

EXPLANATORY STATEMENT for
ASIC Corporations (Superannuation - Investment Strategies) Instrument
2016/65

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes ASIC Corporations (Superannuation - Investment Strategies) Instrument 2016/65 (the **Instrument**) under section 1020F of the *Corporations Act 2001* (the **Act**). Section 1020F of the Act includes paragraph 1020F(1)(c), which provides that ASIC may declare that Part 7.9 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 were omitted, modified or varied as specified in the declaration.

This Instrument remakes ASIC Class Order [CO 06/636]: *Superannuation: Delivery of product disclosure for investment strategies* (“[CO 06/636]”), which will cease to have effect, or to sunset, on 1 October 2016 under the *Legislative Instruments Act 2003*. ASIC will have issued ASIC Corporations (Amendment and Repeal) Instrument 2016/66, which repeals [CO 06/636] prior to the sunset date of 1 October 2016.

Background

In [CO 06/636], ASIC provided relief by modifying some of the requirements for a Product Disclosure Statement (**PDS**) in Part 7.9 of the Act. This relief applies to superannuation trustees who offer a choice of investment strategies to members where, if the member instructs the trustee to follow a particular strategy, the trustee will acquire accessible financial products on behalf of the member. In this situation, section 1012IA of the Act will apply.

Section 1012IA applies to custodial arrangements that allow a retail client to instruct the provider to acquire particular financial products (**accessible financial products**) that either:

- (a) are held on trust for the client (or its nominated beneficiary); or
- (b) otherwise, provide a reference for the calculation of benefits for the client (or its nominated beneficiary).

An example of this type of arrangement is an investor-directed portfolio service (IDPS). The relief under [CO 06/636], which incorporates significant changes made to the original form of [CO 06/636] by ASIC Class Order [CO 07/386], addressed some difficulties that flowed from the operation of section 1012IA. The key difficulties were:

- (a) the duplication of disclosure obligations. Under the Act, a superannuation trustee needs to provide information about the accessible financial product to members twice — in the superannuation entity's PDS, which is prepared by the trustee, and in an accessible product PDS, which is prepared by the issuer of the financial product;
- (b) the law does not allow the superannuation trustee to prepare the accessible product PDS (it must be prepared by the product issuer). Many superannuation trustees indicated a strong preference to prepare the information that must be provided to members about the accessible financial products; and
- (c) the superannuation trustee must give a member a PDS each time an accessible financial product is acquired by the trustee on behalf of the member. Each additional investment of money by the member will be an additional acquisition, with the result that the member will generally be repeatedly given the same accessible product PDS.

Different options for giving PDSs

In broad terms, [CO 06/636] modifies the PDS requirements in sections 1012IA, 1013D, 1013E and 1013F of the Act by providing two options for giving disclosure about accessible financial products. The first option allows the trustee to give disclosure about accessible financial products by giving the member a PDS for the superannuation product that provides general information about the accessible financial product. Under this option, the PDS for the superannuation product will state that a member has the right to obtain a separate PDS for each accessible financial product. If the PDS for the accessible financial product has been prepared by the trustee, the PDS for the superannuation product must state this fact and that the member may obtain the accessible financial product PDS from the trustee. Alternatively, if the PDS for the accessible financial product has been prepared by the issuer of that financial product, the PDS for the superannuation product must state that the PDS for the accessible financial product was prepared by the issuer of the accessible financial product and the member may obtain the PDS from this issuer.

If a trustee relies on this first option, the PDS for the superannuation product must contain the information that a member, as a retail client, would reasonably require to identify the accessible financial product, to understand the investment strategy under which the accessible financial product may be acquired, and to work out whether to ask for further information about the product.

The other option under [CO 06/636] allows the trustee to combine the PDS for the superannuation product and the PDS for the accessible financial product into a single document, an 'integrated PDS'. The integrated PDS must contain the information that a person would reasonably require as a retail client to understand the investment strategy under which the accessible financial product may be acquired.

Additional investment made in accessible financial product

[CO 06/636] also provides relief to streamline the disclosure obligations where an additional investment is made in an accessible financial product under an investment strategy that the member has instructed the trustee to follow. In that instance, [CO 06/636] provides a conditional exemption to a trustee from the requirement under s1012IA to provide a PDS to a member before each time that an accessible financial product is acquired by the trustee on the member's behalf. The conditions require the trustee to:

- (a) notify the member in writing that, at the time an additional acquisition of an accessible financial product occurs, the member may not have received the current PDS for the accessible financial product and the information that have been included in a significant event notice under section 1017B of the Act if the member had made an equivalent direct acquisition of the accessible financial product;
- (b) unless the member held the superannuation product as at 1 July 2007 - obtain the written acknowledgement of a member of the matters set out in paragraph (a), above.

Relief from significant event notice requirements

Further, [CO 06/636] sets out requirements for a trustee to give updated disclosure to a member where the member has given the trustee instructions to follow an investment strategy that involves the acquisition of an accessible financial product. The updated disclosure requirements are triggered when a material adverse change, or a significant event that adversely affects a matter, occurs and the change or event would have been required to be included in a PDS for the accessible financial product prepared on the day before the change or event occurs. If the trustee has decided to stop making regulated acquisitions of the accessible financial product under the relevant investment strategy, then the updated disclosure requirements do not apply.

The updated disclosure requirements depend on whether the accessible financial product is 'open' or 'closed'. An 'open' accessible financial product is an accessible financial product for which a provider will accept new instructions from a client to acquire that product for the client for the first time. A 'closed' accessible financial product is an accessible financial product for which a provider will not accept a new instruction from a client to acquire the product for the client for the first time, even though the provider might continue to invest in that product because of a standing instruction given by a client before the product was closed. Updated disclosure for an 'open' accessible financial product must be given by providing a copy of the current PDS (including a supplementary PDS, where relevant): see s1017CA(5)(b). Updated disclosure for a 'closed' accessible financial product may be given by providing information in a form other than in a PDS or, if there is a current PDS, by giving that PDS to a member: see s1017CA(5)(a).

For both 'open' and 'closed' accessible financial products, the trustee must notify the member of the change or event and this notice must contain information that is reasonably necessary for the member to understand the nature and effect of the change or event: see s1017CA(2) and s1017CA(4). The notice must also include statements that:

- the member may direct the trustee to follow an investment strategy made available by the trustee that does not involve regulated acquisitions of the accessible financial product, in relation to either or both of the following:
 - (a) the holding in the product that the trustee has acquired as a result of following the affected investment strategy; and
 - (b) any future contribution by or on behalf of the client to the superannuation entity to the extent to which it would otherwise have been subject to the affected investment strategy;
- if the member does not give the trustee directions – the trustee will continue to follow the affected investment strategy.

The updated disclosure requirements added by [CO 06/636] also clarify that updated disclosure may be provided in the same way as disclosure under s1017B – that is, in writing, electronically or in a way specified in the *Corporations Regulations 2001* (the **Regulations**). Further, updated disclosure is not required where the member has already received a PDS that contains all the required information, or the member has already received all the required information through a PDS that contains all the required information: see s1017CA(3), (6) and (7).

[CO 06/636] makes numerous technical drafting changes to Part 7.9 of the Act and the Regulations.

After consulting with the public, ASIC decided to preserve the substantive effect of the relief under [CO 06/636] and to remake the relief in the form of this Instrument subject to some minor and technical amendments.

1. Purpose of the instrument

There are two purposes of this Instrument:

- (a) to continue the substance of the relief under [CO 06/636]; and
- (b) to refine the terms of the relief to clarify its operation.

2. Operation of the instrument

The Instrument preserves the substantive effect of [CO 06/636] and makes some technical changes. The changes are intended to clarify the operation of the PDS provisions where the relief applies.

Different options for giving PDSs

General

The Instrument inserts s1013FB into the Act to allow the trustee of a superannuation fund to choose between different methods of giving PDSs where a financial product may be acquired through the fund: refer to s1013FB(1) of the Act, as inserted by s5(e) of the Instrument.

A trustee may elect to not rely on the relief under the Instrument. If this occurs, s1012IA will apply unaffected by the Instrument. This will mean that the trustee will be required to give a member a PDS in relation to the superannuation fund and, on each occasion an interest is acquired in a financial product through the superannuation fund, a PDS for the relevant financial product. This position is reflected in s1013FB(2)(c) of the Act, as inserted by s5(e) of the Instrument.

If a trustee chooses to rely on the relief under the Instrument, there are two methods available for giving PDSs to a member:

- (a) separate PDSs for the superannuation fund PDS and each accessible financial product PDS: refer to s1013FB(2)(a), 1013FB(3) and 1013FB(4); or
- (b) an integrated PDS for the superannuation fund and each accessible financial product: refer to s1013FB(2)(b), 1013FB(5) and 1013FB(6).

This preserves the position that existed under [CO 06/636], subject to non-substantive changes to the terms of the relief.

Separate PDSs method

The new s1013FB(3)(a) of the Act, as inserted by the Instrument, clarifies that, where a trustee chooses to rely on this method, the PDS requirements that apply to the superannuation fund under Division 2 of Part 7.9 of the Act will continue to apply in full. In many cases, the PDS requirements that apply to the superannuation fund will be the shorter PDS requirements under Schedule 10D of the Regulations: refer to reg 7.9.11O of the Regulations.

The Instrument provides that, in addition to the information regarding the superannuation fund, particular information must be given under this method about each accessible financial product: refer s1013FB(3)(b). The Instrument requires that the PDS for the superannuation fund must also contain the information that a person would reasonably require as a retail client to:

- identify the accessible financial product;
- understand the investment strategy under which the product may be acquired; and
- work out whether to ask for further information about the product.

Further, the Instrument requires that the PDS for the superannuation fund includes either (refer to s1013FB(3)(c)):

- a statement that informs people of their right to obtain from the trustee a PDS for the accessible financial product that the trustee has prepared; or
- a statement that informs people of their right to obtain from the trustee a PDS for the accessible financial product that the issuer of the product has prepared.

As the PDS for an accessible financial product must satisfy the requirements of Division 2 of Part 7.9 of the Act, the shorter PDS requirements will apply for some types of accessible financial products. For example, an accessible financial product may be a simple managed investment scheme, to which the shorter PDS requirements would apply (refer Schedule 10E and reg 7.9.11W of the Regulations).

Where this method is relied on, the Instrument relieves the trustee from the obligation to include in the PDS for the superannuation fund any other information about the accessible financial product that would be required by sections 1013C, 1013D, 1013DA, 1013E or 1013F of the Act: refer s1013FB(4)(a). The exemption in relation to the general PDS content requirements under s1013C includes absolving the trustee from any requirement that would otherwise arise to comply with the shorter PDS requirements for an accessible financial product. Further, the trustee must give on request the trustee's PDS for the accessible financial product or the product issuer's PDS for the accessible financial product, as the case may be: refer s1013FB(4)(b).

In relation to the separate PDS method, the terms of the Instrument do not depart in a substantive respect from the corresponding terms of [CO 06/636].

Integrated PDS method

Under the Instrument, the other alternative method available to a trustee to give PDSs is to prepare an integrated PDS: refer to s1013FB(5), as inserted by s5(e) of the Instrument. An integrated PDS is a PDS that combines the superannuation fund PDS and the PDS for each accessible financial product in a single document, or where these PDSs are combined in two or more separate documents that are given at the same time.

Under the integrated PDS method, the integrated PDS must contain the information about the superannuation fund and the information about each accessible financial product that is required by the PDS requirements under Division 2 of Part 7.9 of the Act: refer s1013FB(6)(a). This will include the shorter PDS requirements to the extent that the requirements apply to the superannuation fund and any accessible financial product, such as a simple managed investment scheme. In addition, the integrated PDS must contain the information that a person would reasonably require as a retail client to understand the investment strategy under which the accessible financial product may be acquired: refer s1013FB(6)(b).

The Instrument clarifies the position that the PDS requirements under Division 2 of Part 7.9 of the Act apply to the superannuation fund PDS and the PDS for each accessible financial product. This requirement was not expressed in the corresponding provisions of [CO 06/636], which were limited to the test of the information reasonably required by a member as a retail client.

Significant event notice requirements

The Instrument continues, subject to minor and machinery changes, the adaptation of the significant event notice requirements to the situation where a financial product is acquired through a superannuation fund: refer s1017CA of the Act, as inserted by s5(f) of the Instrument.

Definitional changes and additional acquisitions relief

The Instrument inserts various definitions in sections 1011BA and 1012IA of the Act: please refer to ss5(a) and 5(b)(i) of the Instrument. These definitions do not depart substantively from the corresponding definitions in [CO 06/636].

Under the Instrument, the trustee of a superannuation fund will continue to be relieved from the obligation to give a PDS under s1012IA(2) of the Act on each occasion an additional acquisition is made in an accessible financial product. The Instrument makes only minor and technical changes to the corresponding terms under [CO 06/636].

The Instrument makes technical changes to various provisions in Division 2 of Part 7.9 of the Act to enable the PDS provisions to operate where PDSs are given to a person under a method that is allowed by the Instrument: please refer to ss5(b)(iii), 5(b)(iv), 5(c) and 5(d) of the Instrument. There are no substantive differences between this group of changes made by the Instrument and the corresponding changes made under [CO 06/636].

3. Consultation

In June 2015, we released ASIC Consultation Paper 232 – *Remaking ASIC Class Orders on superannuation*: [CO 04/1574] and [CO 06/636]. This Consultation Paper dealt with two superannuation related Class Orders, [CO 04/1574] and [CO 06/636], that were due to lapse in 2016. For both [CO 04/1574] and [CO 06/636], we proposed in the Consultation Paper to remake the instruments with minor and technical changes.

We received feedback from the Consultation Paper. The submissions received did not raise any fundamental issues or object to the draft of the Instrument that was included in the Consultation Paper. We consider that the relief should be continued with refinements to clarify the operation of the relief and other minor and technical changes.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Superannuation - Investment Strategies) Instrument 2016/65

ASIC Corporations (Superannuation - Investment Strategies) Instrument 2016/65 (the ***Instrument***) 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

The Instrument modifies the Product Disclosure Statement requirements in Part 7.9 of the *Corporations Act 2001* in the situation where a superannuation trustee allows a member of a superannuation fund to select an investment strategy under which the trustee may acquire a financial product to be held on behalf of the member. In this situation, the Instrument provides a superannuation trustee with various options of making the PDS for the superannuation fund and a PDS for each accessible financial product available to the member.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.