

Attachment to CP 274: Draft instrument



ASIC

Australian Securities & Investments Commission

ASIC Corporations (Application Form Requirements) Instrument 2016/XX

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

Dated 2016

[DRAFT ONLY – NOT FOR SIGNATURE]

<insert name>

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Part 1—Preliminary

1 Name of legislative instrument

This is *ASIC Corporations (Application Form Requirements) 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 subsections 741(1) and 1020F(1) of the *Corporations Act 2001*.

4 Definitions

In this instrument:

Act means the *Corporations Act 2001*.

defective has the same meaning as in section 1021B(1) of the Act.

eligible foreign country means:

- (a) in relation to a reconstruction—each of the following:
 - (i) Canada;
 - (ii) France;
 - (iii) Germany;
 - (iv) Italy;
 - (v) Japan;
 - (vi) The Netherlands;
 - (vii) Switzerland;
 - (viii) United States of America; and
- (b) in relation to a foreign capital reduction offer—each country mentioned in paragraph (a) and each of the following:
 - (i) Hong Kong;

- (ii) Malaysia;
- (iii) New Zealand;
- (iv) Singapore;
- (v) South Africa;
- (vi) United Kingdom.

Note: The jurisdictions listed in paragraph (b) are not an eligible foreign country for the purposes of a reconstruction because *ASIC Corporations (Compromises or Arrangements) Instrument 2015/358* provides an exemption from the obligation to provide a disclosure document or Product Disclosure Statement for offers of securities and financial products respectively in reconstructions made under the laws of those jurisdictions.

foreign capital reduction offer means an offer of securities or other financial products that is made:

- (a) to the members of a body that is not a company; and
- (b) in connection with a proposed reduction of the share capital of the body where:
 - (i) the members are asked to vote on a resolution that the body reduce its share capital in accordance with a law that is in force or applies in, or in a part of, an eligible foreign country; and
 - (ii) consideration is to be provided for the issue or transfer of the securities or other financial products.

issue, in subsections 5(1) and 6(2), has a meaning affected by section 761E of the Act.

member approved switch arrangement means a written arrangement between the responsible entity of a registered scheme and its members where:

- (a) the arrangement has been entered into as a result of members voting in favour of a resolution to approve the arrangement at a members' meeting; and
- (b) under the arrangement all members will switch all or part of their interests to interests in another registered scheme operated by the responsible entity or a related body corporate.

nominated electronic means has the same meaning as in section 761A of the Act as notionally modified or varied by *ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647*.

offer:

- (a) in subsections 6(1), 7(1) and 7(3) and section 8, has a meaning affected by sections 700 and 702 of the Act;
- (b) in subsections 6(2) and 7(2), has a meaning affected by sections 1010C and 1011C of the Act.

options, in relation to a:

- (a) body, means options to acquire, by way of issue, shares of the body; and
- (b) registered scheme, means options to acquire, by way of issue, interests in the scheme.

Part 2J.1 capital reduction offer means an offer of securities or other financial products that is made to the members of a company in connection with a proposed reduction of the share capital of the company where:

- (a) the members are asked to vote on a resolution that the company reduce its share capital in accordance with Division 1 of Part 2J.1 of the Act; and
- (b) consideration is to be provided for the issue or transfer of the securities or other financial products.

pro-rata bonus offer, in relation to:

- (a) options of a body, means a grant of options to all holders of shares in a class of shares to which the options relate in proportion to their existing shareholdings on terms that no consideration is payable for the grant of the options; and
- (b) options of a registered scheme, means a grant of options to all holders of interests in a class of interests to which the options relate in proportion to their existing holdings on terms that no consideration is payable for the grant of the options.

reconstruction means a compromise or arrangement.

relevant financial product has the same meaning as in subsection 1016A(1) of the Act.

sale, in subsection 6(2), has a meaning affected by section 1010C of the Act.

stapled security means two or more financial products including at least one interest in a registered scheme:

- (a) that under the constitution of the scheme must be transferred together; and
- (b) where there are no financial products in the same class as those financial products which may be transferred separately.

Short-Form PDS and **Supplementary Short-Form PDS** have the same meanings as in Division 3A of Part 7.9 of the Act, as notionally inserted by Part 3 of Schedule 10BA of the *Corporations Regulations 2001*.

switch means the redemption of interests in a registered scheme and reinvestment of the proceeds in interests in another registered scheme.

voluntary switch arrangement means a written arrangement between the responsible entity of a registered scheme and a member that sets out the circumstances in which an application (**switch application**) by the member to switch from an interest in the scheme to an interest in another registered scheme operated by the responsible entity or a related body corporate may be accepted.

Part 2—Exemption

5 Applications to switch between schemes operated by the same responsible entity or its related bodies corporate

Exemption

- (1) A responsible entity of a registered scheme does not have to comply with section 1016A of the Act in relation to the issue of an interest (***new interest***) in the scheme that is made in accordance with a voluntary switch arrangement or a member approved switch arrangement.

Where exemption is available

- (2) The exemption in subsection (1) is available to a responsible entity where:

- (a) the responsible entity has taken reasonable steps to ensure that:

- (i) in the case of a voluntary switch arrangement—before the time (***relevant time***) of the switch application in relation to the new interest; and
- (ii) in the case of a member approved switch arrangement—before the time (***relevant time***) of the vote on the resolution to approve the arrangement;

it gave, or made available by a nominated electronic means, to the member:

- (iii) a Product Disclosure Statement (***Statement***) or Short-Form PDS (***Statement***) for the new interest that was not defective at the relevant time; and

Note: The information contained in a Statement includes any information contained in a Supplementary Statement given at the same time as the Statement or later: sections 1014D and 1017O (as notionally inserted by Part 3 of Schedule 10BA of the *Corporations Regulations 2001*).

- (iv) information which describes the switch arrangement; and

- (b) the responsible entity believes on reasonable grounds that the information describing the switch arrangement is not misleading or deceptive.

6 Application forms for reconstructions and capital reductions

Exemption

- (1) A person does not have to comply with subsection 723(1) of the Act where the person makes or proposes to make an offer of securities for issue or sale that:

- (a) is made under a reconstruction to which either of the following applies:
 - (i) the reconstruction is between a foreign company and its members or any class of them and the person reasonably believes the reconstruction is regulated by or under a law that is in force in, or in a part of, an eligible foreign country;
 - (ii) the reconstruction relates to a registered scheme and is between the responsible entity of the scheme and the members of the scheme or any class of them; or
 - (b) is a Part 2J.1 capital reduction offer; or
 - (c) the person reasonably believes is a foreign capital reduction offer.
- (2) A person who issues or sells a relevant financial product does not have to comply with subsection 1016A(2) of the Act if the issue or sale results from an offer of the financial product that:
- (a) is made under a reconstruction; or
 - (b) is a Part 2J.1 capital reduction offer; or
 - (c) the person reasonably believes is a foreign capital reduction offer.

7 Bonus issues of options

Application forms

- (1) A body does not have to comply with subsection 723(1) of the Act in relation to a pro-rata bonus offer of options of the body.

Note: Subsection 727(2) of the Act prohibits a person from making an offer of options that needs disclosure to investors under Part 6D.2 of the Act unless the offer is included in or accompanied by a copy of a disclosure document for the offer.

- (2) A responsible entity of a registered scheme does not have to comply with subsection 1016A(2) of the Act in relation to a pro-rata bonus offer of options over interests in the scheme where:
- (a) the interests form part of stapled securities; and
 - (b) shares in a body also form part of the stapled securities.

Advertising

- (3) A body does not have to comply with subsection 734(2) of the Act in relation to an advertisement or publication of a statement about a pro-rata bonus offer of options of the body provided the advertisement or publication:

- (a) where the advertisement or publication is published before the disclosure document for the offer of the options is lodged—includes a statement that a disclosure document for the offer of the options will be made available when the options are offered;
- (b) where the advertisement or publication is published after the disclosure document for the offer of the options is lodged—includes a statement that the offers of the options will be made in, or accompanied by, a copy of the disclosure document.

Part 3—Declaration

8 Advertising and publicity for reconstructions and capital reductions

Chapter 6D of the Act applies to a person who makes or proposes to make an offer of securities for issue or sale to which the exemption in subsection 6(1) applies as if section 734 of the Act were modified or varied by:

- (a) omitting subparagraphs 734(5)(a)(vi) and 734(5)(b)(iii) and paragraph 734(6)(e); and
- (b) in paragraph 734(6)(d), omitting “; and” and substituting “.”.

9 Application forms created by licensees

- (1) Chapter 6D of the Act applies to all persons as if section 723 were modified or varied by, after subsection (1), inserting:

“Licensee personalised application forms

(1A) Despite subsection (1), and subject to subsection (1B), the securities may be issued or transferred in response to an application form if the form was distributed in circumstances covered by one of the following paragraphs:

- (a) the form was distributed to a financial services licensee by the person offering the securities, and partly completed by the licensee before being distributed by the licensee to a person making the application;
- (b) the form was distributed by a financial services licensee to a person making the application (whether or not the form was partly completed by the licensee before being distributed) in circumstances where the form was copied or directly derived by the licensee from an application form that was:
 - (i) distributed to the licensee by the person offering the securities; and
 - (ii) included in, or accompanied by, a disclosure document that was distributed to the licensee by the person offering the securities when the application form was distributed to the licensee;

- (c) the form was created by a financial services licensee and distributed by the licensee to a person making the application (whether or not the form was partly completed by the licensee before being distributed).
- (1B) The securities may only be issued or transferred under subsection (1A) if the person issuing or transferring them has reasonable grounds to believe that:
- (a) when the applicant received the application form, the applicant was given access, at the same time and by the same means, to the disclosure document; and
 - (b) the application form included the following information:
 - (i) the identity of the issuer, the nature of the securities being offered, the price of the securities, the date of the disclosure document and the expiry date of the disclosure document;
 - (ii) a prominent statement to the effect that:
 - (A) there is a disclosure document with information about investing in the securities; and
 - (B) it is advisable to read the disclosure document before applying for the securities.”.
- (2) Division 2 of Part 7.9 of the Act applies to a person issuing or selling a relevant financial product as if section 1016A were modified or varied by, after subsection (2), inserting:

“Licensee personalised application forms

- (2A) Despite subsection (2), and subject to subsection (2B), a restricted issue or restricted sale of a relevant financial product to a recipient may be made pursuant to an application form that was distributed by a financial services licensee to the applicant.
- (2B) The financial product may only be issued or sold under subsection (2A) by a person where:
- (a) the person has reasonable grounds to believe that a Product Disclosure Statement relating to the

product has been given or made available by nominated electronic means to the applicant and was not defective at the time of the application; and

- (b) the application form included the following information:
 - (i) the identity of the issuer, the nature of the financial products being offered and the date of the Product Disclosure Statement;
 - (ii) a prominent statement to the effect that the applicant should have been given or have had made available to them by an electronic means, a Product Disclosure Statement that is required by law to enable the applicant to make an informed decision about acquiring the financial product.”.

10 Requirement to include applicant’s date of birth in the application form

Part 7.9 of the Act applies in relation to a managed investment product as if that Part were modified or varied by, in paragraph 7.9.74(1)(b) of the *Corporations Regulations 2001*, after “birth”, inserting “or a statement that the applicant is at least 18 years of age”.

11 Application forms where no Product Disclosure Statement required

Part 7.9 of the Act applies in relation to a person who issues or sells a relevant financial product as if that Part were modified or varied as follows:

- (a) in the definition of *restricted issue* in subsection 1016A(1), omit “either”, substitute “any”;
- (b) before paragraph (b) of the definition of *restricted issue* in subsection 1016A(1), insert:
 - “(aa) an issue in a situation, or pursuant to an offer made in a situation, where the regulated person does not have to give the client a Product Disclosure Statement because of an exemption under subsection 1020F(1); or”;
- (c) in paragraph (b) of the definition of *restricted issue* in subsection 1016A(1), omit “section 1012E”, substitute “section 1012DAA, 1012E”;
- (d) before paragraph (b) of the definition of *restricted sale* in subsection 1016A(1), insert:

- “(aa) is not made in a situation where the regulated person does not have to give the client a Product Disclosure Statement because of an exemption under subsection 1020F(1); and
- (ab) is not made in a situation to which section 1012DA applies; and”.