



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Amendment) Instrument 2024/146

This is the Explanatory Statement for *ASIC Corporations (Amendment) Instrument 2024/146*.

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

Summary

1. *ASIC Corporations (Amendment) Instrument 2024/146* (**Amending Instrument**) amends certain definitions in the [*ASIC Corporations \(Design and Distribution Obligations Interim Measures\) Instrument 2021/784*](#) (**Principal Instrument**) to ensure the exemptions provided in the Principal Instrument operate as intended by expressly broadening the application of an exemption in the Principal Instrument and to adopt the drafting style used in recent amendments to section 9 of the *Corporations Act 2001* (**Act**).

Purpose of the instrument

2. The [*Treasury Laws Amendment \(Design and Distribution Obligations and Product Intervention Powers\) Act 2019*](#) introduced the design and distribution obligations (**DDO**) to Part 7.8A of the *Corporations Act 2001* (**the Act**). The DDO regime commenced on 5 October 2021.
3. Prior to the commencement of the DDO regime, the Government announced that a number of amendments were required to achieve the intended operation of the reforms, including to clarify the law, to ensure a consistent application of the law, and to ensure that the regime remains fit-for-purpose.
4. To assist with providing certainty on the application of the DDO regime in the period prior to the Government making the necessary legislative amendments, the Principal Instrument was made to enact interim measures consistent with the Government's policy intentions, using ASIC's modification and exemption powers under section 994L of the Act. The Principal Instrument was initially made for a period of two years. *ASIC Corporations (Amendment) Instrument 2023/706* extended the operation of the Principal Instrument, which is now due to repeal on 5 October 2028, in order to allow sufficient time for the Government to make the necessary changes to the primary law.
5. The Amending Instrument has two purposes:

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- (a) ensuring that the exemption for certain non-cash payment facilities in the Principal Instrument operates as intended by changing the definition of “makes non-cash payments” to the broader definition in subsection 12BAA(6) of the *Australian Securities and Investments Commission Act 2001 (ASIC 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).
 - (b) ensuring the definition of “financial product” in the Principal Instrument reflects the operation of subsection 994AA(1) and adopting drafting style used in recent amendments to section 9 of the Act.

Consultation

6. Prior to the commencement of Principal Instrument, ASIC undertook targeted consultation with affected entities as detailed in the Explanatory Statement to the Principal Instrument.
7. ASIC consulted with Treasury regarding the Amending Instrument. Further consultation was not undertaken for the Amending Instrument as it was not considered to be necessary given the amendments are to ensure that the Principal Instrument is operating as intended and to reflect the drafting style adopted in recent changes to section 9 of the Act.

Operation of the instrument

Definition of “financial product”

9. Item 1 of Schedule 1 to the Amending Instrument amends the definition of “financial product” in section 5 of the Principal Instrument to more precisely reflect the operation of subsection 994AA(1) of the Act, which provides that financial products for the DDO “includes” ASIC Act financial products.
10. It is not expected that this will change the operation of the definition, but provides greater precision and reflects the drafting style used in amendments to section 9 of the Act made by [*Treasury Laws Amendment \(2023 Law Improvement Package No. 1\) Act 2023*](#).

Definition of “makes non-cash payments”

12. Item 2 of Schedule 1 to the Amending Instrument amends the definition of “makes non-cash payments” in the Principal Instrument to ensure that the exemption operates as intended by changing the definition of makes non-cash payments to the broader ASIC Act definition.
13. As noted in paragraph 24 of the Explanatory Statement for the Principal Instrument, 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 ASIC Act. A broader meaning of when a

person makes a non-cash payment is given by subsection 12BAA(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).

14. The amendment reflects the intention expressed in paragraph 25 of the Explanatory Statement for the Principal Instrument that products be exempt from the DDO where these products are within scope of the DDO only as non-cash payment facilities. This was intended to include non-cash payment facilities that are only within the DDO due to the broader definition of “makes non-cash payments” in the ASIC Act.

Commencement

10. The Amending Instrument will commence on the day after it is registered on the Federal Register of Legislation.

Incorporation by reference

11. The Amending Instrument does not incorporate any matters by reference.

Retrospective application

12. The Amending Instrument does not have retrospective application.

Legislative instrument and primary legislation

13. The subject matter and policy implemented by the Amending Instrument are more appropriate for a legislative instrument rather than primary legislation because:
 - (a) the interim changes in the Principal Instrument are based on a number of modifications to the primary law and regulations that are required to achieve the intended operation of the DDO regime; and
 - (b) the Amending Instrument ensures the Principal Instrument operates as intended.
17. It will be a matter for the Government and for Parliament as to when the primary law or regulations may be amended in future to include the relief in the Principal Instrument.

Duration of the instrument

18. The Amending Instrument will be repealed in accordance with Division 1 of Part 3 of Chapter 3 of the *Legislation Act 2003*. The amendments made by the Amending Instrument will have effect until the Primary Instrument is repealed on 5 October 2028.

Legislative authority

19. The Amending Instrument is made under subsection 994L(2) of the Act.

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20. The Amending Instrument amends the Principal Instrument. Under subsection 33(3) of the *Acts Interpretation Act 1901*, 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. The Amending Instrument is a disallowable legislative instrument under the *Legislation Act 2003*.

Statement of Compatibility with Human Rights

19. 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 (Amendment) Instrument 2024/146

Overview

1. ASIC Corporations (Amendment) Instrument 2024/146 (**Amending Instrument**) amends the *ASIC Corporations (Design and Distribution Obligations Interim Measures) Instrument 2021/784 (Principal Instrument)*, which 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 (Act)*, consistent with the publicly stated policy intention, using ASIC's modification and exemption powers. The Amending Instrument ensures that the Principal Instrument reflects the policy intention and adopt recent changes to the drafting style of definitions in the Act.

Assessment of human rights implications

2. The Amending 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*.
3. The DDO regime was introduced by *Treasury Laws Amendment (Design Act, and Distribution Obligations and Product Intervention Powers) Act 2019 (DDO Act)* 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 Act and the DDO Regulations, the DDO regime 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 Amending Instrument is to ensure exemptions from the DDO regime provided by the Principal Instrument are operating as intended. To the extent that there may be any engagement with the above human rights, the Amending Instrument will be protective of those rights, and as a result, is compatible with the human rights and freedoms.

Conclusion

5. 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*.