Order [CO 13/763] and *ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156* to ensure that clients for whom shares under a CSF offer are held through a platform or a nominee and custody service have equivalent rights and protections as if they had acquired the shares directly. These rights and protections are provided for under Part 6D.3A of the *Corporations Act 2001*.

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 as it does not raise any human rights issues.