

EXPLANATORY STATEMENT for

ASIC Corporations (Warrants: Out-of-use notices) Instrument 2019/148

and

ASIC Corporations (Repeal) Instrument 2019/147

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes *ASIC Corporations (Warrants: Out-of-use notices) Instrument 2019/148* (**the Instrument**) under paragraph 1020F(1)(a) of the *Corporations Act 2001* (**the Act**).

ASIC makes *ASIC Corporations (Repeal) Instrument 2019/147* (**Repeal Instrument**) under paragraph 1020F(1)(a) 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 08/781] *Warrants: Out-of-use notices* ([**CO 08/781**]) as a new legislative instrument. The Repeal Instrument repeals [CO 08/781].

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 08/781] is due to sunset on 1 April 2019. The Instrument has been issued to preserve the effect of the relief given by [CO 08/781].

A Product Disclosure Statement (**PDS**) or supplementary PDS for warrants does not need to be lodged with ASIC. However, an in-use notice must be provided to ASIC when the PDS is first used. This is because warrants are not a product specified in section 1015B of the *Corporations Act 2001* (**Act**).

If a PDS or supplementary PDS does not need to be lodged with ASIC, then paragraph 1015D(2)(c) of the Act requires a responsible person for the PDS (other than the trustee of a self-managed superannuation fund) to lodge a notice with ASIC, in electronic form, when the financial product to which the PDS or supplementary PDS relates is no longer available to be given in a recommendation, issue or sale situation (***out-of-use notice***).

Paragraph 1015D(2)(c) of the Act was enacted under Part 4 of the *Corporations Legislation Amendment (Simpler Regulatory System) Act 2007 (Cth) (SRS Act)*. The policy objectives behind subsection 1015D(2) as outlined in the Explanatory Memorandum to the SRS Act are to:

- Ensure ASIC is aware of all product information that it requires to be useful;
- Minimise the cost to business in providing the information; and
- Enhance protection of consumers by ensuring ASIC has regulatory oversight of all financial products able to be sold to investors.

However, the characteristics of a warrant in terms of the underlying security, expiry date and exercise price are such that each warrant in a PDS or supplementary PDS can be considered to constitute a separate financial product under Ch 7 of the Act. This means that, without the relief provided by [CO 08/781], the responsible person for a PDS or supplementary PDS covering two or more warrant products would have to lodge out-of-use notices frequently.

2. Purpose of the instruments

The purpose of [CO 08/781] is to minimise the burden on warrant issuers of complying with paragraph 1015D(2)(c) of the Act by modifying the lodging requirements for out-of-use notices.

[CO 08/781] allows the responsible person for a PDS or supplementary PDS to delay lodging an out-of-use notice with ASIC until the time when all the warrant products offered under a PDS or supplementary PDS cease to be available.

ASIC considers that the relief in the Instrument is consistent with the policy objectives of section 1015D of the Act.

The Instrument will continue the relief provided by ASIC Class Order [CO 08/781] in a new legislative instrument that reflects current drafting practice, without any significant changes.

The purpose of the Repeal Instrument is to repeal [CO 08/781].

3. Operation of the instruments

Operation of the Instrument

Exemptions

Section 5 of the Instrument provides an exemption to a responsible person (in practical terms the warrant issuer) for a PDS or supplementary PDS that forms part of a Multiple Warrant Statement, from the requirement under subsection 1015D(2) of the Act to lodge an out-of-use notice with ASIC until all the warrants to which the Multiple Warrant Statement relates, cease to be available to be recommended or offered to new clients in a recommendation, issue or sale situation.

Where relief applies

The exemption from the requirement under subsection 1015D(2) of the Act will only apply to a Multiple Warrant Statement. A Multiple Warrant Statement is defined in section 4 of the Instrument as a document in relation to which the following apply:

- (a) the document has set out in it 2 or more PDSs (that includes 2 or more separate documents given at the same time) or supplementary PDSs for warrants; and
- (b) the responsible person for each PDS and supplementary PDS is the same.

However, even with the relief in the Instrument, the responsible person will eventually need to lodge an out-of-use notice with ASIC when all the warrants to which the PDS or supplementary PDS relates are no longer available to be given to new clients in a recommendation, issue or sale situation.

Operation of the Repeal Instrument

Schedule 1 of the Repeal Instrument repeals [CO 08/781].

4. Consultation

As part of its review of [CO 08/781], ASIC released Consultation Paper 307: *Remaking ASIC class order on warrants: Out-of-use notices - [CO 08/781]* (CP 307) ASIC did not receive submissions in response to CP 307.

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

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ASIC Corporations (Repeal) Instrument 2019/148

ASIC Corporations (Warrants: Out-of-use notices) Instrument 2019/148 (the Instrument) and ASIC Corporations (Repeal) Instrument 2019/147 (the 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 an exemption to a responsible person (in practical terms the warrant issuer) for a PDS or supplementary PDS for warrants from the requirement under subsection 1015D(2) of the Act to lodge an out-of-use notice with ASIC until all the warrants to which the PDS or supplementary PDS relates, cease to be available to be recommended or offered to new clients in a recommendation, issue or sale situation.

The exemption from the requirement under subsection 1015D(2) of the Act will only apply where:

- (a) a document has set out in it 2 or more PDSs (that includes 2 or more separate documents given at the same time) or supplementary PDSs for warrants; and
- (b) the responsible person for each PDS and supplementary PDS is the same.

The Instrument remakes ASIC Class Order [CO 08/781] *Share and interest sale facilities (ICO 08/781)* as a new legislative instrument, without significant changes.

The Repeal Instrument repeals [CO 08/781].

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.