



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Design and Distribution Obligations Interim Measures) Instrument 2021/784

ASIC Corporations (Amendment) Instrument 2021/785

This is the Explanatory Statement for:

- (a) *ASIC Corporations (Design and Distribution Obligations Interim Measures) Instrument 2021/784* (the **Instrument**); and
- (b) *ASIC Corporations (Amendment) Instrument 2021/785* (the **Amendment Instrument**).

The Explanatory Statement is approved by the Australian Securities and Investments Commission (**ASIC**).

Summary

1. The Instrument and the Amendment Instrument put in place interim measures in relation to the operation of the design and distribution obligations (**DDO**), using ASIC's modification and exemption powers. As foreshadowed in a public statement by the Government titled '*Updated amendments to the design and distribution obligations*', these interim measures provide certainty on the application of the DDO ahead of legislative changes proposed to be made by the Government to give effect to its intended operation.
2. The Instrument sunsets after two years. The Amendment Instrument adopts the sunset periods of the existing instruments it amends.
3. The Instrument:
 - (a) amends section 761G of the *Corporations Act 2001* (the **Act**) to clarify that the retail and wholesale client definitions apply to Part 7.8A of the Act in the same way as they apply to the rest of Chapter 7 of the Act;
 - (b) amends subsection 994F(4) of the Act to remove the requirement for persons who engage in retail product distribution conduct (**distributors**) to report to persons who make TMDs for products (**issuers**) *whether* a complaint has been received, including where nil complaints are received. However there remains a requirement for distributors to report to issuers

the number of complaints they receive, to the extent they receive any during the reporting period;

- (c) amends subsection 994F(5) of the Act to remove the requirement for distributors to report that information specified by the issuer in its target market determination (**TMD**) has not been acquired during the reporting period (i.e. where nil information is acquired), while retaining a requirement to report such information where it is acquired by distributors during the reporting period;
 - (d) amends the meaning of “excluded conduct” in subsection 994A(1) to clarify that it includes giving a disclosure document under Part 6D.2 or a Product Disclosure Statement (**PDS**) under Part 7.9 of the Act in the course of providing personal advice about a financial product;
 - (e) amends regulation 7.8A.25 of the *Corporations Regulations 2001* (the **Regulations**) to address any uncertainty that employers remain exempt from the DDO when they provide a PDS for their default fund to employees;
 - (f) exempts products from the DDO where these products are within the scope of the DDO only as non-cash payment facilities (aside from debit cards, credit products and stored value facilities);
 - (g) exempts from the DDO regime foreign exchange contracts that settle immediately;
 - (h) exempts from the DDO regime margin lending facilities provided to non-natural persons; and
 - (i) exempts from the DDO regime cashless welfare arrangements.
4. The Amendment Instrument:
- (a) amends the meaning of ‘product distributor’ under the [ASIC Corporations \(Basic Deposit and General Insurance Product Distribution\) Instrument 2015/682](#) (**ASIC Instrument 2015/682**) to clarify that employees of licensees are not inadvertently regulated persons for the purposes of the DDO regime (even though they do not rely on the relief in that instrument); and
 - (b) amends [ASIC Class Order \[CO 14/1262\]](#) so that the application of the DDO extends to 31-day notice term deposits.

Purpose of the instruments

5. The *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* introduced the DDO to Chapter 7 of the Act. Issuers and distributors of financial products must comply with these obligations from 5 October 2021.

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6. The DDO are intended to help consumers obtain appropriate financial products by requiring issuers and distributors to have a consumer-centric approach to designing and distributing products.
 7. The Government has announced that a number of amendments are required to achieve the intended operation of the reforms, including to clarify the law, to ensure a consistent application of the law, and that the regime remains fit-for-purpose.
 8. To assist with providing certainty on the application of the regime in the period prior to the Government making the necessary legislative amendments, the Instrument and Amendment Instrument make interim measures consistent with the Government's policy intentions, using ASIC's modification and exemption powers under s994L of the Act. This will allow the Government time to make these changes permanent. These interim measures will also avoid industry needing to implement product governance arrangements, ahead of commencement, for products that are ultimately not intended to be caught by these reforms.

Consultation

9. The Government's proposed amendments are a result of feedback the Government has received from stakeholders in relation to implementing the DDO prior to commencement.
10. Following the Government's announcement that it would make amendments to achieve its intended operation of the reforms, ASIC undertook targeted consultation with a range of relevant stakeholders, including industry bodies and consumer groups, to invite their feedback on the proposed interim measures. Submissions were supportive of ASIC implementing these interim measures.

Operation of the instrument

Commencement

11. Section 2 of the Instrument and the Amendment Instrument provide that the Instrument (other than subsection 6(5)) and the Amendment Instrument commence on the later of:
 - (a) 5 October 2021; and
 - (b) the day after it is registered on the Federal Register of Legislation.
12. Subsection 6(5) of the Instrument, which relates to the provision of PDSs by employers, commences on 1 November 2021.

Retail and wholesale client definitions

13. Regulations 7.6.02AB–7.6.02AF of the Regulations modify section 761G (meaning of retail and wholesale client) for Parts 7.6, 7.7, 7.7A, 7.8 and 7.9 of

the Act. However, these regulations would not apply for the purposes of the DDO, which is contained in Part 7.8A of the Act.

14. Section 6(1) of the Instrument rectifies this by providing that Part 7.8A of the Act applies in relation to regulated persons, and any other persons who are required to make a TMD, as if section 761G were modified using wording mirroring that of regulations 7.6.02AB–7.6.02AF.

Reporting of complaints and other information requested by the issuer

15. Subsections 994F(4) and (5) of the Act broadly require distributors to report to issuers:
 - (a) the number of complaints received in relation to the product during the reporting period; and
 - (b) information specified in the TMD (see subparagraph 994B(5)(h)(i)) that the distributor acquired during the reporting period.
16. As a result of paragraph 994F(4)(a), distributors would be required to report to issuers *whether* they received any complaints, even in circumstances where they had not received any complaints. Similarly, as a result of paragraph 994F(5)(b), where distributors did not acquire information specified by the issuer, distributors would be required to report that fact.
17. Consistent with the Government’s stated policy intent, subsection 6(2) of the Instrument removes the requirement for distributors to report whether they have received a complaint, including where they have received nil complaints. If distributors receive complaints during the reporting period, they will still be required to report to issuers the number of complaints they receive. This will assist issuers to assess whether their product governance arrangements are appropriate, and their products are meeting the needs of consumers.
18. Similarly, subsection 6(3) of the Instrument removes the requirement for distributors to report the fact that they had not acquired the information specified by the issuer in the TMD. If distributors acquire the specified information during the reporting period, they will still be required to report to issuers the information that they acquire.

Meaning of excluded conduct

19. The Act provides an exemption from the reasonable steps obligation where personal advice is provided (the ‘excluded conduct’ provision: see subsection 994A(1)).
20. Consistent with the Government’s stated policy intent, subsection 6(4) removes any uncertainty that the excluded conduct provision can be relied upon in circumstances where a disclosure document or PDS is given in the course of providing personal advice.

Provision of Product Disclosure Statements by employers

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21. Regulation 7.8A.25 of the Regulations exempts employers from Part 7.8A of the Act where the employer is complying with certain superannuation guarantee obligations. Regulation 7.8A.25 provides that an employer is not subject to the DDO when they are engaging in a transaction that involves specified retail product distribution conduct that relates to a financial product that is, or will be, an interest in the chosen fund of the employee or the employer's default fund.
 22. Consistent with the Government's stated policy intent and the original intention of regulation 7.8A.25, subsection 6(5) of the Instrument amends regulation 7.8A.25 to clarify any uncertainty that employers remain exempt from the DDO when they provide a PDS for their default fund to employees.

Facilities for making non-cash payments

23. The obligations apply to non-cash payment facilities as a result of regulation 7.8A.07 of the Regulations, which applies to basic banking products within the meaning of section 961F. A basic banking product under section 961F includes 'a facility for making non-cash payments'.
24. The application of the DDO also extends to products that are not regulated under Parts 6D.2 or 7.9 of the Act, but that are 'financial products' under Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001 (ASIC Act)* (see subsections 994AA(1) and (2) of the Act). A broader meaning of when a person makes a non-cash payment is given by subsection 12BAA(1)(6) of the ASIC Act (for the purposes of subsection 12BAA(1)), compared with the meaning given by section 763D of the Act (for the purposes of section 763A).
25. The Government's intention is that products be exempt from the DDO where these products are within scope of the DDO only as non-cash payment facilities. This means that credit facilities (such as a credit card)—which could satisfy the ASIC Act definition of a facility through which a person makes non-cash payments—will continue to be within the scope of the DDO. The Government's intention is that exclusions from this exemption also apply for debit cards and stored value facilities, such that they continue to be within the scope of the DDO.
26. Subsection 7(1) of the Instrument provides an interim solution by exempting from subsections 994B(1) and (2) of the Act a financial product that:
 - (a) is a financial product only because it is a non-cash payment facility; and
 - (b) is neither:
 - (i) a debit card; or
 - (ii) a stored value facility.
27. The Instrument provides a new definition for 'stored value facility' and refers to existing definitions for a variety of other non-cash payment facilities.

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28. Paragraph 7(1)(b) of the Instrument intentionally does not refer to facilities such as credit cards because these products are clearly caught by paragraph 7(1)(a) of the Instrument (i.e. credit cards are also a different kind of financial product).

Contracts to exchange currency that are to be settled immediately

29. Paragraph 765A(1)(m) of the Act provides an exemption for foreign exchange contracts that are settled immediately from the definition of ‘financial product’. However, there is no similar exemption in the ASIC Act, which provides that a foreign exchange contract is a financial product (see paragraph 12BAA(7)(j) of the ASIC Act, contrast subparagraph 764A(1)(k)(ii) of the Act). The result is that the DDO applies to foreign exchange contracts settled immediately. This outcome is contrary to the Government’s intention, as outlined in its recent statement.
30. Subsection 7(2) of the Instrument achieves the Government’s intention on an interim basis by exempting from subsections 994B(1) and (2) of the Act contracts to exchange currency to another where the contract is settled immediately.

Margin lending to non-natural persons

31. Paragraph 994B(3)(b) of the Act provides an exemption from the DDO for ‘margin lending facilities’. However, as a result of the definition of ‘margin lending facility’ under the Act, and the extended operation of the DDO to financial products for the purposes of the ASIC Act, margin lending to corporates would remain within the scope of the DDO.
32. Section 761EA of the Act (which defines the meaning of ‘margin lending facility’) is limited to margin loans provided to natural persons. As such, a margin lending facility that involves the provision of credit to a corporate entity is excluded from being regulated by the Act. However, such a facility would be subject to the DDO as a financial product (as a credit facility under section 12BAA of the ASIC Act) if the corporate is deemed to be a retail client and the credit is not for a business purpose (see paragraph 7.8A.20(9)(b) of the Regulations).
33. The Government intends that margin lending to corporates be exempt from the DDO. Subsection 7(3) of the Instrument achieves this on an interim basis by exempting from subsections 994B(1) and (2) of the Act margin lending facilities provided to non-natural persons.

Cashless welfare arrangements

34. The Government has stated that it intends to exempt the Government’s Cashless Debit Card and the BasicsCard from the DDO regime, as the key design and distribution features of these products are set out in legislation. This is consistent with the treatment of other products which are also subject to special product-specific rules under legislation and are exempt from the DDO regime, including MySuper products.

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35. Subsection 7(4) of the Instrument achieves the Government’s intention on an interim basis by exempting from subsections 994B(1) and (2) of the Act these products and their linked account products.

Employees of licensees

36. Subregulation 7.8A.02(3) *prescribes* in relation to certain products, a ‘product distributor’ within the meaning of s910A of the Act (as modified by [ASIC Instrument 2015/682](#)) for the purposes of the definition of ‘regulated person’ in subsection 994A(1) of the Act.
37. An employee of a licensee—who would not need to rely on [ASIC Instrument 2015/682](#), as they could rely on the exemption paragraph 911B(1)(a)—could nonetheless satisfy the definition of ‘product distributor’. The effect of this is that the employee would be personally subject to the DDO as a result of subregulation 7.8A.02(3). This was not intended.
38. The Amendment Instrument provides an interim measure to address this issue by inserting, after “a person (the principal distributor)”, “other than an employee of the licensee, who”, to paragraph 5(1)(a) of [ASIC Instrument 2015/682](#).
39. This issue arises due to the wording of subregulation 7.8A.02(3) that *prescribes* ‘product distributors’ as regulated persons. We do not consider the issue arises for other employees who provide services on behalf of a licensee under paragraph 911B(1)(a), merely because other AFS licence exemptions *could* be available to them under subsection 911A(2) when they do not in fact rely on these exemptions.

31-day notice term deposits

40. The DDO applies to basic banking products within the meaning of section 961F of the Act, as a result of regulation 7.8A.07. Under subsection 961F(a) of the Act, a basic banking product includes a basic deposit product. There is separately a definition of basic deposit product in section 761A for the purposes of Chapter 7 of the Act.
41. [\[CO 14/1262\]](#) was made to facilitate term deposits that are only breakable on 31 days’ notice. The DDO do not apply to these products, despite applying to other term deposits. This was a technical oversight, which is addressed by the Amendment Instrument.

Legislative instrument and primary legislation

42. The subject matter and policy implemented by these instruments are more appropriate for a legislative instrument rather than primary legislation because:
- (a) The Government has identified that a number of amendments are required to achieve its intended operation of the DDO reforms. These changes are necessary to clarify the law and ensure its consistent application.

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- (b) These instruments make these changes on an interim basis ahead of the Government making the changes on a more permanent basis to ensure the changes are made ahead of commencement, and to avoid firms implementing product governance arrangements for products that are not intended to be covered by the reforms.

Legislative authority

43. Subsection 994L(2) of the Act provides the legislative authority for the Instrument and the Amendment Instrument.
44. Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force 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 any instrument, the power is to be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to amend any such instrument.
45. The Instrument and the Amendment Instrument are disallowable legislative instruments under the *Legislation Act 2003*.

Statement of Compatibility with Human Rights

46. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the Attachment.

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

ASIC Corporations (Design and Distribution Obligations Interim Measures) Instrument 2021/784

ASIC Corporations (Amendment) Instrument 2021/785

Overview

1. *ASIC Corporations (Design and Distribution Obligations Interim Measures) Instrument 2021/784* (the **Instrument**) and *ASIC Corporations (Amendment) Instrument 2021/785* (the **Amendment Instrument**) put in place interim measures to provide certainty on the application of the design and distribution obligations (**DDO**) regime under Part 7.8A of the *Corporations Act 2001* (the **Act**) consistent with the Government's publicly stated policy intention, using ASIC's modification and exemption powers.

Assessment of human rights implications

2. These instruments 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*.
3. The DDO framework was introduced by *Treasury Laws Amendment (Design Act, and Distribution Obligations and Product Intervention Powers) Act 2019 (DDO Bill)* and amended by the *Corporations Amendment (Design and Distribution Obligations) Regulations 2019 (DDO Regulations)*. As explained and discussed in the explanatory materials to the DDO Bill and the DDO Regulations, the DDO Framework potentially engages the following human rights:
 - (a) the right to the presumption of innocence; and
 - (b) the right to privacy.
4. The effect of the instruments is to provide relief from certain requirements under the DDO legislative framework. To the extent that there may be any engagement with the above human rights, the instruments will be protective of those rights, and as a result, are compatible with the human rights and freedoms.

Conclusion

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5. These instruments 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*.