

Attachment to CP 280: Draft instrument



ASIC

Australian Securities & Investments Commission

ASIC Corporations (Wholesale Equity Scheme Trustees) Instrument 2017/XX

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

Dated 2017

[DRAFT ONLY – NOT FOR SIGNATURE]

<signature>

<insert name>

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Part 1—Preliminary

1 Name of legislative instrument

This is the *ASIC Corporations (Wholesale Equity Scheme Trustees) Instrument 2017/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 paragraphs 926A(2)(a) and (c) of the Act.

4 Definitions

In this instrument:

Act means the *Corporations Act 2001*.

eligible trustee means, in relation to a wholesale equity scheme, a trustee of the scheme that is a body corporate that does not control any entity which is an issuer of an investment product held by the body corporate.

Note: “control” is defined in section 50AA of the Act.

exempt liability means, in relation to a wholesale equity scheme, a liability arising from any act or omission relating to a wholesale equity financial service for which the trustee of the scheme may be indemnified from the trust property.

incidental property, in relation to a wholesale equity scheme, means cash, deposits or current accounts with an Australian ADI or interests in a cash management trust that are held for no more than three months pending the acquisition of investment products, or expenditure or distribution to members.

investment product means:

- (a) a security within the meaning of section 761A of the Act; or
- (b) an option to acquire, by way of transfer, a security covered by paragraph (a), (b) or (c) of the definition of *security* in section 761A of the Act; or
- (c) a managed investment product within the meaning of section 761A of the Act; or

- (d) a financial product covered by paragraph 764A(1)(ba) of the Act; or
- (e) an option to acquire, by way of transfer, a financial product covered by subparagraph 764A(1)(b)(i) or (ii) of the Act; or
- (f) an option to acquire, by way of transfer, a financial product covered by subparagraph 764A(1)(ba)(i) or (ii) of the Act.

manager: see section 6.

old class order means ASIC Class Order [CO 07/74].

PF 209 means *ASIC Pro Forma 209: Australian financial services licence conditions* as at the date of this instrument.

relevant financial conditions, in relation to an Australian financial services licence, means conditions to the effect of conditions 13 (base level requirements), 21 (financial requirements for holding client money or property), 22 (financial requirements for licensee transacting with clients) and 28 (audit opinion on financial requirements) of PF 209.

representative has the meaning given by section 910A of the Act.

trust property of a wholesale equity scheme means:

- (a) contributions of money or money's worth to the scheme; and
- (b) money borrowed or raised by the trustee for the purposes of the scheme; and
- (c) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraph (a) or (b); and
- (d) income and property derived, directly or indirectly, from contributions, money or property referred to in paragraph (a), (b) or (c).

trustee: see section 5.

wholesale equity financial services: see section 5.

wholesale equity scheme means a trust that is operated under a managed investment scheme to which all of the following apply:

- (a) the scheme is not registered; and
- (b) all of the trust property (other than incidental property) consists of investment products; and
- (c) at all times the value of investment products which are quoted on a financial market does not exceed 20% of the trustee's reasonable estimate of the market value of the trust property;
- (d) no interests in the scheme have been issued to a person as a retail client.

Part 2—Exemption

5 Licensing relief for eligible trustees

A person (**trustee**) who is an eligible trustee of a wholesale equity scheme does not have to comply with subsection 911A(1) of the Act for the provision of the following financial services (**wholesale equity financial services**):

- (a) dealing in (other than by issuing to a person as a retail client) investment products that form part of the trust property of the wholesale equity scheme; and
- (b) providing a custodial or depository service in relation to the investment products.

Note 1: A trustee may also have the benefit of paragraph 911A(2)(b) of the Act which will allow it to issue interests in a wholesale equity scheme without an Australian financial services licence if certain circumstances exist.

Note 2: *ASIC Corporations (Effect of Licensing Exemptions) Instrument 2015/1115* provides relief from subsection 911B(1) of the Act to a person who provides financial services on behalf of a person who does not need an Australian financial services licence because of an exemption under section 926A of the Act.

6 Where the relief applies

The exemption in section 5 is available where all of the following apply:

- (a) a related body corporate (the **manager**) of the trustee holds an Australian financial services licence that:
 - (i) authorises the manager to provide all of the wholesale equity financial services that are provided by the trustee in reliance on section 5; and
 - (ii) contains conditions to the effect that the manager must:
 - (A) as far as possible, comply with the Act as if the trustee were providing those wholesale equity financial services as the manager's representative; and
 - (B) have in place a deed poll that contains enforceable, unlimited and irrevocable covenants, for the benefit of each person (**beneficiary**) to whom the trustee provides a wholesale equity financial service, to the effect that the manager will indemnify the beneficiary in relation to any liability (other than an exempt liability) that arises from the trustee's provision of a wholesale equity financial service to the beneficiary; and

- (C) for the purposes of the relevant financial conditions of the manager’s Australian financial services licence— treat the assets, liabilities, cash inflows and cash outflows of the trustee as though they were included in the assets, liabilities, cash inflows and cash outflows of the manager;
- (b) if the trustee or manager becomes aware or should reasonably have become aware of matters that give it reason to believe that the trustee has failed to comply, other than in an immaterial respect, with the conditions in section 7, 10 business days have not elapsed without full particulars of the failure having been provided to ASIC in writing (to the extent that the trustee or manager knows those particulars or would have known them if it had undertaken reasonable enquiries).

7 Conditions

- (1) The trustee must comply with:
 - (a) for so long as the trustee relies on the exemption in section 5— conditions 13(a) and (b) of PF 209 as if the trustee were a financial services licensee whose licence contained those conditions; and
 - (b) section 912AC (other than subsections (4) to (7)) of the Act (as notionally inserted by ASIC Class Order [CO 13/761]) as if:
 - (i) from the time the trustee first relies on the exemption in section 5 until the time the trustee ceases to rely on the exemption, the trustee were a financial services licensee:
 - (A) whose licence authorises it to provide a custodial or depository service; and
 - (B) to whom section 912AC applies; and
 - (ii) the references in subsection 912AC(10) to “other financial requirements in conditions on its licence” were references to the conditions mentioned in paragraph (a); and
 - (iii) subsection 912AC(10) did not require the audit opinion to deal with compliance with, or a requirement under, subsection 912AC(4) or (7); and
 - (iv) the requirement in paragraph 912AC(11)(a) to lodge the audit opinion with the balance sheet required under section 989B were a requirement to lodge the audit opinion no later than 3 months after the end of the financial year of the trustee; and
 - (c) sections 912AAC and 912AAD of the Act (as notionally inserted by ASIC Class Order [CO 13/1410]) as if, from the time the trustee

first relies on the exemption in section 5 until the time the trustee ceases to rely on the exemption, the trustee were a financial services licensee whose licence authorises it to provide a custodial or depository service.

Note: Condition 13 of PF 209 set out the base level requirements applicable to all financial services licensees who are not bodies regulated by the Australian Prudential Regulation Authority. Section 912AC of the Act (as notionally inserted by ASIC Class Order [CO 13/761]) sets out the tailored cash needs, net tangible assets and audit requirements that apply to licensees authorised to provide a custodial or depository service. Together, these conditions require the licensee to be solvent at all times and have positive net assets and to meet the tailored cash needs, net tangible assets and audit requirements. Sections 912AAC and 912AAD of the Act (as notionally inserted by ASIC Class Order [CO 13/1410]) set out standards that apply to a licensee in relation to the provision of a custodial or depository service by the licensee or a person engaged by the licensee. The exclusion of the requirements of subsections 912AC(4) to (7) of the Act in paragraph (b) means that the trustee will not have to comply with the net tangible assets requirement.

- (2) The trustee must take all reasonable steps to ensure that no interests in the scheme are acquired by a person as a retail client.

Note: The scheme will not be a wholesale equity scheme (and the exemption in section 5 will not be available) if any interests are issued to a person as a retail client: definition of *wholesale equity scheme*.

8 Exclusion from reliance

The exemption in section 5 does not apply to a person if ASIC has given a notice in writing to the person that they may not rely on that exemption and ASIC has not withdrawn that notice in writing.

Part 3—Declaration

9 Adequate financial resources for managers that are responsible entities, IDPS operators or custodial or depository services providers

(1) Part 7.6 (other than Divisions 4 and 8) of the Act applies in relation to a manager as if that Part were modified or varied by:

(a) after subsection 912AA(2) (as notionally inserted by ASIC Class Order [CO 13/760]), inserting:

“(2A) This section applies to a licensee (*manager*) that holds an Australian financial services licence that:

- (a) authorises the manager to provide wholesale equity financial services (within the meaning of the *ASIC Corporations (Wholesale Equity Scheme Trustees) Instrument 2017/XX (ASIC Instrument)*); and
- (b) contains conditions to the effect of the conditions referred to in subparagraph 6(a)(ii) of the *ASIC Instrument*);

as if the assets, liabilities, cash inflows and cash outflows of any eligible trustee were included in the assets, liabilities, cash inflows and cash outflows of the manager.

(2B) In subsection (2A), *eligible trustee* means a person who is both:

- (a) an eligible trustee of a wholesale equity scheme (within the meaning of the *ASIC Instrument*);
- (b) a related body corporate of the manager.”; and

(b) after subsection 912AC(2) (as notionally inserted by ASIC Class Order [CO 13/761]), inserting:

“(2A) This section applies to a licensee (*manager*) that holds an Australian financial services licence that:

- (a) authorises the manager to provide wholesale equity financial services (within the meaning of the *ASIC Corporations (Wholesale Equity Scheme Trustees) Instrument 2017/XX (ASIC Instrument)*); and
- (b) contains conditions to the effect of the conditions referred to in subparagraph 6(a)(ii) of the *ASIC Instrument*);

as if the assets, liabilities, cash inflows and cash outflows of any eligible trustee were included in the assets, liabilities, cash inflows and cash outflows of the manager.

- (2B) In subsection (2A), *eligible trustee* means a person who is both:
- (a) an eligible trustee of a wholesale equity scheme (within the meaning of the ASIC Instrument);
 - (b) a related body corporate of the manager.”.

Part 4—Transitional

10 ASIC Class Order [CO 07/74]

- (1) If a trustee relied on the old class order immediately before its repeal and the repeal did not occur at the end of the financial year of the trustee, the old class order continues to apply in relation to the trustee, despite its repeal, until the end of that financial year. The exemption (including any related conditions) in the old class order from the requirement to hold an Australian financial services licence that is expressed to be made under paragraph 911A(2)(1) has effect under section 926A of the Act instead.

Note: *ASIC Corporations (Effect of Licensing Exemptions) Instrument 2015/1115* provides relief from subsection 911B(1) of the Act to a person who provides financial services on behalf of a person who does not need an Australian financial services licence because of an exemption under section 926A of the Act.

- (2) If a trustee relied on the old class order immediately before its repeal and then relies on the exemption in section 5:
- (a) in addition to the condition in section 7, the exemption in section 5 is subject to a condition that the trustee must lodge with ASIC a report referred to in sub-subparagraph 5(c)(iii) of the old class order that:
- (i) relates to the period commencing on the date referred to in sub-subparagraph 5(c)(iii)(A) or (B) of the old class order (as applicable) and ending on the day that the old class order ceases to apply in relation to the trustee; and
- (ii) is lodged no later than 3 months after the end of the period to which the report relates; and
- (b) paragraph 6(b) applies as if the reference to the conditions in section 7 included a reference to the condition in paragraph (a).