

ASIC CLASS ORDER [CO 12/749]

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 12/749] under paragraph 1020F(1)(c) of the *Corporations Act 2001* (the Act).

Paragraph 1020F(1)(c) of the Act 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.

1. Background

The *Corporations Amendment Regulations 2010 (No 5)* established a new shorter Product Disclosure Statement (PDS) regime under Subdivision 4.2B (for superannuation products) and Subdivision 4.2C (for simple managed investment schemes) of Division 4 of Part 7.9 of the *Corporations Regulations 2001*. The shorter PDS regime fully commences on 22 June 2012.

The new shorter PDS regime requires a PDS to be a maximum of eight A4 pages in length and to comply with certain heading and content requirements.

On 22 December 2011, following discussions with industry, the Minister for Financial Services and Superannuation, the Honourable Bill Shorten MP, announced that the Government will be undertaking further consultation with industry and consumer groups to determine whether certain products should be excluded from the shorter PDS regime or included in the regime but with modified content requirements.

The Minister's announcement stated that, on an interim basis:

- Superannuation platforms will be excluded from the shorter PDS regime, however relief will be provided by ASIC so that superannuation platforms can, at the discretion of the provider, be included in the shorter PDS regime; and
- Multifunds will also be excluded from the shorter PDS regime, however, relief will also be provided so that multifunds can, at the discretion of the provider, be included in the shorter PDS regime.

The Minister's announcement also stated that “other complex products such as hedge funds will continue to remain excluded from the shorter PDS regime, in accordance with the original policy intent, until these products can be fully considered in respect of the policy intent of the shorter PDS regime”.

Regulations to give effect to these proposals are not yet in force.

2. Purpose of the class order

The purpose of this class order is to give effect to the Minister's announcement in relation to the application of the shorter PDS regime to superannuation platforms, multifunds and hedge funds.

The class order will assist industry by providing greater certainty regarding their compliance obligations.

The class order will apply on an interim basis pending further work by Government.

3. Operation of the class order

The class order has the effect that superannuation platforms, multifunds and hedge funds are excluded from the shorter PDS regime.

Superannuation platforms

'Superannuation platforms' refers to those superannuation products in which:

- (a) 2 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
- (b) 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.

A superannuation product that has a default option or which provides pre-mixed investment strategies remains subject to the shorter PDS regime, even if it also allows a member to choose from a range of accessible investments.

For the purpose of determining whether a superannuation product is a superannuation platform, a facility (for example a cash account) where members' contributions are temporarily placed when they fail to make a choice of investment or makes an error in their choice of investment is to be disregarded.

Multifunds

'Multifunds' refers to a simple managed investment scheme for which a shorter PDS is required to be prepared that is offered as part of a collection of registered managed investment schemes (irrespective of whether they are also simple managed investment schemes) for which a standard PDS is required to be prepared where they are all grouped together for the purposes of product distribution and marketing in an omnibus PDS.

The class order has different outcomes for different types of multifunds.

Where the multifund only involves a combination of simple managed investment schemes, the class order will permit an issuer/s to opt out of the shorter PDS regime by preparing an omnibus standard PDS.

Where the multifund involves the combination of simple managed investment schemes and other registered managed investment schemes that are not simple managed investment schemes, the class order will also permit an issuer/s to opt out of the shorter PDS regime by preparing an omnibus standard PDS.

However, where the multifund includes a hedge fund or fund of hedge fund, the class order will exclude the use of a shorter PDS.

There may be some situations where a simple managed investment scheme is offered with another type of financial product (ie a non - managed investment scheme product). The class order will not allow the issuer/s to opt out of the shorter PDS regime for the simple managed investment scheme by preparing an omnibus standard PDS covering the simple managed investment scheme and the other non- managed investment scheme products.

Hedge fund

‘Hedge fund’ refers to a registered managed investment scheme which:

- (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 defined characteristics of a hedge fund.

The definition of ‘hedge fund’ and ‘fund of hedge fund’ uses the expression ‘promoted by’. Promotion by a responsible entity includes any promotion caused or authorised by the responsible entity in accordance with section 52 of the Act. Therefore, if a responsible entity (or anyone authorised by the responsible entity) uses the term ‘hedge fund’ in any promotional material, including disclosure documentation, it is a hedge fund under this class order.

Hedge funds typically exhibit particular characteristics which distinguish them from other kinds of registered schemes that would not be considered to be hedge funds. These characteristics are:

- (a) use of investment strategies intended to generate returns with low correlation to equity and bond indices and/or complex investment structures;
- (b) use of leverage to increase returns;
- (c) use of derivatives for speculative purposes;
- (d) use of short selling;
- (e) performance fees (in contrast to fees based on funds under management).

Not all schemes considered to be hedge funds will exhibit all of these characteristics. Some schemes may exhibit one of these characteristics and would not be considered to be a hedge fund. The approach taken by the class order is that if the scheme is covered by two or more of the following characteristics it will be taken to be a hedge fund:

- (a) the scheme:
 - i. invests in accordance with investment strategies that aim to produce a return with low correlation to published indices relating to equities or bonds; or
 - ii. acquires an economic interest in financial products through:
 - A. three or more interposed entities; or
 - B. two or more interposed entities if at least one of those entities is a foreign entity,

in circumstances where the responsible entity of the scheme or an associate has the capacity to control either the disposal of the financial products or two or more of the entities.
- (b) the scheme uses debt for the dominant purpose of making a financial investment; or
- (c) the scheme uses derivatives. However, a scheme will not be caught by this characteristic if it uses derivatives for the dominant purpose of:
 - i. managing foreign exchange or interest rate risk; or
 - ii. more efficiently gaining an economic exposure, through the use of exchange traded derivatives, to the underlying reference assets of those derivatives, but only on a temporary basis; or
- (d) the scheme engages in short selling; or
- (e) the responsible entity (or investment manager) has a right to be paid a fee based on the performance of the scheme's property. This fee may be in addition to any management fee that the responsible entity (or investment manager) may have a right to be paid.

Fund of hedge fund

The exclusion from the shorter PDS regime also applies to funds of hedge funds. These are defined as a registered managed investment scheme that:

- (a) is promoted by the responsible entity using the expression and as being a 'fund of hedge funds'; or
- (b) invests at least 35% of scheme property in a way that gives rise to economic interests in one or more:

- i. hedge funds; or
 - ii. a scheme or body in or outside this jurisdiction that would be a hedge fund if it were a registered managed investment scheme. (This covers unregistered managed investment schemes or bodies operating or carrying on a business outside this jurisdiction that would be hedge funds if they were offered to retail clients in this jurisdiction); or
- (c) is promoted by the responsible entity on the basis that scheme property will be invested in the way set out in paragraph (b).

Opt in and transitional arrangements

Issuers of superannuation platforms and multifunds may choose to opt in to the shorter PDS regime. The ability to opt into, or out of, the shorter PDS regime applies irrespective of whether the issuer has prepared a shorter PDS since 2010.

If an issuer of a superannuation platform or multifund decides to opt into the shorter PDS regime, it must comply with the regime as it currently appears in the Act. For example, this means that a shorter PDS covering multiple simple managed investment schemes will not be permitted. A separate shorter PDS will be required for each simple managed investment scheme.

Responsible entities of hedge funds or fund of hedge funds may not opt in to the shorter PDS regime. However, those responsible entities which have issued a shorter PDS prior to the commencement of this class order may continue to use that shorter PDS until 31 January 2013.

The class order has effect until 22 June 2013.

4. Statement of Compatibility with Human Rights

This statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

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* because it does not engage any of the applicable rights or freedoms.

5. Consultation

Before making this class order ASIC undertook targeted consultation with industry in relation to the exclusion of multifunds and superannuation platforms. We received submissions from the Financial Services Council, Australian Institute of Superannuation Trustees, Association of Superannuation Funds of Australia, Freehills, ANZ, MLC and Greenfields.

ASIC has publicly consulted twice on the definition of a hedge fund.

In February 2011, ASIC released Consultation Paper 147 *Hedge Funds: Improving disclosure for retail investors* (CP 147). In response to the submissions received to CP147, in February 2012, ASIC released Consultation Paper 174 *Hedge Funds: Improving Disclosure – Further Consultation* (CP 174).

ASIC received 7 responses to the revised proposals in CP 174 from industry bodies, financial services providers and an academic. CP 147 and CP174 can be found on the ASIC website.