
EXPLANATORY STATEMENT for

ASIC Corporations (Wholesale Equity Scheme Trustees) Instrument 2017/849

and

ASIC Corporations (Amendment and Repeal) Instrument 2017/848

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes *ASIC Corporations (Wholesale Equity Scheme Trustees) Instrument 2017/849* (**the Instrument**) under paragraph 926A(2)(a) of the *Corporations Act 2001* (**Act**).

ASIC makes *ASIC Corporations (Amendment and Repeal) Instrument 2017/848* (Amendment and **Repeal Instrument**) under paragraphs 911A(2)(l) and 926A(2)(c) 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 of the Act (other than Divisions 4 and 8) and paragraph 926A(2)(c) provides that ASIC may declare that such provisions apply in relation to a person or financial product, or a class of persons or financial products, as if the specified provisions were omitted, modified or varied as specified in the declaration.

Paragraph 911A(2)(l) of the Act provides that ASIC may exempt a person from the requirement to hold an Australian financial services (**AFS**) licence for a financial service they provide in circumstances where the provision of the service is covered by an exemption specified by ASIC in writing and published in the *Gazette*.

The Instrument remakes ASIC Class Order [CO 07/74] *Wholesale equity schemes: Licencing relief for trustees* as a new legislative instrument. The Amendment and Repeal Instrument repeals [CO 07/74] and amends ASIC Class Orders [CO 13/760] *Financial requirements for responsible entities and operators of investor directed portfolio services* and [CO 13/761] *Financial requirements for custodial or depository service providers* so that they are consistent with the requirements contained in the Instrument.

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 Instrument remakes [CO 07/74], which provides relief to trustees of wholesale equity schemes from the requirement under Part 7.6 of the Corporations Act to obtain an AFS licence to provide 'wholesale equity financial services' by:

- (a) dealing in investment products that form part of the trust property of the wholesale equity scheme; and
- (b) providing a custodial or depository service in relation to the investment products of the trust.

Broadly, the relief applies where:

- (a) a related body corporate of the trustee ('manager') holds an AFS licence that authorises the manager to provide all of the wholesale equity financial services that are provided by the trustee;
- (b) the manager's AFS licence contains conditions that ensure that the manager is, effectively, controlling the operations of the trustee and that, as far as possible, the same regulatory and liability consequences apply as if the manager were providing the wholesale equity financial service itself; and
- (c) in the event that the trustee fails to comply with these conditions, full particulars of the failure are provided to ASIC before 10 business days have elapsed after the trustee or manager becomes aware, or should reasonably have become aware, of the failure.

Wholesale equity schemes

A 'wholesale equity scheme' is essentially an unregistered managed investment scheme that primarily invests in securities of unlisted companies and whose members are all wholesale clients. Wholesale equity schemes are usually structured by the manager using a multiple unit trust structure with separate corporate trustees that are related bodies corporate of the manager. This ensures consistent and equal tax outcomes for all investors, in line with global standards.

ASIC made [CO 07/74] to remove impediments in the venture capital and private equity industry by allowing wholesale equity schemes to hold equities in small, unlisted, closely held private equities.

New financial and custody requirements

In 2013, as part of ASIC's wider review of the financial and custody requirements applicable to AFS licensees, ASIC strengthened the financial requirements for responsible entities and custodial and depository service providers, imposing:

- (a) new financial requirements relating to net tangible assets (**NTA**), cash flow projections and liquidity; and
- (b) minimum standards (or custody requirements) for providers of custodial or depository services.

The financial requirements are outlined in Regulatory Guide 166 *Licensing: Financial requirements (RG 166)* and are implemented through Class Order [CO 13/760] *Financial requirements for responsible entities and operators of investor directed portfolio services* and Class Order [CO 13/761] *Financial requirements for custodial or depository service providers*.

The custody requirements are outlined in Regulatory Guide 133 *Managed investments and custodial or depository services: Holding assets (RG 133)* and implemented through Class Order [CO 13/1410] *Holding assets: Standards for providers of custodial and depository services*.

The Instrument amends the conditions of relief for trustees of wholesale equity schemes to align them with the financial and custody requirements implemented through [CO 13/760], [CO13/761] and [CO 13/1410].

Sunsetting of Class Order

The *Legislation Act 2003* provides for the periodic expiry of legislative instruments ('sunsetting') to ensure that they are kept up to date and only remain in force for as long as they are needed. [CO 07/74] is scheduled to sunset on 1 October 2017.

ASIC has formed the view that [CO 07/74] still forms a useful part of the legislative framework and has decided to continue the relief currently given by [CO 07/74] in the Instrument, with minor changes.

2. Purpose of the instrument

The purpose of the Instrument is to continue the substantive effect of the relief granted by [CO 07/74] in a new legislative instrument, to:

- (a) reflect current drafting practice;
- (b) align the relief with [CO 13/760], [CO 13/761] and [CO 13/1410], which have come into force since the introduction of [CO 07/74]; and
- (c) provide transitional provisions to continue the relief under [CO 07/74] until the end of the financial year of the trustee.

In particular, subject to the transitional relief, the Instrument aligns the conditions of relief for trustees of wholesale equity schemes with the conditions imposed on licenced providers of custodial and depository services under [CO 13/761] and [CO 13/1410]. This addresses risks associated with the provision of these services and promotes consistency and the informed participation of investors.

The Instrument provides transitional relief for trustees that relied on relief under [CO 07/74] until the end of the financial year of the trustee in order to simplify the preparation of financial reports and the audit process.

The purpose of the Amendment and Repeal Instrument is to:

- (a) repeal [CO 07/74]; and
- (b) amend [CO 13/760] and [CO 13/761] so that the manager must treat the assets, liabilities, cash inflows and cash outflows of the trustee as though they were included in the assets, liabilities, cash inflows and cash outflows of the manager for the purposes of [CO 13/760] and [CO 13/761]. This promotes consistency and the informed participation of investors.

3. Operation of the instruments

Instrument

Subsection 911A(1) of the Act provides that *"a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services"*, subject to certain exceptions.

Section 5 of the Instrument provides relief to an ‘eligible trustee’ of a ‘wholesale equity scheme’ (as defined in section 4 of the Instrument) from the requirement to comply with subsection 911A(1) of the Act for the provision of ‘wholesale equity financial services’. ‘Wholesale equity financial services’ is defined in section 5 of the Instrument.

Section 6 of the Instrument sets out the circumstances in which the relief under section 5 of the Instrument applies. It provides that the related body corporate of the trustee (i.e. ‘manager’) must hold an AFS licence authorising it to provide wholesale equity financial services, subject to the following conditions:

- (a) the manager must, as far as possible, comply with the Act as if the trustee were providing the wholesale equity financial services as the manager’s representative (sub-subparagraph 6(a)(ii)(A) of the Instrument);
- (b) the manager must have in place a deed poll in favour of each person (‘beneficiary’) to whom the trustee provides a wholesale equity financial service to the effect that the manager will indemnify the beneficiary in relation to liabilities that arise from the trustee’s provision of the wholesale equity financial service (sub-subparagraph 6(a)(ii)(B) of the Instrument); and
- (c) for the purposes of the ‘relevant financial conditions’ (as defined in section 4 of the Instrument), the manager must treat the assets, liabilities, cash inflows and cash outflows of the trustee as though they were included in the assets, liabilities, cash inflows and cash outflows of the manager (sub-subparagraph 6(a)(ii)(C) of the Instrument).

Sub-subparagraph 6(a)(ii)(A) of the Instrument ensures that the manager is effectively controlling the operations of the trustee, so that the manager has the capacity to ensure the trustee’s compliance. Sub-subparagraphs 6(c)(ii)(B) and (C) protect scheme members by ensuring, as far as practicable, that the same regulatory and liability consequences apply as would apply if the manager had provided the wholesale equity financial services itself.

Paragraph 6(b) of the Instrument provides a further condition that, if the trustee or manager becomes aware (or should reasonably have become aware) of matters that give it reason to believe that the trustee has failed to comply, other than in an immaterial respect, with the conditions in section 7 of the Instrument, it must provide full particulars of the failure to ASIC in writing before 10 business days have elapsed.

Financial and custody requirements for trustees

Section 7 of the Instrument sets out the conditions with which the trustee must comply in order to rely on the relief in section 5 of the Instrument. It provides that, for so long as the trustee relies on this relief, the trustee must comply with:

- (a) the base level financial requirements in condition 13 of *ASIC Pro Forma 209: Australian financial services licence conditions (PF 209)* – that is, to be solvent at all times, have positive net assets and have sufficient cash resources to cover the next 3 months – as if the trustee were a financial services licensee whose licence contained these conditions (paragraph 7(1)(a) of the Instrument);
- (b) the tailored cash needs requirement in section 912AC of the Act as notionally inserted by [CO 13/761] (excluding the NTA requirements and the audit requirements insofar as they relate to compliance with the NTA requirements) as if the trustee were a financial services licensee whose licence authorised it to provide a custodial or depositary service and to whom section 912AC applies, subject to certain modifications (paragraph 7(1)(b) of the Instrument); and
- (c) the custody requirements in sections 912AAC and 912AAD of the Act as notionally inserted by [CO 13/1410] as if the trustee were a financial services licensee whose licence authorised it to provide a custodial or depositary service (paragraph 7(1)(c) of the Instrument).

The conditions in paragraphs 7(1)(b) and (c) of the Instrument align the relief provided to wholesale equity scheme trustees with the financial and custody requirements that were introduced in 2013 to apply to all providers of custodian and depositary services through [CO 13/761] and [CO 13/1410].

Subsection 7(2) of the Instrument provides that the trustee must take all reasonable steps to ensure that no interests in the scheme are acquired by a person as a retail client. The purpose of this requirement is to ensure that the relief will not affect the protections Parliament intended for retail clients.

Exclusion from reliance

Section 8 of the Instrument provides that a person may not rely on the exemption in section 5 of the Instrument if ASIC has given the person a notice in writing stating that the person cannot rely on the exemption.

Transitional relief

Section 9 of the Instrument provides transitional relief to a trustee that relied on the relief in [CO 07/74] immediately before its repeal to enable the relief under [CO 07/74] to continue until the end of the financial year of the trustee (if the repeal does not occur at the end of the financial year of the trustee) to simplify the preparation of financial reports and the audit process.

Amendment and Repeal Instrument

As an AFS licensee, the manager must meet the financial and custody requirements implemented through [CO 13/760], [CO 13/761] and [CO 13/1410] and outlined in RG 166 and RG 133, subject to the authorisations on its AFS licence.

Schedule 1 to the Amendment and Repeal Instrument aligns the financial requirements in [CO 13/760] and [CO 13/761] with the requirement in subparagraph 6(a)(ii)(C) of the Instrument. It applies to all managers that hold an AFS licence that authorise the manager to provide wholesale equity financial services and which contains a condition to the effect of the condition in subparagraph 6(a)(ii) of the Instrument, which is equivalent to sub-subparagraph 5(a)(ii)(C) of [CO 07/74]. It provides that section 912AA as notionally inserted by [CO 13/760] and section 912AC as notionally inserted by [CO 13/761] apply to managers who have to comply with those sections *"as if the assets, liabilities, cash inflows and cash outflows of any eligible trustee were included in the assets, liabilities, cash inflows and cash outflows of the manager."*

Schedule 2 to the Amendment and Repeal Instrument repeals [CO 07/74].

4. Documents incorporated by reference

The Instrument incorporates by reference the following documents:

- (a) ASIC Pro Forma PF 209, as in force as at the date of the Instrument. PF 209 sets out the standard licence conditions that, subject to individual circumstances, will usually be applied to licences authorising a person to provide financial services under an AFS licence. The pro forma is available at www.asic.gov.au/pro-formas; and
- (b) ASIC Class Order [CO 07/74] as in force immediately before its repeal (repeal will occur at the same time the Instrument commences). ASIC Class Order [CO 07/74] is available at www.legislation.gov.au.

5. Consultation

On 15 March 2017, ASIC released Consultation Paper 280 *ASIC class order on wholesale equity schemes: Licencing relief for trustees – [CO 07/74] (CP 280)*, seeking feedback on our proposal to either remake [CO 07/74] without significant changes or repeal [CO 07/74] if it no longer formed a useful part of the legislative framework. A draft version of the Instrument was attached to CP 280.

CP 280 referred to the expiry of [CO 07/74] on 1 October 2017. The consultation period was due to close on 13 April 2017, but was extended until 22 May 2017.

ASIC received five submissions in response to CP 280. All of the respondents expressed the view that the relief in [CO 07/74] continued to form a useful regulatory purpose and were supportive of the proposal to remake [CO 07/74] in a new instrument without significant changes. Following the consultation, ASIC decided to proceed to remake [CO 07/74], without significant changes, but updated with the minor changes proposed by CP 280.

As the relief under [CO 07/74] is considered to be operating effectively and efficiently and is being remade without significant changes, no Regulatory Impact Statement is required.

Statement of Compatibility with Human Rights

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

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ASIC Corporations (Wholesale Equity Scheme Trustees) Instrument 2017/849 (the Instrument) and ASIC Corporations (Amendment and Repeal) Instrument 2017/848 (the Amendment and Repeal Instrument) are 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 provides relief to trustees of wholesale equity schemes from the requirement to obtain an Australian financial services licence, in the circumstances and subject to the conditions specified in the instrument.

The Instrument remakes ASIC Class Order [CO 07/74] *Wholesale equity schemes: Licencing relief for trustees* as a new legislative instrument, without significant changes. The Amendment and Repeal Instrument repeals [CO 07/74] and amends ASIC Class Orders [CO 13/760] *Financial requirements for responsible entities and operators of investor directed portfolio services* and [CO 13/761] *Financial requirements for custodial or depository service providers* so that they are consistent with the requirements contained in the Instrument.

Human rights implications

These legislative instruments do not engage any of the applicable rights or freedoms.

Conclusion

These legislative instruments are compatible with human rights as they do not raise any human rights issues.

Australian Securities and Investments Commission