

ASIC Class Order [CO 12/749]

About this compilation

Compilation No. 6

This is a compilation of ASIC Class Order [CO 12/749] as in force on 12 March 2016. It includes any commenced amendment affecting the legislative instrument to that date.

This compilation was prepared by the Australian Securities and Investments Commission.

The notes at the end of this compilation (the *endnotes*) include information about amending instruments and the amendment history of each amended provision.

Australian Securities and Investments Commission Corporations Act 2001 — Paragraph 1020F(1)(c) — Declaration

Enabling legislation

1. The Australian Securities and Investments Commission makes this instrument under paragraph 1020F(1)(c) of the *Corporations Act 2001* (the *Act*).

Title

2. This instrument is ASIC Class Order [CO 12/749].

Commencement

3. This instrument commences on the day it is registered under the *Legislative Instruments Act 2003*.

Note: An instrument is registered when it is recorded on the Federal Register of Legislative Instruments (*FRLI*) in electronic form: see *Legislative Instruments Act 2003*, section 4 (definition of *register*). The FRLI may be accessed at <http://www.frli.gov.au/>.

Declaration

Superannuation products: platforms

4. Part 7.9 of the Act applies in relation to all persons as if regulation 7.9.11K of the *Corporations Regulations 2001* (the *Regulations*) were modified or varied as follows:
 - (a) in paragraph (2)(c), omit “product).”, substitute “product);”;
 - (b) after paragraph (2)(c) insert:
 - “(d) subject to subregulation (3), a superannuation product that relates to a superannuation entity in which:

- (i) two or more investment strategies are available from which a member, or a class of members, may choose in accordance with subsection 52(4) of the *Superannuation Industry (Supervision) Act 1993*; and
 - (ii) each of the investment strategies enables a regulated acquisition (within the meaning of section 1012IA of the Act) of a financial product to be made.”;
- (c) after subregulation (2) insert:
- “(3) Paragraph (2)(d) does not apply to a superannuation product on and from the first occasion a Product Disclosure Statement is given which:
- (a) covers the product; and
 - (b) is prepared or purports to be prepared in accordance with Part 7.9 of the Act as affected by this Subdivision;
- and continues not to apply unless and until a Product Disclosure Statement is given which:
- (c) covers the product; and
 - (d) is prepared or purports to be prepared in accordance with Part 7.9 of the Act as it applies but for this Subdivision.”.

Simple managed investment schemes: multifunds and hedge funds

5. Part 7.9 of the Act applies in relation to all persons as if regulation 7.9.11S of the Regulations were modified or varied by, after subregulation (4), inserting:
- “(5) This Subdivision does not apply to a Product Disclosure Statement to which all of the following apply:
- (a) the Statement covers a financial product which relates to a simple managed investment scheme;
 - (b) the Statement is prepared or purports to be prepared in accordance with Part 7.9 of the Act as it applies but for this Subdivision;
 - (c) the Statement is set out in a document in which there is also set out one or more other Product Disclosure Statements which:
 - (i) cover a financial product which relates to another registered managed investment schemes but not another financial product; and
 - (ii) is prepared or purports to be prepared in accordance with Part 7.9 of the Act as it applies but for this Subdivision.
- (6) Subject to subsection (7), this Subdivision does not apply to a simple managed investment scheme that is a hedge fund or fund of hedge funds.
- (7) Until 1 February 2014, subregulation (6) does not apply to a hedge fund or fund of hedge funds to which both of the following apply:
- (a) a Product Disclosure Statement covering a financial product that relates to the fund was prepared and given on or before 22 June 2012;

- (b) the Product Disclosure Statement was prepared or purported to be prepared in accordance with Part 7.9 of the Act as affected by this Subdivision.

(8) In this regulation:

derivative includes an agreement under which:

- (a) a person agrees to deliver securities or interests in a managed investment scheme (each a **delivery product**) to another person at a time (**maturity**) in the future;
- (b) the maturity is determined by reference to a specified time or the occurrence or non-occurrence of a specified event or circumstance;
- (c) the number and value of the delivery products to be delivered at maturity is ultimately determined or derived from the value or amount of one or more of the following:
 - (i) other financial products;
 - (ii) an asset;
 - (iii) a rate (including an interest rate or exchange rate);
 - (iv) an index;
 - (v) a commodity.

fund of hedge funds means a registered managed investment scheme:

- (a) that is promoted by the responsible entity using the expression and as being a “fund of hedge funds”; or
- (b) in relation to which at least 35% of scheme property is invested in a way that gives rise to economic interests in one or more of the following:
 - (i) a hedge fund; or
 - (ii) a managed investment scheme or body, whether operating or carrying on business in or outside this jurisdiction, that would be a hedge fund if the scheme or body were a registered managed investment scheme; or
- (c) that is promoted by the responsible entity on the basis that scheme property will be invested in a way so that paragraph (b) will apply to it.

hedge fund means a registered managed investment scheme that:

- (a) is promoted by the responsible entity using the expression and as being a “hedge fund”; or
- (b) is covered by two or more of the following:
 - (i) the scheme:
 - (A) deals in financial products in accordance with investment strategies intended to produce a return with low correlation (including no correlation) to each of the prescribed published indexes or any combination of them; or

- (B) acquires an economic interest in financial products through:
 - (I) three or more interposed entities; or
 - (II) two or more interposed entities if at least one of the entities is an entity that is formed or incorporated outside this jurisdiction or under laws other than Australian laws;

where the responsible entity of the scheme or an associate has the capacity to control:

 - (III) the disposal of the products; or
 - (IV) two or more of the interposed entities;

(For the purposes of sub-subparagraph (B), the calculation of the number of interposed entities through which the scheme acquires an economic interest in a financial product is to be performed by reference to each separate vertical stream of interposed entities.

Example: Where a head scheme directly invests in schemes A and B, and both schemes A and B directly invest in scheme C, there are 2 vertical streams, with each stream comprising 2 interposed entities. The first vertical stream comprises schemes A and C. The second vertical stream comprises schemes B and C. There is no single vertical stream comprising schemes A, B and C”;

- (ii) the scheme acquires any of the following for the dominant purpose of making a financial investment:
 - (A) a credit facility;
 - (B) a margin lending facility;
 - (C) a financial product (other than partly-paid securities) the acquisition of which is likely to result in a debt, whether actual, contingent or prospective, owed by the holder of the product to another person;
- (iii) the scheme deals in derivatives excluding dealings covered by one or more of the following sub-subparagraphs:
 - (A) the dealing is for the dominant purpose of managing foreign exchange or interest rate risk associated with the holding of some or all of the scheme property; or
 - (B) both of the following apply:
 - (I) the dealing takes place on a financial market;
 - (II) the dealing is for the dominant purpose of managing the financial risk arising from deferring a proposed dealing in another financial product that is not a derivative for a period of less than 28 days; or
 - (C) both of the following apply:
 - (I) the dealing takes place on a financial market;
 - (II) the notional derivatives exposure of the scheme (excluding derivatives covered by sub-subparagraph (A) or (B)) at any point in time does not exceed 10% of the net asset value of the scheme at that time unless the exposure is attributable to

circumstances that were not reasonably foreseeable by the responsible entity and the exposure is for a period of no more than 3 consecutive business days;

(For the purposes of sub-subparagraph (B):

- (a) a dealing in a derivative for the dominant purpose of managing the financial risk arising from deferring a proposed dealing in another financial product that is not a derivative is taken to be for a period of deferral of 28 days or more if the dealing, and any previous dealing in derivatives that takes place on a financial market, together are for the dominant purpose of managing the financial risk arising from deferring the same proposed dealing in the other financial product for a period of 28 days or more;
 - (b) a dealing in a derivative for the dominant purpose of managing the financial risk arising from deferring a proposed dealing in another financial product is not taken to satisfy the sub-subparagraph merely because the derivative has a term of 28 days or more)
- (iv) the scheme sells financial products, whether in or outside this jurisdiction, in relation to which, at the time of the sale:
- (A) the seller does not have a presently exercisable and unconditional right to vest the products in a buyer; or
 - (B) the seller has a presently exercisable and unconditional right to vest the products in a buyer only because of a securities lending arrangement;
- (v) both of the following are satisfied:
- (A) the responsible entity of the scheme or a person who manages some or all of the scheme property has rights to be paid fees (*performance fees*) substantially based on the performance of that property whether or not the responsible entity or the person also has rights to be paid fees substantially based on the gross or net value of all of the scheme property;
 - (B) the responsible entity has made a statement in writing (whether in a Product Disclosure Statement or otherwise) to the effect that performance fees will be payable in the event the responsible entity or the person satisfy certain criteria related to the performance of the scheme property and has not withdrawn that statement. The scheme deals in, acquires or sells a financial product, an economic interest or facility if the responsible entity of the scheme does so in relation to the scheme (whether directly or through an interposed entity) or the scheme is promoted by the responsible entity on the basis that it will do so.

For the purposes of determining whether a registered managed investment scheme is covered by two or more subparagraphs of paragraph (b) of this definition, a scheme that deals in derivatives which, but for this provision, results in the scheme being covered by:

- (a) subparagraph (iii) (the derivatives limb); and
- (b) either or both of the following:
 - (i) subparagraph (ii) (the leverage limb);
 - (ii) subparagraph (iv) (the short selling limb);

is taken not to be covered by the leverage limb or the short selling limb unless the scheme is covered by the leverage limb or the short selling limb for some other reason.

A registered managed investment scheme is taken to be covered by two or more subparagraphs of paragraph (b) of this definition if all of the following apply:

- (a) the scheme and any other entity (including, for the avoidance of doubt, a registered scheme or foreign entity) through which the scheme acquires an economic interest in financial products, taken together, would be covered by two or more of those subparagraphs;
- (b) the scheme, taken alone, would not be covered by two or more of those subparagraphs;
- (c) a reasonable person would conclude that the use of one or more of those other entities as a means through which the scheme acquires an economic interest in financial products is for the sole or dominant purpose of bringing about a result that the scheme, taken alone, would not be covered by two or more of those subparagraphs.

interposed entity, in relation to a scheme, means an entity that is interposed between the scheme and a financial product in which the scheme has an economic interest but does not include:

- (a) a registered scheme; or
- (b) an entity which:
 - (i) is incorporated, formed or registered in a foreign jurisdiction in relation to which a prescribed foreign regulatory authority regulates financial services; and
 - (ii) either:
 - (A) is, or whose operator is, specifically authorised by that regulatory authority to make offers of financial products that comprise rights or interests in the entity to the general public in that foreign jurisdiction; or
 - (B) is, or whose operator is, specifically authorised to make offers of financial products that comprise rights or interests in the entity to the general public in another foreign jurisdiction by a prescribed foreign regulatory authority that regulates financial services in that other jurisdiction.

net asset value, in relation to a scheme, means the value of the assets of the

scheme less the value of the liabilities of the scheme (other than liabilities to members as members of the scheme), as they would appear on a balance sheet at the time of calculation made up for lodgment as part of a financial report under Chapter 2M of the Act if the scheme were a reporting entity.

notional derivatives exposure, in relation to a scheme, means the absolute sum of:

- (a) the face value of, or the notional amount in respect of, each derivative as at the date on which the derivative is entered into, held by the scheme that gives rise to an exposure (***long exposure***) because the scheme would benefit by an increase in the price or value of the underlying or reference asset to which the derivative relates; and
- (b) the face value of, or the notional amount in respect of, each derivative as at the date on which the derivative is entered into, held by the scheme that gives rise to an exposure (***short exposure***) because the scheme would benefit by a decrease in the price or value of the underlying or reference asset to which the derivative relates;

adjusted as follows:

- (c) if a derivative gives rise to a long exposure and another derivative gives rise to a short exposure, and both derivatives are otherwise on the same terms and relate to an underlying or reference asset of the same class, the face value of, or notional amount in respect of, each derivative is to be offset against each other.

prescribed foreign regulatory authority means a foreign regulatory authority included in Schedule 10F.

prescribed published index means a published index which is widely used for benchmarking purposes and is solely or predominantly comprised of one or more of the following asset classes:

- (a) shares that are able to be traded on a financial market;
- (b) interests in managed investment schemes that are able to be traded on a financial market;
- (c) debentures of a body corporate;
- (d) debentures, stocks or bonds issued by a government;
- (e) bills of exchange, promissory notes, certificates of deposit or other negotiable short-term money market instruments.

securities lending arrangement means an arrangement under which:

- (a) one entity (the ***lender***) agrees that it will:
 - (i) deliver particular financial products to another entity (the ***borrower***) or to an entity nominated by the borrower; and

- (ii) vest title in those products in the entity to which they are delivered; and
- (b) the borrower agrees that it will, after the lender does the things mentioned in paragraph (a):
 - (i) deliver the products (or equivalent products) to the lender or to an entity nominated by the lender; and
 - (ii) vest title in those products (or those equivalent products) in the entity to which they are delivered.”.

5A. Part 7.9 of the Act applies in relation to all persons as if the Regulations were modified or varied by, after Schedule 10E, inserting:

“Schedule 10F Prescribed foreign regulatory authorities
(subregulation 7.9.11S(8))

Item	Foreign regulatory authorities
1	Alberta Securities Commission
2	Finanzmarktaufsicht of Austria
3	Financial Services and Markets Authority of Belgium
4	British Columbia Securities Commission
5	Financial Supervision Commission of Bulgaria
6	Cyprus Securities and Exchange Commission
7	Czech National Bank
8	Finanstilsynet of Denmark
9	Dubai Financial Services Authority
10	Estonian Financial Supervision Authority
11	Finanssivalvonta of Finland
12	Autorité des Marchés Financiers of France
13	Bundesanstalt für Finanzdienstleistungsaufsicht of Germany
14	Hellenic Capital Market Commission of Greece
15	Guernsey Financial Services Commission
16	Hong Kong Securities and Futures Commission
17	Pénzügyi Szervezetek Állami Felügyelete of Hungary
18	Fjármálaeftirlitið of Iceland
19	Central Bank of Ireland
20	Isle of Man Financial Supervision Commission
21	Israel Securities Authority
22	Commissione Nazionale per le Società e la Borsa of Italy
23	Financial Services Agency of Japan
24	Jersey Financial Services Commission
25	Finanšu un kapitāla tirgus komisija of Latvia
26	Finanzmarktaufsicht of Liechtenstein
27	Bank of Lithuania
28	Commission de Surveillance du Secteur Financier of Luxembourg
29	Securities Commission of Malaysia
30	Malta Financial Services Authority
31	Autoriteit Financiële Markten of the Netherlands
32	New Zealand Financial Markets Authority
33	Finanstilsynet of Norway
34	Ontario Securities Commission
35	Securities and Exchange Commission of Pakistan
36	Polish Financial Supervision Authority

37	Comissão do Mercado de Valores Mobiliários of Portugal
38	Quebec Autorité des Marchés Financiers
39	Romanian National Securities Commission
40	The Monetary Authority of Singapore
41	Národná banka Slovenska
42	Financial Services Board of the Republic of South Africa
43	Comisión Nacional del Mercado de Valores of Spain
44	Finansinspektionen of Sweden
45	Securities Commodities Authority of the United Arab Emirates
46	Financial Conduct Authority of the United Kingdom
47	U.S. Securities and Exchange Commission

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Cessation

6. This instrument ceases to apply on 30 June 2017.

Notes to ASIC Class Order [CO 12/749]

Note 1

ASIC Class Order [CO 12/749] (in force under s1020F(1)(c) of the *Corporations Act 2001*) as shown in this compilation comprises that Class Order amended as indicated in the tables below.

Note 2

This class order was amended by ASIC Class Order [CO 13/1128]. The amending class order contains a transitional provision that affects the operation of the amendments to this class order. The transitional provision states:

“Transitional

5. A responsible entity of a simple managed investment scheme:
- (a) that was either a *hedge fund* or *fund of hedge funds* within the meaning of subregulation 7.9.11S(8) of the Regulations as in force immediately before the commencement of this instrument; and
 - (b) that is neither a *hedge fund* nor *fund of hedge funds* within the meaning of subregulation 7.9.11S(8) of the Regulations as in force immediately after the commencement of this instrument; and
 - (c) in relation to which a Product Disclosure Statement prepared or purported to be prepared in accordance with Part 7.9 of the Act as it applies but for Subdivision 4.2C of Division 4 of Part 7.9 of the Regulations was in use immediately before the commencement of this instrument;
- may continue to use that Product Disclosure Statement until 1 February 2014 despite the amendments made by this instrument.”.

Table of Instruments

Instrument number	Date of FRLI registration	Date of commencement	Application, saving or transitional provisions
[CO 12/749]	18/6/2012 (<i>see</i> F2012L01235)	18/6/2012	
[CO 12/1592]	30/11/2012 (<i>see</i> F2012L02299)	30/11/2012	-
[CO 13/632]	28/5/2013 (<i>see</i> F2013L00853)	28/5/2013	-
[CO 13/1128]	3/10/2013 (<i>see</i> F2013L01761)	3/10/2013	Para 5: 1/2/2014
[CO 14/23]	10/2/2014 (<i>see</i> F2014L00134)	10/2/2014	-

Instrument number	Date of FRLI registration	Date of commencement	Application, saving or transitional provisions
[CO 14/1118]	5/11/2014 (<i>see</i> F2014L01484)	5/11/2014	-
2016/56	11/3/2016 (<i>see</i> F2016L00298)	12/3/2016	-

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Para 5	am. [CO 12/1592]; [CO 13/632] and [CO 13/1128]
Para 5A	ad. [CO 13/1128]
Para 6	am. [CO 12/1592]; [CO 14/23]; [CO 14/1118] and 2016/56