

Attachment to CP 252: Draft instrument



ASIC

Australian Securities & Investments Commission

ASIC Corporations (Share and Interest Sale Facilities) Instrument 2016/XX

I, <insert name>, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Dated 2016

<signature>

<insert name>

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Part 1—Preliminary

1 Name of legislative instrument

This instrument is the *ASIC Corporations (Share and Interest Sale Facilities) Instrument 2016/XX*.

2 Commencement

This instrument commences on the day after it is registered on the Federal Register of Legislative Instruments.

Note: The register may be accessed at www.comlaw.gov.au.

3 Authority

This instrument is made under sections 601QA, 926A and 1020F of the Act.

4 Definitions

In this instrument:

Act means the *Corporations Act 2001*.

approved foreign market means the main board of any of the following financial markets:

- (a) Borsa Italiana;
- (b) Bursa Malaysia;
- (c) Euronext Amsterdam;
- (d) Euronext Paris;
- (e) Frankfurt Stock Exchange;
- (f) Hong Kong Stock Exchange;
- (g) JSE (also known as the Johannesburg Stock Exchange);
- (h) London Stock Exchange;
- (i) NASDAQ Global Market or the NASDAQ Global Select Market;
- (j) New York Stock Exchange;
- (k) NYSE MKT;
- (l) NZX;

- (m) Singapore Exchange;
- (n) SIX Swiss Exchange;
- (o) Tokyo Stock Exchange;
- (p) Toronto Stock Exchange.

broker means a participant of a licensed market or approved foreign market with whom the issuer has entered arrangements for the operations of the sale facility or related purchase facility.

control transaction means a transaction or proposed transaction that affects the control, or potential control, of:

- (a) where the financial products are shares – the issuer; or
- (b) where the financial products are issued in a managed investment scheme – the managed investment scheme to which those interests relate.

participating holder means, in relation to a facility, a person who:

- (a) holds a financial product in the same class of financial products as those that may be sold or purchased through the facility; and
- (b) has elected to participate in the facility.

register of members means:

- (a) in relation to a company or registered scheme – the register of members required to be set up and maintained under section 169 of the Act; and
- (b) in relation to a foreign company – the register of members (however described) required to be kept under the laws of its place of origin.

related purchase facility means a facility made available in conjunction with a sale facility, through which a participating holder can acquire, by way of transfer, additional financial products in the same class.

sale facility means a facility through which a participating holder can sell financial products.

Part 2—Exemption

5 Exemption for sale facility or related purchase facility

- (1) A person (the *operator*) who operates a managed investment scheme by reason of operating a sale facility or related purchase facility does not have to comply with:
 - (a) subsection 601ED(5) of the Act in relation to the facility; and
 - (b) Divisions 2 to 5 of Part 7.9 of the Act in relation to an interest in the facility; and
 - (c) the requirement to hold an Australian financial services licence for the provision of the following financial services:
 - (i) dealing in an interest in the facility; and
 - (ii) the provision of general advice in relation to an interest in the facility.
- (2) To avoid doubt, an operator who invites a holder of a financial product to make an offer to sell the financial product through a sale facility does not have to comply with Division 5A of Part 7.9 of the Act.
- (3) The exemptions in subsections (1) and (2) apply where all of the following are satisfied:
 - (a) the financial products that may be sold or purchased (as applicable) through the facility:
 - (i) are shares or interests in a managed investment scheme that are admitted to quotation on a licensed market or approved foreign market; and
 - (ii) are issued by the operator or a related body corporate of the operator;
 - (b) where the facility is a sale facility – under the terms of the facility:
 - (i) the financial products (the *relevant financial products*) of participating holders to be sold through the facility are pooled; and
 - (ii) a broker sells the relevant financial products in the ordinary course of trading on the relevant market;
 - (iii) the proceeds of the sale net of expenses (to the extent (if any) that they are not met by the operator) are distributed to participating holders; and

- (iv) each participating holder is paid their proportion of the proceeds of the sale as soon as practicable and, in any event, within eight weeks after the date on which the operator received the participating holder's election to participate in the facility;
- (c) where the facility is a related purchase facility – under the terms of the facility:
 - (i) the money of the participating holders to be used to purchase financial products through the facility is pooled; and
 - (ii) a broker purchases the financial products in the ordinary course of trading on the relevant market; and
 - (iii) the broker may deduct from the money referred to in subparagraph (i) expenses of purchasing the financial products (to the extent (if any) that they are not met by the operator); and
 - (iv) each participating holder is allocated their proportion of the financial products purchased; and
 - (v) each participating holder has transferred to them the financial products allocated to them as soon as practicable and, in any event within eight weeks after the date on which the operator received the participating holder's election to participate in the facility; and
 - (vi) each participating holder may purchase financial products through the facility (aggregated with financial products of the same class that were purchased through any previous facility) for consideration totalling no more than \$5,000 in any consecutive 12 month period.

6 Conditions

- (1) An operator relying on the exemptions in paragraphs 5(1)(a) or (b) or (c) or subsection 5(2) must:
 - (a) give or send to each holder of financial products of the operator who has been invited to participate in the facility, a document which complies with subsection (2) of this section, by:
 - (i) giving the document to the holder personally; or
 - (ii) sending the document:
 - (A) by post to the address for the holder in the register of members or an alternative address (if any) nominated by the holder; or

- (B) to the fax number or electronic address (if any) nominated by the holder; and
 - (b) take reasonable steps to ensure the facility is operated during any period where a control transaction has been publicly proposed and has not ended; and
 - (c) take reasonable steps to ensure that where a related purchase facility is made available in conjunction with a sale facility, a participating holder can participate in either, but not both, of the facilities.
- (2) The document:
- (a) must contain all of the following statements and information:
 - (i) a statement that the facility is open until the expiry date set out in the document, which cannot be more than 12 months after the date of the document;
 - (ii) information about the minimum and maximum number (if any) of financial products a participating holder can sell or purchase through the facility;
 - (iii) a statement that the market price of financial products is subject to change from time to time;
 - (iv) information about how to obtain up-to-date information on the market price of the financial product;
 - (v) information about any expenses relating to the sale or purchase of financial products that will be paid by participating holders;
 - (vi) information about:
 - (A) for a sale facility – how the proceeds of sale for financial products sold through the facility will be allocated between participating holders; and
 - (B) for a related purchase facility – how the financial products purchased through the facility will be allocated between participating holders;
 - (vii) a statement that:
 - (A) for a sale facility – the amount of money received by a participating holder for a financial product that is sold through the facility may be more or less than the actual price that is received by the broker for that financial product; and

- (B) for a related purchase facility – the amount of money that is paid by a participating holder for a financial product that is acquired through the facility may be more or less than the actual consideration that is paid by the broker for that financial product;
 - (viii) information about any other significant characteristics or features of the facility or of the rights and obligations of holders who elect to participate in the facility;
 - (ix) information about any alternatives that the holder may have to participating in the facility; and
- (b) must be worded and presented in a clear, concise and effective manner; and
 - (c) may be given in printed or electronic form and, if given in electronic form, must, as far as practicable, be given in a way that will allow the holder to print or save a copy of it; and
 - (d) may be made up of two or more separate documents that are given at the same time and by the same means.

Exclusion

- (3) The exemptions in subsections 5(1) and (2) do not apply to an operator who has been notified in writing by ASIC that they are excluded from relying on this instrument.