

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Corporations Act 2001

Corporations Amendment (Crowd-sourced Funding) Regulations 2018

Section 1364 of the *Corporations Act 2001* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Corporations Amendment (Crowd-sourced Funding) Regulations 2018* (the Regulations) is to amend the *Corporations Regulations 2001* to:

- prescribe that proprietary companies with one or more crowd-sourced funding (CSF) shareholders are only exempt from the takeover rules in section 606 of the Act while the company is eligible to make a CSF offer;
- provide that funds raised by a CSF offer can be loaned to its own wholly owned subsidiaries;
- modify the application of the unsolicited offer provisions in Division 5A of Part 7.9 of the Act in relation to any securities of a proprietary company that is an eligible CSF company and has one or more CSF shareholders to provide greater commercial flexibility;
- simplify and add flexibility to the structure and content of CSF offer documents for proprietary and public companies;
- prescribe additional content requirements for CSF offer documents relating to proprietary companies;
- require CSF intermediaries to check identification documents for all the directors and senior managers of proprietary and public companies making CSF offers; and
- provide that withdrawal rights only apply if the defect is materially adverse from the point of view of the investor.

Details of the Regulations are set out in the Attachment.

The Act does not specify any conditions that need to be met before the power to make the Regulations may be exercised.

An exposure draft of the Regulations and accompanying explanatory material were released for public consultation from 11 December 2017 to 02 February 2018. Two submissions were received during the consultation process. The submissions did not raise any concerns in relation to the Regulations.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence at the later of the day after the Regulations are registered or the *Corporations Amendment (Crowd-sourced Funding for Proprietary Companies) Act 2018* commences.

Statement of Compatibility with Human Rights

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

Corporations Amendment (Crowd-sourced Funding) Regulations 2018

This Legislative 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 *Corporations Amendment (Crowd-sourced Funding) Regulations 2018*

The *Corporations Amendment (Crowd-sourced Funding) Regulations 2018* amends the *Corporations Regulations 2001* to:

- prescribe that proprietary companies with one or more crowd-sourced funding (CSF) shareholders are only exempt from the takeover rules in section 606 of the *Corporations Act 2001* (the Act) while the company is eligible to make a CSF offer;
- provide that funds raised by a CSF offer can be loaned to its own wholly owned subsidiaries;
- modify the application of the unsolicited offer provisions in Division 5A of Part 7.9 of the Act in relation to any securities of a proprietary company that is an eligible CSF company and has one or more CSF shareholders to provide greater commercial flexibility;
- simplify and add flexibility to the structure and content of CSF offer documents for proprietary and public companies;
- prescribe additional content requirements for CSF offer documents relating to proprietary companies;
- require CSF intermediaries to check identification documents for all the directors and senior managers of proprietary and public companies making CSF offers; and
- provide that withdrawal rights only apply if the defect is materially adverse from the point of view of the investor.

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.

Attachment

This Attachment sets out the details of the *Corporations Amendment (Crowd-sourced Funding) Regulations 2018*.

Conditions for the exemption from the takeover rules for proprietary companies with one or more CSF shareholders

The *Corporations Amendment (Crowd-sourced Funding for Proprietary Companies) Act 2018* (the CSF Act) provides that proprietary companies with one or more CSF shareholders are exempt from the takeover rules in section 606 of the Act as long as the conditions in the *Corporations Regulations 2001* are satisfied. The exemption from the takeover rules was provided to proprietary companies with one or more CSF shareholders to reduce compliance costs and avoid unduly restricting companies from adjusting their capital structure as they use CSF to grow their business. However, as companies grow and engage in more sophisticated activities, it will no longer be appropriate for them to be exempt from the takeover rules in section 606 of the Act.

The Regulations therefore prescribe that the exemption will only apply while a company is still an eligible CSF company under section 738H of the Act. As such, a proprietary company with one or more CSF shareholders will only be exempt from the takeover rules in section 606 of the Act if:

- its consolidated assets and turnover are under \$25 million;
- its principal place of business is in Australia;
- a majority of its directors ordinarily reside in Australia; and
- it and its related parties do not have a principal purpose of investing in securities or interests in other entities or schemes.

This approach has been adopted because it would be inappropriate for proprietary companies that out-grow the CSF framework to continue to be exempt from the takeover rules in section 606 of the Act in perpetuity. Linking eligibility for the takeovers exemption in this way avoids establishing multiple thresholds and recognises that companies over this size are better placed to understand, and have the resources to comply with, the takeovers rules. Similarly, proprietary companies that do not have their principal place of business in Australia or have a principal purpose of investing in securities or interests in other schemes or entities are sophisticated enough that it is appropriate for the takeover rules to apply to them.

Funds raised by CSF Company can be loaned to its owned wholly owned subsidiaries.

The Regulations provide that funds raised by the CSF offer by the holding company can be used to make loans to its owned wholly owned subsidiaries. The current law prohibits funds raised from a CSF offer from being on-lent, as an investor protection measure. However, this protection is not required in the case of wholly owned subsidiaries, and allowing access in this way will provide greater flexibility and expand eligibility for CSF to a broader number of businesses who adopt a company group structure.

Modifications to the unsolicited offer provisions for proprietary companies with one or more CSF shareholders

The Regulations modify the application of the unsolicited offer provisions in Division 5A of Part 7.9 of the Act in relation to proprietary companies that are eligible CSF companies and have one or more CSF shareholders. The modifications include:

- reducing the minimum amount of time an offer has to be open from 1 month to 14 days; and
- allowing variations to the terms and consideration offered.

The reduction of the minimum offer period to 14 days will allow offers to be made while still providing adequate time for shareholders to consider an offer and get appropriate advice.

As proprietary companies with one or more CSF shareholders are exempt from the takeover rules, more offers to buy out shareholders of these companies are likely to be caught by the unsolicited offer provisions. Allowing variations to the terms of an offer is necessary to provide additional commercial flexibility to facilitate the offers and provide exit opportunities for CSF shareholders.

Variations can include an increase in the price and/or consideration and extend the offer (but not beyond 12 months). Variations may only be made by sending a supplementary offer document that identifies the original offer, describes the variation and is worded clearly, concisely and in an effective manner. Variations can only be made in relation to offers that have not already been accepted and include the same rights applying to the offer (for example, in relation to misleading and deceptive conduct). However if the only change is the period of offer, then the supplementary offer document is only required to be sent to anyone who has not accepted the offer.

Simplifying the content and structure requirements for CSF offer documents for proprietary and public companies

The content and structure requirements for a CSF offer document have been simplified to provide additional flexibility and reduce duplication. The changes include:

- allowing some required information to be presented in a summary format within a relevant section with the rest of the details to be included in any of the other required sections or an additional section or appendix;
- clarifying that information can be presented in any order within each of the required sections of a CSF offer document;
- clarifying that a CSF offer document can be presented online in commonly used digital formats, so that it can be easily accessed, downloaded and saved; and
- clarifying that CSF offer documents can include additional information beyond what is required and that the additional information may be included in any of the required sections or in an additional section or appendix and that it forms part of the CSF offer document.

The requirement for section 2 of the CSF offer document to include details of a company's capital structure is likely to be lengthy and will partially overlap with the requirement for section 3 of the CSF offer document to include a description of the securities on issue. To allow additional flexibility and further simplify CSF offer documents, the Regulations provide for this information to be summarised in the relevant sections of a CSF offer document with full details to be available either in another required section or an additional section or appendix. The summary would, however, also need to identify where in the CSF offer document the full information is presented. Any information presented in the appendix forms part of the offer document and must be presented clearly and concisely.

Similarly, the copy of the company's financial statements in section 2 of the CSF offer document can be summarised within the section and the full document included either in another required section of the offer document or an additional section or appendix. The summary will have to identify where in the CSF offer document the full financial statements are included.

Where information is summarised, an offering company must ensure that the summary is not misleading or deceptive.

All the other details required in a CSF offer document are either factual details that cannot be summarised (for example, the details of the company) or descriptions of circumstances that are applicable / relevant to the company (for example, descriptions of relevant offences and risks).

Additional disclosure requirements for proprietary companies

As the CSF Act extends the CSF regime to proprietary companies, the Regulations prescribe additional disclosure requirements for proprietary companies accessing the CSF regime. The additional disclosure requirements ensure proprietary companies appropriately describe the impact of the regulatory concessions and investor protection measures that apply to them. Under the new requirements, proprietary companies accessing CSF will have to outline the effect of:

- the requirement for proprietary companies with CSF shareholders to obtain shareholder approval for related party transactions under Chapter 2E of the Act;
- the exemption for proprietary companies with one or more CSF shareholders from the takeover rules in section 606 of the Act;
- the requirement for proprietary companies with one or more CSF shareholders to have their financial statements audited once \$3 million or more is raised from CSF offers; and
- the requirement for proprietary companies with one or more CSF shareholders to provide their annual financial statements online.

The Regulations also clarify that the description of the rights attaching to a company's securities also covers rights and liabilities arising out of the company's constitution and shareholder agreements and there must be disclosure of any restrictions that apply to the company in relation to the off-market transfer of shares, including any rights of

the directors to refuse to register a transfer of shares in the company, including where such a transfer would breach the 50 shareholder cap.

The requirement to summarise the key terms of a company's constitution applies to both public and proprietary companies.

Checking of the director identities for proprietary and public companies making CSF offers

The Regulations provide that a CSF intermediary must verify the identity of all directors and intended directors of a company making a CSF offer in addition to checking ASIC's registers. The Regulations provide flexibility allowing an intermediary to check a director or intended director's identification against authenticated electronic records.

Withdrawal rights only apply if the defect is materially adverse from the point of view of the investor

The Regulations provide that withdrawal rights only apply if the defect is materially adverse from the point of view of the investor. A replacement or supplementary offer document is still required when a CSF offer document is deemed defective. A CSF offer document is defective if it is misleading, deceptive, has missing information, or a new situation has emerged, that would have been required to be included in the original offer document. Intermediaries and companies are still required to issue a supplementary or replacement offer document in all cases, however withdrawal rights will only apply if news is materially adverse from the point of view of the investor.