

# ASIC CLASS ORDER [CO 13-763]

## EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (ASIC) makes ASIC Class Order [CO 13-763] under subsections 601QA(1), 655A(1), 673(1), 741(1), 926A(2), 951B(1), 992B(1) and 1020F(1) of the *Corporations Act 2001* (the Act).

Paragraph 601QA(1)(a) of the Act provides that ASIC may exempt a person from a provision of Chapter 5C of the Act.

Paragraph 655A(1)(b) of the Act provides that ASIC may declare that Chapter 6 of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

Paragraph 673(1)(b) of the Act provides that ASIC may declare that Chapter 6C of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

Paragraph 741(1)(a) of the Act provides that ASIC may exempt a person from a provision of Chapter 6D of the Act.

Paragraph 741(1)(b) of the Act provides that ASIC may declare that Chapter 6D of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

Paragraph 926A(2)(c) of the Act provides that ASIC may declare that Part 7.6 (other than Divisions 4 and 8) of the Act applies in relation to a person or financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.

Paragraph 951B(1)(c) of the Act provides that ASIC may declare that Part 7.7 of the Act applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions of this Part were omitted, modified or varied as specified in the declaration.

Paragraph 992B(1)(a) of the Act provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.8 of the Act.

Paragraph 1020F(1)(a) of the Act provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.9 of the Act.

## 1. Background

A review of ASIC's policy on the regulation of platforms was initiated by ASIC to address existing and emerging issues in the platforms sector. The platforms sector has changed and grown significantly since our policy was first developed, and continues to develop, expand and present new challenges. Given this, we recognised a corresponding need to review and update our regulation of investor directed portfolio services (IDPS) and IDPS operated through a registered managed investment scheme (IDPS-like schemes) (together, referred to as platforms).

The review of our regulation of platforms follows a consultation paper published in March 2012, setting out our proposals and supporting rationale for reviewing our regulatory approach to platforms: see Consultation Paper 176 *Review of ASIC policy on platforms: Update to RG 148* (CP 176).

As part of this review, ASIC proposed to retain key aspects of its current regulatory approach to IDPS, including continuing to exempt them from requiring registration as a managed investment scheme and require IDPS Guides for investors of IDPS, who should also continue to have access to the same standards of information about products available through the IDPS that they would have had if they were acquiring those products directly. In addition, ASIC proposed certain changes to its regulatory approach, for example, enhanced disclosure about the differences between investing in an IDPS and investing directly.

On 28 June 2013, ASIC released RG 148 *Platforms that are managed investment schemes* (RG 148) to explain our objectives when regulating platforms, set out the requirements for operating a platform and the disclosure obligations of operators of IDPS and responsible entities of IDPS-like schemes and provide guidance to people who provide financial product advice on platforms.

## 2. Purpose of the class order

When regulating a platform that is an IDPS, ASIC requires that IDPS operators must hold an Australian financial services (AFS) licence with an authorisation to operate an IDPS. IDPS operators must also comply with the requirements in ASIC Class Order [CO 13-763] *Investor directed portfolio services* ([CO13-763], which replaces ASIC Class Order 02-294 *Investor directed portfolio services* ([CO 02-294]).

ASIC treats interests in IDPS as financial products under the Act and applies the financial product advice provisions of the Act where advice is given about using them or investing through them. When regulating advice about using platforms, ASIC expects advisers to comply with the financial product advice provisions of the Act.

The purpose of this class order is to update our current regulation of IDPS to address complexities existing in current regulatory settings and emerging issues, treat platform operators similarly where there is no regulatory basis for different treatment, and promote confident and informed investors, including by ensuring that they receive adequate disclosure and advice about IDPS and investments available through them.

### 3. Operation of the class order

This class order revokes [CO 02-294] for IDPS operators that are not authorised to operate an IDPS before 1 July 2013. The revised requirements in [CO 13-763] apply from 1 July 2013 to AFS licensees that are authorised to operate an IDPS from that date.

ASIC Class Order [CO 02-294] (issued on 11/3/2002, including amendments up to [CO 07-480] (issued on 2/7/2007)) will continue to apply to operators authorised to operate an IDPS on or before 30 June 2013 until 1 July 2014 when it will be superseded by the provisions of [CO 13-763]. IDPS operators may opt in earlier to the revised regulatory framework by providing a written notification to ASIC that they will rely on the class order, together with publishing notification on their website.

#### **Summary of key requirements for IDPS operators contained in [CO 13-763]**

*Relief from managed investment, fundraising, hawking and most of the financial product disclosure provisions*

An IDPS operator is provided relief from the managed investment, fundraising, hawking and most of the financial product disclosure provisions of the Act:

- (a) An operator of an IDPS that operates a managed investment scheme does not have to comply with section s601ED.
- (b) The operator is exempt from the requirements in Parts 6D.2 and 6D.3 from disclosures to investors about securities for an offer of accessible securities made through the IDPS.
- (c) The operator does not have to comply with the conduct requirements in Part 7.8 and Part 7.9 of the Act other than section 1012IA in relation to a financial product that is:
  - (i) an interest in a managed investment scheme arising out of participation or proposed participation in the IDPS; or
  - (ii) held or that may be held by a client because the legal ownership of a financial product is held by a custodian for the client as part of the IDPS,

including in relation to an offer to issue, an offer to arrange for the issue, the issue, the acceptance of an offer to acquire, and a recommendation to acquire the financial product.

*Continuing requirements for IDPS operators in [CO 13-763]*

- (d) The IDPS operator must continue to perform its obligations honestly, with due care and diligence.
- (e) An IDPS operator must provide an IDPS Guide, comply with quarterly reporting obligations, provide an annual investor statement and audit report and

if requested, a copy of all communications that are required by law to be given to a holder of financial products and securities.

- (f) Except where relief is provided, a PDS or a disclosure document must be given if an investor acquires an accessible investment through an IDPS including by way of an allocation of entitlements relating to an accessible investment to the interest of the client in the IDPS or an increased investment in an accessible financial product in respect of which a client's interest in the IDPS has been allocated entitlements.
- (g) The IDPS operator must compensate clients in relation to the functions that the operator has contracted to perform for acts and omissions of any of its agents engaged to perform those functions or functions connected with the performance of those functions as if they were the acts or omissions of the licensee.
- (h) An IDPS operator must hold all investments within the IDPS (not including assets held by a client) on trust for clients of the IDPS.
- (i) The IDPS operator must give to a client on request a copy of all communications that are required by law to be given to the holder of an accessible investment by the operator or a custodian.
- (j) Before an operator or a custodian acting on its behalf acquires accessible investments (accessible securities and financial products) for a client, they need to ensure that the client has been given an IDPS Guide and the relevant PDS, except in certain circumstances provided in [CO 13-763].
- (k) Maintain professional indemnity insurance and insurance against fraud by officers of the IDPS.
- (l) An IDPS operator that appoints another person to perform the transactional functions of the IDPS must enter into a written agreement with the person regarding these outsourced functions, which must include the provisions specified in [CO 13-763].
- (m) There remains a prohibition on investment where the custodian is a related body corporate.

*New requirements for IDPS operators in [CO 13-763]*

- (n) An IDPS operator must be a public company that holds an AFS licence specifically authorising it to operate an IDPS.
- (o) IDPS Guide disclosure requirements include:
  - (i) content must be worded and presented in a clear, concise and effective manner, and must contain up-to-date information when given;

- (ii) all information a person would reasonably require for the purpose of making a decision, as a retail client, whether to become a client of the IDPS;
  - (iii) disclosure of the key differences in the rights available to IDPS investors, as opposed to investing directly needs to be disclosed. At a minimum, such disclosure must cover cooling-off rights, voting rights and withdrawal rights under section 724 and section 1016E of the Act relating to accessible investments;
  - (iv) disclosure of the consequences for investors who do not opt in to continuing to receive financial product advice;
  - (v) disclosure of how and to whom investors may make a complaint, for example, for complaints about:
    - (A) platform operation – the platform operator;
    - (B) investments acquired through the platform – the product issuers (as available); and
    - (C) financial product advice about using platforms and investments acquired through them – AFS licensee for whom the adviser was acting;
  - (vi) disclosure of how the IDPS operator will determine which investments are selected for inclusion on an IDPS, including the process applied and the factors considered for selecting investments;
  - (vii) disclosure of fees and charges in a format that complies with Sch 10 of the Corporations Regulations as if it were a PDS for a registered managed investment scheme
- (p) The application form accompanying the IDPS Guide must contain a prominent consumer warning acknowledgement, with cross references to the relevant parts of the IDPS Guide, and proximate to where the investor signs or submits their acceptance or agreement, which identifies the key areas of difference between acquiring a financial investment directly and through an IDPS (including any differences in respect of rights) and, if applicable, any adverse effect on the investors if they do not opt in to receive financial product advice about using the IDPS or investing through it.
- (q) An IDPS Guide will not need to be corrected or withdrawn where there is a change to its content unless the change is materially adverse from the viewpoint of a reasonable person as a retail client. The non-materially adverse information can be provided through a facility including a website.
- (r) Incorporation by reference can be used to exclude certain information required to be disclosed in an IDPS Guide if that information is publicly available in a document other than the IDPS Guide that is referred to the Guide.

- (s) IDPS operators are exempt from section 1012IA of the Act if the investors have already been given a PDS for the same financial product held through the IDPS and have access, and are aware that they have access, to the most current PDS in use or a PDS that does not differ from the most current in use in a way that is materially adverse from the member's viewpoint and the IDPS operator has no reason to believe is defective.
- (t) Exemption from section 1012IA of the Act continues to apply to dividend or distribution reinvestment plans and regular savings plans. Under the terms of a regular savings plan, the investor will be given access to disclosures that the IDPS operator reasonably believes are current, as soon as reasonably practicable and in any event within five business days of acquisition.
- (u) An IDPS operator must have in place a voting policy that includes information about the IDPS operator's voting practices on company and scheme resolutions, available to investors free of charge on request.
- (v) An IDPS operator must have in place a policy for investors who do not opt in to receiving financial product advice, available to investors free of charge on request.
- (w) An IDPS operator must take reasonable steps to facilitate resolution of disputes between investors and product issuers of accessible financial products, including informing members whether issuers have internal dispute resolution systems that are available to the investors.
- (x) If a financial product issuer gives a notice in writing to the IDPS operator stating that it will comply with the internal dispute resolution requirements in [CO13-763], it must comply with the standards and requirements prescribed in [CO 13-763].
- (y) An IDPS operator may give documents to an investor by giving the document to the investor's agent who is associated with the IDPS operator.
- (z) Multiple operators of an IDPS can produce one IDPS Guide that satisfies the FSG requirement.
- (aa) IDPS operators must comply with the requirements in [CO 13-763] or will be in breach of AFS licensee obligations to comply with the relevant financial services laws. IDPS operators must report breaches as required by 912D of the Act.

#### **4. Documents incorporated by reference**

The Class order incorporates by reference the following documents:

- (a) ASIC Class Order [13-762] – which modifies the Act as it applies to a responsible entity of an investor directed portfolio service provided through a registered managed investment scheme and to a person who is offering or

issuing accessible securities through an IDPS like scheme. This document is registered on the Federal Register of Legislative instruments

## **5. Consultation**

In March 2012, a consultation paper was published setting out our proposals and supporting rationale for reviewing our regulatory approach to platforms: see CP 176. The consultation process closed on 20 April 2012.

A summary of key submissions made in response to CP 176 and further targeted consultation, together with our consideration of those responses can be found in Report 351 *Response to submissions on CP 176 Review of ASIC policy on platforms: Update to RG 148* (REP 351).

The Office of Best Practice has also approved the attached Regulation Impact Statement for this class order.

## Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **ASIC Class Order [CO 13-763]**

This class order 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*.

#### **Overview of the class order**

ASIC Class Order [CO 13-763] updates our current regulation of IDPS to address complexities existing in current regulatory settings and emerging issues concerning platforms generally. The objective of [CO 13-763] is to:

- (a) promote investor confidence and help investors make informed decisions about IDPS;
- (b) apply the minimum appropriate regulation to IDPS operators, consistent with the framework for the regulation of financial services and products in the Act; and
- (c) treat IDPS and IDPS-like schemes similarly where there is no regulatory basis for different treatment.

#### **Human rights implications**

This class order does not engage any of the applicable rights or freedoms.

#### **Conclusion**

This class order is compatible with human rights as it does not raise any human rights issues.