

EXPLANATORY STATEMENT for

ASIC Corporations (Share and Interest Sale Facilities) Instrument 2018/99

and

ASIC Corporations (Amendment and Repeal) Instrument 2018/98

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes *ASIC Corporations (Share and Interest Sale Facilities) Instrument 2018/99* (**the Instrument**) under subsections 601QA(1), 926A(2) and 1020F(1) of the *Corporations Act 2001* (**the Act**).

ASIC makes *ASIC Corporations (Amendment and Repeal) Instrument 2018/98* (**Amendment and Repeal Instrument**) under subsections 283GA(1), 601QA(1), 655A(1), 741(1), 926A(2), 992B(1) and 1020F(1) and paragraph 911A(2)(l) of the Act.

Paragraph 601QA(1)(a) provides (among other matters) that ASIC may exempt a class of persons from the provisions of Ch 5C of the Act. Section 926A(2) provides (among other matters) that ASIC may exempt a class of persons from all or specified provisions of Part 7.6 of the Act. Paragraph 1020F(1)(a) provides (among other matters) that ASIC may exempt a class of persons from the provisions of Part 7.9 of the Act.

The Instrument remakes ASIC Class Order [CO 08/10] *Share and interest sale facilities* (**[CO 08/10]**) as a new legislative instrument. The Amendment and Repeal Instrument repeals [CO 08/10] and amends *ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669* to refer to the Instrument in the definition of applicable ASIC legislative 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

Under the *Legislation Act 2003* legislative instruments cease automatically, or 'sunset', after 10 years, unless action is taken to exempt or preserve them. [CO 08/10] is due to sunset on 1 April 2018. The Instrument has been issued to preserve the effect of the relief given by [CO 08/10].

Sale facilities can be a convenient and cost effective way for holders of shares and interests in managed investment schemes, especially those with small holdings, to sell their shares or interests at or near their current market value. Sometimes, in conjunction with a sale facility, operators also offer a related purchase facility under which holders can, as an alternative to selling their shares or interests, purchase more shares or interests of the same class.

2. Purpose of the instruments

Some sale facilities and related purchase facilities may satisfy the definition of a managed investment scheme for the purposes of Ch 5C of the Act (e.g. because participating members contribute shares, interests or money, which are then pooled and used to produce benefits for the members, and the members do not have day-to-day control).

The managed investment scheme, licensing and product disclosure requirements might therefore apply to the entities involved in operating these facilities (i.e. the operator of the facility, who is either the issuer of the financial products or a related body corporate of the issuer, the registry provider who maintains the register of members, and the intermediary appointed by the operator to sell or purchase financial products on a financial market).

The operation of certain sale facilities may be prohibited under s1019F of the Act, which prevents a person from inviting another person to make an offer to sell a financial product in circumstances where, if the invitation were instead an offer to purchase the financial product, that offer would be covered by Div 5A of Part 7.9 of the Act.

The purpose of the Instrument is to facilitate the operation of sale facilities and related purchase facilities in circumstances where ASIC is satisfied that:

- (a) the managed investment provisions (Ch 5C), the AFS licensing provisions (Pt 7.6) and the product disclosure provisions (Pt 7.9) of the Act were not intended to apply to the types of facilities covered by the relief; and
- (b) without relief, operators would be unable to offer these facilities to members without incurring excessive costs or regulatory obstacles, which would disadvantage both operators and members.

The Instrument will continue the relief provided by ASIC Class Order [CO 08/10] in a new legislative instrument that reflects current drafting practice, without any significant changes.

The purpose of the Amendment and Repeal Instrument is to repeal [CO 08/10] and amend to *ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669* to refer to the Instrument in the definition of applicable ASIC legislative instrument.

3. Operation of the instruments

Operation of the Instrument

Exemptions

Paragraph 5 of the Instrument provides exemptions to persons (the *operator*) who operate a managed investment scheme by reason of operating a sale facility or related purchase facility from:

- the obligation to register a managed investment scheme under s601ED(5) of the Act in relation to the facility;
- the product disclosure provisions under Divisions 2 to 5 of Part 7.9 of the Act in relation to an interest in the facility;
- the requirement under s911A(1) of the Act to hold an AFS licence covering dealing in, and general advice in relation to, an interest in the facility; and
- Div 5A of Part 7.9 of the Act in relation to an invitation to participate in a sale facility.

These exemptions are intended to cover persons who act as an agent of the operator in operating the facility and giving invitations to sell products through the facility. This will usually include the registry provider who maintains the members register and the intermediary engaged by the operator to sell or purchase products.

Where relief applies

These exemptions will only apply to a sale facility or related purchase facility where:

- (a) the financial products that may be acquired or disposed of through the facility:
 - (i) are shares or interests in a managed investment scheme that are admitted to quotation on a licensed market or approved foreign market; and
 - (ii) are issued by the operator or a related body corporate of the operator;
- (b) where the facility is a sale facility – under the terms of the facility all of the following apply:
 - (i) the financial products (the *relevant financial products*) of participating holders to be disposed of through the facility are pooled;
 - (ii) a broker disposes of the relevant financial products in the ordinary course of trading on the relevant market;
 - (iii) each participating holder is paid their proportion of the proceeds of the disposal, net of expenses, as soon as practicable and in any event,

within eight weeks after the date on which the operator received the participating holder's election to participate in the facility;

- (c) where the facility is a related purchase facility – under the terms of the facility all the following apply:
- (i) the money of the participating holders to be used to acquire financial products through the facility is pooled;
 - (ii) a broker acquires the financial products in the ordinary course of trading on the relevant market;
 - (iii) the broker may deduct expenses of acquiring the financial products from the money referred to in subparagraph (i);
 - (iv) each participating holder is allocated their proportion of the financial products purchased;
 - (v) each participating holder has transferred to them the financial products allocated to them within eight weeks after the date on which the operator received the participating holder's election to participate in the facility;
 - (vi) each participating holder may acquire financial products through the facility (aggregated with any other financial products in the same class that were acquired through any previous facility) for consideration totalling no more than \$5,000 in any consecutive 12 month period.

Conditions of the relief

The relief is subject to conditions that:

- the operator gives or sends to holders an invitation document that contains certain information about the market value of financial products, how the facility works, how the proceeds of sale of financial products purchased will be allocated between participating holders and what the holder can do instead of participating in the facility; and
- the operator takes reasonable steps to ensure the facility is not operated during any period where a control transaction has been publicly proposed and has not ended; and
- the operator takes reasonable steps to ensure that, where a related purchase facility is available in conjunction with a sale facility, a participating holder can only participate in either, but not both, of the facilities.

Operation of the Amendment and Repeal Instrument

Schedule 1 of the Amendment and Repeal Instrument amends the definition of applicable ASIC legislative instrument in *ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669* to replace references to [CO 08/10] with that of the Instrument.

Schedule 2 of the Amendment and Repeal Instrument repeals the whole of [CO 08/10].

4. Consultation

As part of its review of [CO 08/10], ASIC released Consultation Paper 252 *Remaking ASIC class order on share and interest sale facilities (CP 252)*. ASIC did not receive submissions in response to CP 252.

The Office of Best Practice Regulation has assessed that a Regulatory Impact Statement is not required in order to make the Instrument.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Share and Interest Sale Facilities) Instrument 2018/99 and ASIC Corporations (Amendment and Repeal) Instrument 2018/98

ASIC Corporations (Share and Interest Sale Facilities) Instrument 2018/99 (the Instrument) and ASIC Corporations (Amendment and Repeal) Instrument 2018/98 (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 facilitate operation of sale facilities and related purchase facilities in circumstances where ASIC is satisfied that:

- (a) the managed investment provisions (Ch 5C), the AFS licensing provisions (Pt 7.6) and the product disclosure provisions (Pt 7.9) of the Act were not intended to apply to the types of facilities covered by the relief; and
- (b) without relief, operators would be unable to offer these facilities to members without incurring excessive costs or regulatory obstacles, which would disadvantage both operators and members.

The Instrument remakes ASIC Class Order [CO 08/10] *Share and interest sale facilities* ([CO 08/10]) as a new legislative instrument, without significant changes.

The Amendment and Repeal Instrument repeals [CO 08/10] and amends *ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669* to refer to the Instrument in the definition of applicable ASIC legislative 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.