

Attachment 1 to CP 267: Draft instrument



ASIC

Australian Securities & Investments Commission

ASIC Corporations (Audit Relief) Instrument 2016/XX

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

Date 2016

[DRAFT ONLY – NOT FOR SIGNATURE]

<signature>

<insert name>

Contents

Part 1—Preliminary	3
1 Name of legislative instrument.....	3
2 Commencement	3
3 Authority.....	3
4 Definitions	3
Part 2—Orders	6
5 Relief from audit obligations	6
6 Where the relief applies	6
7 Conditions.....	12
Part 3—Savings and transitional	14
8 Application of ASIC Class Order [CO 98/1417].....	14

Part 1—Preliminary

1 Name of legislative instrument

This is *ASIC Corporations (Audit Relief) Instrument 2016/XX*.

2 Commencement

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

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

3 Authority

This instrument is made under subsection 341(1) of the *Corporations Act 2001*.

4 Definitions

In this instrument:

Act means the *Corporations Act 2001*.

approved subordinated debt means, in relation to a company, debt of the company which:

- (a) has been subordinated under an agreement which has:
 - (i) been executed by the company and the creditor and lodged with ASIC before the commencement of the relevant financial year; and
 - (ii) been approved by ASIC for the purposes of this instrument or for the purposes of ASIC Class Order [CO 98/1417]; and
- (b) is not provided by an entity controlled by the company and is not funded directly or indirectly by the company or one of its controlled entities.

borrower, in relation to a debenture, means a body that is or will be liable to repay money under the debenture, but does not include a body that only has debentures on issue that were issued or allotted:

- (a) by excluded issues to which paragraph 66(2)(d) of the Law applied as that Law stood before 13 March 2000; or
- (b) because of offers which did not need disclosure to investors under Part 6D.2 of the Act because of subsection 708(1) of the Act.

closed group, when used in relation to:

- (a) *ASIC Corporations (Wholly-owned Companies) Instrument 2016/XX*—has the same meaning as in that instrument; and
- (b) ASIC Class Order [CO 98/1418]—has the same meaning as Closed Group in that instrument.

control has the same meaning as in Accounting Standard AASB 10 *Consolidated Financial Statements*.

group has the same meaning as in AASB 10 *Consolidated Financial Statements*.

Law means in relation to a company, the former Corporations Law of the State or Territory under which the company was registered immediately before the commencement of the Act; and includes a separate reference to the former Corporations Law of each other State and Territory.

management accounts means accounts which include an income statement, a statement of changes in equity, balance sheet and cash flow statement.

prescribed accountant means each of the following:

- (a) a member of CPA Australia (**CPAA**), who is entitled to use the post-nominals “CPA” or “FCPA”, and is subject to and reasonably believes that he or she complies with the CPAA’s continuing professional development requirements;
- (b) a member of Chartered Accountants Australia and New Zealand (**CA ANZ**), who is entitled to use the post-nominals “CA”, “ACA” or “FACA”, and is subject to and reasonably believes that he or she complies with the CA ANZ’s continuing professional education requirements;
- (c) a member of the Institute of Public Accountants (**IPA**), who is entitled to use the post-nominals “AIPA”, “MIPA”, or “FIPA”, and is subject to and reasonably believes that he or she complies with the IPA’s continuing professional education requirements; or
- (d) another accountant approved by ASIC for the purpose of compiling financial reports under this instrument and who reasonably believes that he or she complies with such requirements as may be specified by ASIC.

quarter means one of the periods of no more than 3 months into which the relevant financial year of a company is divided, as determined by the directors of the company.

relevant financial year has the meaning given by subsection 5(1).

unapproved subordinated debt means any subordinated debt which is not approved subordinated debt.

Part 2—Orders

5 Relief from audit obligations

- (1) A company does not have to comply with any of the following in relation to the company's financial report for a financial year (*relevant financial year*) that ends on or after 1 January 2017:
- (a) subsection 301(1) of the Act;
 - (b) subparagraph 314(1)(a)(iii) of the Act;
 - (c) paragraph 314(1)(b) of the Act to the extent that a concise report required to be given under that paragraph must include:
 - (i) a statement by an auditor referred to in paragraph 314(2)(c) of the Act; or
 - (ii) a statement that the auditor's report will be sent to a member free of charge if the member asks for it;
- Note: See paragraph 314(2)(e) of the Act.
- (d) subsection 316(2) of the Act to the extent that it requires the company to send a member an auditor's report on its financial report.
- (2) The auditor (if any) of the company does not have to comply with subsection 314(3) of the Act in relation to the company's financial report for the financial year.

6 Where the relief applies

The relief in section 5 is available to a company and its auditor in relation to a relevant financial year where all of the following are satisfied as at 4 months after the end of the relevant financial year:

Nature of company

- (a) the company was:
 - (i) a large proprietary company for the relevant financial year; or
 - (ii) a small proprietary company to which paragraph 292(2)(b) of the Act applies in relation to the relevant financial year;
- (b) if the company was a large proprietary company—subsection 319(4) of the Law, as taken to be included in the Act by subsection 1408(2) of the Act, does not apply to the company;

- (c) the company was not, at any time during the relevant financial year, any of the following:
 - (i) a disclosing entity;
 - (ii) a borrower in relation to a debenture;
 - (iii) the guarantor of such a borrower;
 - (iv) a financial services licensee;

Previous audits

- (d) the company has not had its financial report or financial statements audited for a financial year ending during 1993 or any later financial year (except for a financial year which ended after 9 December 1995 and before 24 April 1997 if the company was a small proprietary company for that financial year and was controlled by a foreign company for all or part of that financial year);

Resolutions by shareholders and directors, and notice to ASIC

- (e) within the period commencing 3 months before the commencement of the relevant financial year and ending 4 months after the end of the relevant financial year, the following have occurred:
 - (i) all of the directors of the company have passed a unanimous resolution that the company's financial report for the relevant financial year should not be audited; and
 - (ii) all of the shareholders of the company (irrespective of whether they hold voting or non-voting shares) have passed a unanimous resolution that the company's financial report for the relevant financial year should not be audited; and
 - (iii) unless the company relied on the relief available under this instrument or, if applicable, ASIC Class Order [CO 98/1417] in respect of the financial year immediately preceding the relevant financial year, a notice of the resolutions mentioned in subparagraphs (i) and (ii) signed by a director or company secretary has been lodged with ASIC using ASIC Form 382 as in force at the date of this instrument;
- (f) before passing the resolution referred to in subparagraph (e)(ii), the shareholders of the company were provided, either in the notice of meeting or in material accompanying a circular resolution, with a statement by the directors stating whether, in their opinion, the cost of having the financial statements audited outweighs the expected benefits of the audit and setting out their reasons for that opinion;

Notice requiring an audit

- (g) the company has not been given written notice that the relief under this instrument is not to apply to the company for the relevant financial year by:
 - (i) a director, at any time before the directors' statement for the relevant financial year is signed; or
 - (ii) shareholders who control 5% or more of the votes which might be cast at a general meeting of the company (as calculated as at the close of business on the day before the shareholders serve the notice), at any time up to:
 - (A) one month before the end of the relevant financial year; or
 - (B) a later time if ASIC has given written notice to the company approving that time; or
 - (iii) any person who is owed approved subordinated debt by the company, at any time up to:
 - (A) one month before the end of the relevant financial year; or
 - (B) a later time if ASIC has given written notice to the company approving that time; or
 - (iv) ASIC;

Solvency declarations

- (h) the directors' declarations made under subsections 295(4) and (5) of the Act in respect of each financial year which ended on or after 1 July 1998 up to, and including, the relevant financial year contained unqualified statements that in the directors' opinion there were, when the declaration was made, reasonable grounds to believe that the company would be able to pay its debts as and when they become due and payable;
- (i) all directors' statements made under the former subsection 301(5) of the Law in respect of all years ending on or after 18 November 1996 contained unqualified statements that in the directors' opinion there were, when the statement was made, reasonable grounds to believe that the company would be able to pay its debts as and when they fell due;

Procedures to assess solvency

- (j) the company has had procedures in place from the commencement of the relevant financial year which enable all the directors to assess whether the company is able to pay all its debts as and when they become due and payable (including, without limiting the generality of this requirement, any debts for which the company may become liable by virtue of any deed of cross guarantee to which the company has become a party for the

purposes of relief to its wholly-owned entities under ASIC Class Order [CO 98/1418] or *ASIC Corporations (Wholly-owned Companies) Instrument 2016/XX*) and the nature and frequency of those procedures were adequate for that purpose, having regard to the business and financial circumstances of the company;

Quarterly management accounts

- (k) to enable the directors to make the resolution required in paragraph (l), the directors of the company have caused management accounts covering the company to be prepared for each quarter:
 - (i) within one month after the end of the quarter; or
 - (ii) by a later time if ASIC has given the company written notice approving that time;
- (l) within one month after the end of each quarter, or by a later time if ASIC has given the company written notice approving that time:
 - (i) the directors have considered:
 - (A) the management accounts prepared for that quarter; and
 - (B) all information that has become available since the end of the quarter about the company's affairs which is material to the assessment of the management accounts for that quarter; and
 - (ii) having regard to the management accounts and that information, the directors have resolved that, at the end of the quarter and at the time the resolution was made:
 - (A) the total liabilities of the company did not exceed 70% of total tangible assets of the company; and
 - (B) the company was able to pay all its debts as and when they become due and payable;
- (m) if the company prepared management accounts on a consolidated basis for any quarter during the relevant financial year, at the end of any such quarter and at the time a resolution is made in accordance with paragraph (l), the total consolidated liabilities did not exceed 70% of the total consolidated tangible assets;
- (n) if, at the end of any quarter during the relevant financial year, the company is a party to any deed of cross guarantee for the purposes of relief to its wholly-owned entities under ASIC Class Order [CO 98/1418] or *ASIC Corporations (Wholly-owned Companies) Instrument 2016/XX*, the directors have resolved that, at the end of any such quarter and at the time the resolution is made in accordance with paragraph (l), the total consolidated liabilities did not exceed 70% of the total consolidated tangible assets in respect of:

- (i) if the company prepares management accounts on a consolidated basis covering those (and only those) entities comprising the closed group—those entities; and
- (ii) if the company prepares management accounts on a consolidated basis covering those (and only those) entities which are parties to the deed—those entities;

Annual financial requirements

- (o) at the time the directors' declaration was made under subsections 295(4) and (5) of the Act for the relevant financial year, the directors considered:
 - (i) the financial report of the company for the relevant financial year (including any consolidated financial statements required by accounting standards); and
 - (ii) all information that has become available since the end of the relevant financial year about the company's affairs, which is material to the assessment of the financial report of the company, and, where relevant, the assessment of the consolidated financial statements;

and, having regard to this information, the directors resolved that, at the end of the relevant financial year and at the time the resolution was made:

- (iii) the total liabilities of the company did not exceed 70% of total tangible assets of the company;
- (iv) if relevant, the total consolidated liabilities did not exceed 70% of the total consolidated tangible assets for the company and its controlled entities; and
- (v) if the company is a party to any deed of cross guarantee for the purposes of relief to its wholly-owned entities under ASIC Class Order [CO 98/1418] or *ASIC Corporations (Wholly-owned Companies) Instrument 2016/XX*, the total consolidated liabilities did not exceed 70% of total consolidated tangible assets in respect of:
 - (A) those (and only those) entities comprising the closed group; and
 - (B) those (and only those) entities which are parties to the deed;
- (p) for either the relevant financial year or the financial year immediately preceding the relevant financial year, the company made a profit after related income tax expense on the following bases:
 - (i) a single entity basis;

- (ii) if the company is a party to any deed of cross guarantee for the purposes of relief to its wholly-owned entities under ASIC Class Order [CO 98/1418] or *ASIC Corporations (Wholly-owned Companies) Instrument 2016/XX*, on a consolidated basis separately for both:
 - (A) those (and only those) entities comprising the closed group; and
 - (B) those (and only those) entities which are parties to the deed; and
- (iii) if the company is required under the Act or another ASIC order under section 340 or 341 of the Act to prepare consolidated financial statements, on a consolidated basis for the company and its controlled entities;
- (q) assets, liabilities, and profit after related income tax expense for the purposes of paragraphs (l) to (p) have been determined in accordance with accounting standards (as if the company, any controlled entities and the group were reporting entities) except that liabilities must include any unapproved subordinated debt and may exclude approved subordinated debt;

Compilation of the financial reports

- (r) the directors of the company have caused the financial report for the relevant financial year of the company to be compiled by a prescribed accountant and reasonably believe that the prescribed accountant has undertaken the compilation in accordance with APES 315 *Compilation of Financial Information (APES 315)*;
- (s) a compilation report that the directors of the company reasonably believe has been prepared by the prescribed accountant in accordance with APES 315 is attached to the relevant financial report and is included with all copies of the relevant financial report distributed to members, lodged with ASIC or provided to any other person;

Lodgement of financial reports

- (t) the financial report and directors' report for the relevant financial year and for the immediately preceding financial year:
 - (i) substantially comply with Chapter 2M of the Act; and
 - (ii) are or were lodged with ASIC in accordance with subsection 319(1) and paragraph 319(3)(b) of the Act;

Statement in directors' report

- (u) in the directors' report for the relevant financial year, the directors state that the financial report for that relevant financial year has not been

audited, in reliance on this instrument, and that the requirements of this instrument have been complied with;

No proposed modified auditor's report

- (v) no registered company auditor or affected auditor (as defined in ASIC Class Order [CO 14/757]) has indicated to the company, any of its directors or other officers that, if the financial report of the company for the relevant financial year were audited in accordance with Division 3 of Part 2M.3 of the Act, the auditor's report may contain a modified opinion within the meaning of paragraph 5(b) of Auditing Standard ASA 705 *Modifications to the Opinion in the Independent Auditor's Report*, and there are no material disagreements or unresolved issues as between the company and any such auditor in relation to accounting treatments or amounts that may appear in the financial report of the company for the relevant financial year;

Compliance with conditions

- (w) the company has complied with each of the following as they apply to the company:
 - (i) the conditions in section 7; and
 - (ii) the condition in paragraph (fa) of ASIC Class Order [CO 98/1417] (as continued in force by section 8).

7 Conditions

Ceasing to rely on relief

- (1) If a company:
 - (a) relies on the relief available under subsection 5(1) in respect of a financial year; and
 - (b) does not rely on that relief in respect of the immediately following financial year (***first non-reliance year***);

the company must lodge with ASIC a notice signed by a director or company secretary that the company has ceased to rely on the relief using ASIC Form 396 as at the date of this instrument.

- (2) A notice required under subsection (1) must be lodged during the period commencing 3 months before the commencement of the first non-reliance year and ending 4 months after the end of the first non-reliance year.

Requests for management accounts

- (3) If:

- (a) a shareholder or a person who is owed approved subordinated debt requests, in writing, a copy of the management accounts mentioned in paragraphs 6(k), (m) or (n) or a copy of the directors' resolution mentioned in paragraph 6(l) for a quarter specified in the request; and
- (b) the request is made within 7 years after the end of the quarter to which the management accounts or directors' resolution relates;

the company must make a copy of the management accounts or the resolution (as the case may be) available to that person, free of charge, at the company's registered office or by sending these documents by pre-paid ordinary post:

- (c) within 14 days after receiving the request or 14 days after the resolution is passed, whichever is later; or
- (d) by a later time if ASIC has given the company written notice approving that time.

Part 3—Savings and transitional

8 Application of ASIC Class Order [CO 98/1417]

ASIC Class Order [CO 98/1417] continues to apply, despite its repeal, in relation to a financial year ending before 1 January 2017, provided that the condition in paragraph (fa) of the class order applies as if the words “or *ASIC Corporations (Audit Relief) Instrument 2016/XX*” were inserted after the words “under this Order” in that paragraph .

Note: The condition in paragraph (fa) of ASIC Class Order [CO 98/1417] imposes an ongoing obligation on a company that relies on relief under the class order in relation to a financial year ending before 1 January 2017. This continues to apply after the company has obtained the benefit of that relief.