



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (On-Sale Disclosure Relief for Scrip Bids and Schemes of Arrangement) Instrument 2023/686

This is the Explanatory Statement for *ASIC Corporations (On-Sale Disclosure Relief for Scrip Bids and Schemes of Arrangement) Instrument 2023/686 (Instrument)*.

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

Summary

1. Chapter 6D and Part 7.9 of the Act respectively regulate the disclosure of securities of a body and interests in registered schemes to retail investors. Generally, an offer of securities for issue must be made under a prospectus that complies with Chapter 6D of the Act, and an offer of interests in a registered scheme for issue must be made under a Product Disclosure Statement (*PDS*) under Part 7.9 of the Act.
2. An offer of securities *for sale* and an offer of interests in a registered scheme *for sale* will, in certain circumstances, also require disclosure by way of prospectus or PDS respectively under the on-sale provisions (subsections 707(3) and 1012C(3) of the Act).
3. The on-sale provisions are anti-avoidance provisions designed to ensure that retail investors receive adequate disclosure regardless of whether securities or interests are issued to them by the issuer directly, or indirectly through an intermediary (i.e. issued to an intermediary such as a wholesale client who in turn offers the securities or interests for sale to retail investors).
4. In some cases the operation of the on-sale provisions can raise practical difficulties, particularly in circumstances where the operator of a sale facility or a nominee acquires securities or interests in relation to a takeover bid or a scheme of arrangement under Part 5.1 of the Act with the intention of on-selling those securities or interests. The mischief that the on-sale provisions were designed to address is not present in these circumstances. For this reason, ASIC provides the technical relief in this Instrument.
5. The Instrument has the effect that neither a prospectus nor a PDS is required to be given for sale offers of securities or interests in registered schemes in specified circumstances relating to “scrip” takeover bids and schemes of arrangement.

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6. The *Legislative Instruments Act 2003* (the **LIA**) provides for the periodic expiry of legislative instruments (‘sunsetting’) to ensure that they are kept up to date and only remain in force for so long as they are needed. [Class Order \[CO 13/525\]](#) *On-sale disclosure relief for scrip bids and schemes of arrangement* (**[CO 13/525]**) is a legislative instrument and was scheduled to eventually expire under the sunsetting provisions of the LIA. ASIC’s reissuing of the relief underlying [CO 13/525] has given ASIC the opportunity to deal with its eventual expiry. The modifications in the Instrument are the same as those in [CO 13/525].
 7. [CO 13/525] is repealed by *ASIC Corporations, Credit and Superannuation (Amendment and Repeal) Instrument 2023/699*.

Purpose of the instrument

8. The purpose of the Instrument is to give technical on-sale disclosure relief for certain incidental aspects of:
 - (a) “scrip takeover bids” under Chapter 6 of the Act (i.e. bids under which the consideration offered for the acquisition of bid class securities is or includes securities of a body or interests in a registered scheme); or
 - (b) “scrip schemes of arrangement” under Part 5.1 of the Act (i.e. schemes of arrangement involving an offer of securities of a body or interests in a registered scheme).
9. ASIC recently reviewed the policy underlying [CO 13/525] as part of a wider review of legislative instruments relating to takeover provisions in Chapters 6–6C. ASIC considers that the relief provided in [CO 13/525] is still both necessary and appropriate. ASIC has decided to reissue the relief underlying [CO 13/525] in the Instrument.

Consultation

10. On 30 November 2022, ASIC released Consultation Paper 365 (**CP 365**) seeking feedback on proposals to remake nine class orders relating to takeovers, compulsory acquisitions and relevant interests (including [CO 12/1209], [CO 13/519], [CO 13/520], [CO 13/521], [CO 13/522], [CO 13/524], [CO 13/525], [CO 13/526], and [CO 13/528]). The consultation period closed on 23 January 2023.
11. CP 365 invited feedback as to whether [CO 13/525] *On-sale disclosure relief for scrip bids and schemes of arrangement* was operating effectively and efficiently, or whether there were issues or improvements that should be considered to improve its operation.
12. ASIC received 4 submissions in response to CP 365, one of which addressed [CO 13/525]. We took that submission into account in making the Instrument. Details of the submissions received are contained in REP 773 Response to

submissions on CP 365 which is available on ASIC’s website at www.asic.gov.au.

Operation of the instrument

13. The effect of the Instrument is that neither a prospectus nor a PDS is required to be given for sale offers of securities or interests in registered schemes in specified circumstances. The Instrument applies to sale offers made in the following circumstances:
 - (a) in respect of “scrip” takeover bids—where a bidder appoints a nominee to sell securities or interests and remit the proceeds to:
 - (i) persons who elect to participate in a sale facility (i.e. a facility offered to persons who do not wish to participate in the scrip takeover bid);
 - (ii) persons who would otherwise be issued with a small parcel of securities or interests; and
 - (iii) foreign holders; or
 - (b) in relation to “scrip schemes of arrangement”—where securities or interests that would otherwise be issued to the following persons are sold and those persons receive their proportion of the proceeds:
 - (i) persons who elect to participate in a sale facility (i.e. a facility offered to persons who do not wish to participate in the scrip scheme of arrangement);
 - (ii) persons who would have otherwise been entitled to receive a small parcel of securities or interests; and
 - (iii) foreign holders of those securities.
14. Without this relief, the on-sale provisions would be triggered, and the person offering the securities or interests for sale would need to give a prospectus or PDS in relation to that offer, because securities or interests would have been issued as scrip consideration with the purpose that those securities or interests are to be on-sold.
15. The persons who would be entitled to the proceeds of the sale will have received adequate disclosure about the scrip consideration because these incidental facilities are being operated in connection with a regulated takeover bid under Chapter 6 of the Act or a regulated scheme of arrangement under Part 5.1 of the Act.

Legislative instrument and primary legislation

16. The subject matter and policy implemented by the Instrument is more appropriate for a legislative instrument rather than primary legislation because it

provides administrative relief in circumstances where strict compliance with the primary legislation produces an unintended or unforeseen result.

17. It will be a matter for the Government and for Parliament as to whether the Act or Regulations may be amended in future to include the relief in the Instrument.

Duration of the Instrument

18. The Instrument expires after 5 years. This allows sufficient time for the Government and for Parliament to determine whether to amend the primary legislation or regulations to include the relief.

Legislative authority

19. This Instrument is made under sections 741 and 1020F of the *Corporations Act 2001*. Paragraph 741(1)(a) provides that ASIC may exempt a class of persons from a provision of Chapter 6D of the Act. Paragraph 1020F(1)(a) provides that ASIC may exempt a class of persons from specified provisions of Part 7.9 of the Act.
20. The Instrument commences on the day after it is registered on the Federal Register of Legislation and continues in force for 5 years until 1 October 2028.
21. 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 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.
22. As a legislative instrument, the Instrument is disallowable under section 42 of the *Legislation Act 2003*.

Statement of Compatibility with Human Rights

23. 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 (On-Sale Disclosure Relief for Scrip Bids and Schemes of Arrangement) Instrument 2023/686

Overview

1. An offer of securities of a body for sale and an offer of interests in a registered scheme for sale will, in certain circumstances, require disclosure by way of prospectus or a Product Disclosure Statement under the on-sale provisions of Chapter 6D and Part 7.9 of the Act.
2. The on-sale provisions are anti-avoidance provisions designed to ensure that retail investors receive adequate disclosure regardless of whether securities or interests are issued to them directly, or indirectly through an intermediary (i.e. issued to an intermediary such as a wholesale client who in turn offers the securities or interests for sale to retail investors).
3. In some cases the operation of the on-sale provisions can raise practical difficulties, particularly in circumstances where the operator of a sale facility or a nominee acquires securities or interests in relation to a takeover bid or a scheme of arrangement under Part 5.1 of the Act with the intention of on-selling those securities or interests.
4. The Instrument gives on-sale disclosure relief for certain incidental aspects of:
 - a. “scrip takeover bids” under Chapter 6 of the Act (i.e. bids under which the consideration offered for the acquisition of bid class securities is or includes securities or interests in a registered scheme); or
 - b. “scrip schemes of arrangement” under Part 5.1 of the Act (i.e. schemes of arrangement involving an offer of securities or interests in a registered scheme).

Assessment of human rights implications

5. This Instrument does not engage any of the applicable rights or freedoms.

Conclusion

6. This 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*.