ASIC Class Order [CO 12/752]

About this compilation

Compilation No. 2

This is a compilation of ASIC Class Order [CO 12/752] as in force on 20 December 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 926A(2)(c) — Declaration

Enabling legislation

1. The Australian Securities and Investments Commission makes this instrument under paragraph 926A(2)(c) of the *Corporations Act 2001* (the ***Act***).

Title

2. This instrument is ASIC Class Order [CO 12/752].

Commencement

3. This instrument commences on the later of:

   (a) the date it is registered under the *Legislative Instruments Act 2003*; and

   (b) 31 January 2013.

   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

4. Part 7.6 (other than Divisions 4 and 8) of the Act applies in relation to all persons as if that Part were modified or varied by, after subsection 912A, inserting:

   "**Section 912AB Adequate financial resources for financial services licensees that issue derivatives to retail clients**

   (1) This section applies to a financial services licensee that:

(a) holds an Australian financial services licence covering the provision of the following financial services:

(i) dealing in a financial product by issuing derivatives;

(ii) making a market for derivatives; and

(b) incurs actual or contingent liabilities by issuing derivatives to persons as a retail client; and

(c) is not:

(i) a body regulated by APRA; or

(ii) a market participant; or

(iii) a clearing participant.

(2) A financial services licensee covered by subsection (1) that complies with this section is taken to comply with conditions (if any) of its licence that relate to:

(a) a cash needs requirement;

(b) financial requirements for licensees transacting with clients;

(c) reporting triggers and requirements for financial requirement conditions; and

(d) the obligation to lodge an audit opinion on the financial requirements to the extent the opinion is for a part of a financial year or other period during which the licensee was covered by subsection (1).

Note: The conditions on the licence may include other requirements that relate to having available adequate financial resources.

Cash needs requirement

(3) The licensee must:

(a) in each March, June, September and December, prepare a projection of the licensee's cash flows over at least the next 12 months based on the licensee's reasonable estimate of revenues and expenses over this period; and

(b) have the projection approved in writing by the following persons as being based on the licensee's reasonable estimate of revenues and expenses over the relevant period:

(i) if the licensee is a body corporate—the directors of the licensee;

(ii) if the licensee is a partnership or the trustees of a trust—the partners of the licensee or the trustees;

Authorised Version F2017C00173 registered 07/03/2017

(iii) if the licensee is a natural person—the person; and

(c) document the calculations and assumptions used in preparing the projection, and describe in writing why the assumptions are appropriate; and

(d) update the projection of the licensee's cash flows if there is reason to suspect that an updated projection would show that the licensee was not meeting the requirements in subparagraphs (i) and (ii) of paragraph (e); and

(e) have the persons mentioned in the subparagraphs (as applicable) of paragraph (b) certify in writing that, based on the projection of the licensee's cash flows, the licensee:

(i) will have access when needed to enough financial resources to meet its liabilities over the projected term of at least the next 12 months; and

(ii) will hold at all times during the period to which the projection relates in cash or cash equivalents, an amount equal to or greater than the current amount the licensee is required to hold in cash or cash equivalents under subsection (5); and

(f) make the projections available to ASIC on request.

Net tangible assets

(4) The licensee must:

(a) until 31 January 2014—have at all times NTA (the ***required NTA***) of at least the greater of:

(i) $500,000; or

(ii) 5% of average revenue of the licensee; and

(b) from 1 February 2014—have at all times NTA (the ***required NTA***) of at least the greater of:

(i) $1,000,000; or

(ii) 10% of average revenue of the licensee.

(5) The licensee must hold at all times:

(a) cash and cash equivalents in an amount that is at least 50% of the required NTA; and

(b) liquid assets in an amount that is at least 50% of the required NTA.

Authorised Version F2017C00173 registered 07/03/2017

Money that is in an account held by the licensee for the purposes of section 981B or other cash or cash equivalents that are held in respect of any liability or obligation to clients cannot be counted towards either requirement.

Note: For the avoidance of doubt, any other cash and cash equivalents cannot be counted for both paragraph (a) and (b).

(6) The licensee must lodge with ASIC a statement in writing setting out:

(a) its NTA as at the end of the licensee's financial year; and

(b) details of how this was worked out.

The statement must be lodged no later than when the licensee is required to lodge a balance sheet with ASIC under section 989B for the financial year.

Reporting triggers and requirements for financial requirement conditions

(7) Where the NTA of the licensee decreases (a ***notifiable event***) from an amount greater than 110% of the required NTA to a lower amount, the licensee must, by the following times, lodge a written report with ASIC that specifies the NTA of the licensee as at the date of the report:

(a) within 3 business days after becoming aware of the notifiable event; and

(b) on the first day of every month after becoming aware until, as at the last day of the preceding month, the NTA is greater than 110% of the required NTA.

(8) Where the NTA of the licensee is less than the required NTA for a continuous period of 2 months, the licensee must, within 3 business days after that 2 month period and in the form approved by ASIC in writing for the purposes of this subsection, disclose the deficiency to:

(a) each person to whom it provides financial services; and

(b) each person for the benefit of whom it holds money or property on trust under Divisions 2 or 3 of Part 7.8.

(9) Subject to subsection (10), where the NTA of the licensee is at any time less than the required NTA, the licensee must not enter into a transaction with any person to whom it provides financial services that could give rise to further liabilities, contingent liabilities or other financial obligations of the licensee unless the persons specified in the subparagraphs (as applicable) of paragraph (3)(b) have certified in writing that, having conducted reasonable enquiries into the financial position of the licensee, there is no reason to believe that:

(a) the licensee will not comply with section 912A except to the extent that paragraph 912A(1)(c) requires compliance with subsections (4) and (5) of this section; and

Authorised Version F2017C00173 registered 07/03/2017

(b) there is or will be a deficiency in any accounts maintained by the licensee for the purposes of section 981B.

(10) Where the NTA of the licensee is at any time equal to or less than 75% of the required NTA, the licensee must not enter into a transaction with any person to whom it provides financial services that could give rise to further liabilities, contingent liabilities or other financial obligations of the licensee.

Audit opinion on financial requirements

(11) The licensee must lodge with ASIC a report by a registered company auditor addressed to the licensee and ASIC for each financial year of the licensee and any other period that ASIC directs that states whether, during any part of the period for which the licensee was covered by subsection (1):

(a) in the auditor's opinion, the licensee:

(i) complied with subsections (4) and (5) and other financial requirements in conditions on its licence; and

(ii) had at all times a projection that purports to, and appears on its face to, comply with paragraph (3)(a); and

(iii) correctly calculated the projection in paragraph (3)(a) on the basis of the assumptions the licensee adopted for the projection; and

(b) following an examination of the calculations, assumptions and description prepared under paragraph (3)(c) and relied on by the licensee in complying with paragraph (3)(a), the auditor has no reason to believe that:

(i) the licensee did not satisfy paragraph 912A(1)(h) for managing the risk of having insufficient financial resources to comply with subsections (4) and (5) of this section and other financial requirements in conditions on its licence; or

(ii) the licensee failed to comply with paragraphs (3)(b), (c) or (d); or

(iii) the assumptions the licensee adopted for its projection in paragraph (3)(a) were inappropriate.

(12) The audit opinion must be lodged by no later than:

(a) for each financial year of the licensee—the day the licensee is required to lodge a balance sheet under section 989B; and

(b) for any period of time that ASIC directs—the date ASIC directs the audit opinion to be lodged.

(13) In this section:

Authorised Version F2017C00173 registered 07/03/2017

adequately secured means in relation to a financial services licensee:

(a) secured by an enforceable security interest over a financial product (other than a financial product issued by the licensee or its associates) if:

(i) the financial product is:

(A) regularly traded on:

(I) a financial market (as defined in subsection 767A(1) and disregarding subsection 767A(2)) operated by a market licensee or a financial services licensee other than the licensee or its associates that, in the reasonable opinion of the licensee, produces sufficiently reliable prices to assess the value of the security provided by the security interest;

(II) an approved foreign market; or

(B) an interest in a registered scheme for which withdrawal prices are regularly quoted by the responsible entity of the scheme and the licensee believes on reasonable grounds that withdrawal may be effected within 5 business days; and

(ii) the market value of the financial product is:

(A) if the financial product is a debt instrument—at least 109% of the amount owing;

(B) otherwise—at least 120% of the amount owing; or

(b) secured by a registered first mortgage over real estate that has a fair market valuation of at least 120% of the amount owing; or

(c) owing from an eligible provider; or

(d) secured by an enforceable security interest over amounts owing to another financial services licensee which themselves are adequately secured.

adjusted assets means, in relation to a financial services licensee, the value of total assets 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 if the licensee were a reporting entity:

(a) minus the value of excluded assets that would be included in the calculation; and

(b) minus the value of any receivable that would be included in the calculation, up to the amount that the licensee has excluded from

Authorised Version F2017C00173 registered 07/03/2017

adjusted liabilities on the basis that there is an enforceable right of set-off with that receivable; and

(c) minus the value of any assets that would be included in the calculation that are encumbered as a security against liability to a person that provides a security bond to ASIC up to the amount of the bond; and

(d) minus the value of any assets that would be included in the calculation that may be required to be applied to satisfy a liability under a credit facility that is made without recourse to the licensee up to the amount of that liability excluded from adjusted liabilities; and

(e) plus the amount of any eligible undertaking that is not an asset.

adjusted liabilities means, in relation to a financial services licensee, the amount of total liabilities 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 if the licensee were a reporting entity:

(a) minus the amount of any liability under any subordinated debt approved by ASIC in writing; and

(b) minus the amount of any liability that is the subject of an enforceable right of set-off, if the corresponding receivable is excluded from adjusted assets; and

(c) minus the amount of any liability under a credit facility that is made without recourse to the licensee; and

(d) plus the value of any assets that are encumbered as a security against another person's liability where the licensee is not otherwise liable, but only up to the lower of:

(i) the amount of that other person's liability; or

(ii) the value of the assets encumbered; and

(e) plus the maximum potential liability of any guarantee provided by the licensee other than a:

(i) guarantee limited to an amount recoverable out of any scheme property of a registered scheme operated by the licensee as a responsible entity; or

(ii) guarantee of the obligations of a member of a stapled group.

amount of an eligible undertaking means the amount that remains payable in accordance with the undertaking at the relevant time despite any amount previously paid under the undertaking less any amount that would be repayable as a liability by the licensee if money were paid.

Authorised Version F2017C00173 registered 07/03/2017

approved foreign market means each of the following:

(a) American Stock Exchange;

(b) Borsa Italiana;

(c) Bursa Malaysia Main Board and Bursa Malaysia Second Board;

(d) Euronext Amsterdam;

(e) Euronext Paris;

(f) Frankfurt Stock Exchange;

(g) Hong Kong Stock Exchange;

(h) JSE;

(i) London Stock Exchange;

(j) NASDAQ Stock Market;

(k) New York Stock Exchange;

(l) New Zealand Exchange;

(m) Singapore Exchange;

(n) SWX Swiss Exchange;

(o) Tokyo Stock Exchange;

(p) Toronto Stock Exchange; and

(q) a foreign market approved in writing for this purpose by ASIC.

average revenue means:

(a) for a financial services licensee in its first financial year—the licensee's reasonable forecast of its revenue from the calculation date for the remainder of the first financial year pro-rated to a 12 month period; and

(b) for a financial services licensee in its second financial year of being authorised to provide the financial services specified in paragraph (1)(a)—the average of:

(i) the aggregate of the licensee's:

(A) revenue for the second financial year to date; and

Authorised Version F2017C00173 registered 07/03/2017

(B) reasonable forecast of its revenue for the remainder of the second financial year; and

(ii) the licensee's revenue in the first financial year from the calculation date pro-rated to a 12 month period; and

(c) for a financial services licensee in its third financial year of being authorised to provide the financial services specified in paragraph (1)(a)—the average of:

(i) the aggregate of the licensee's:

(A) revenue for the third financial year to date; and

(B) reasonable forecast of its revenue for the remainder of the third financial year; and

(ii) the licensee's revenue for its second financial year; and

(iii) the revenue in the first financial year from the calculation date pro-rated to a 12 month period; and

(d) for all subsequent financial years of a financial services licensee—the average of:

(i) the aggregate of the licensee's:

(A) revenue for the current financial year to date; and

(B) reasonable forecast of its revenue for the remainder of the current financial year; and

(ii) the licensee's revenue for the last preceding financial year; and

(iii) the licensee's revenue for the second preceding financial year.

calculation date means, in relation to a financial services licensee, the day on which the licensee is authorised to provide the financial services specified in paragraph (1)(a).

cash or cash equivalents means:

(a) cash on hand, demand deposits and money deposited with an Australian ADI that is available for immediate withdrawal; and

(b) short-term, highly liquid investments that are readily convertible to known amounts of cash that are subject to an insignificant risk of changes in value; and

(c) the value of any eligible undertaking provided by an eligible provider; and

Authorised Version F2017C00173 registered 07/03/2017

(d) a commitment by an eligible provider, which cannot be withdrawn by the provider without giving at least 6 months written notice to the person to whom the commitment is made, to provide cash within 5 business days.

clearing participant means a participant (as defined in section 761A in relation to a clearing and settlement facility) in the licensed CS facility operated by ASX Clear Pty Limited (***ASX Clear***) that is required to comply with, and complies with, the operating rules of ASX Clear that impose financial requirements, taking into account any waiver of those requirements by ASX Clear.

eligible provider means:

(a) an Australian ADI; or

(b) an entity approved by ASIC in writing for the purpose of this paragraph.

eligible undertaking means:

(a) an enforceable and unqualified undertaking by an eligible provider, expressed to be irrevocable without the written consent of ASIC, to pay, on written demand by the licensee, an amount of a financial commitment of the licensee (disregarding any part previously paid or any amount that would be repayable as a liability by the licensee if money were paid); or
(b) an undertaking approved in writing by ASIC as an eligible undertaking.

excluded assets means in relation to a financial services licensee:

(a) intangible assets (including, for the avoidance of doubt, a deferred tax asset); and

(b) receivables from, or assets invested in, any person who:

(i) is an associate of the licensee; or

(ii) was an associate of the licensee at the time the liability was incurred or the investment was made; or

(iii) became liable to the licensee in connection with the acquisition of interests in a managed investment scheme operated by the licensee; and

(c) assets:

(i) held as a beneficial interest or an interest in a managed investment scheme; or

Authorised Version F2017C00173 registered 07/03/2017

(ii) invested in a superannuation product in respect of which the licensee or an associate may exercise any form of power or control; and

(d) receivables from a trustee of a trust in respect of which the licensee or an associate may exercise any form of power or control;

but, despite anything in the paragraphs above, does not include the following:

(e) a receivable mentioned in paragraph (b) or (d):

(i) to the extent that it is adequately secured; or

(ii) to which all of the following apply:

(A) it is receivable as a result of a transaction entered into by the licensee in the ordinary course of its business on its standard commercial terms applicable to persons that are not associated with the licensee on an arm's length basis;

(B) no part of the consideration in relation to the transaction is, in substance, directly or indirectly invested in the licensee;

(C) the total value of the receivable (before any discount is applied) is not more than 20% of the assets less liabilities of the licensee; or

(iii) to which all of the following apply:

(A) it is receivable from an insurance company that is a body regulated by APRA and results from a transaction entered into by the licensee in the ordinary course of its business on its standard commercial terms applicable to persons that are not associated with the licensee on an arm's length basis;

(B) the licensee has no reason to believe that any amount invested in the licensee would not have been invested if the transaction that caused the receivable had not taken place or were not at the time of the investment expected to take place;

(C) the licensee has no reason to believe that the recoverability of the receivable will materially depend on the value of an investment by any person in the licensee;

(D) the total value of the receivables under this subparagraph is not more than 60% of the adjusted liabilities of the licensee disregarding this subparagraph; or

(iv) to which ASIC has given its consent in writing to the licensee treating the receivable as not being an excluded asset; or

Authorised Version F2017C00173 registered 07/03/2017

(v) to the extent that it is owing by way of fees from, or under rights of reimbursement for expenditure by the licensee out of property of or in relation to:

(A) a superannuation entity;

(B) an IDPS;

(C) a registered scheme;

to the extent that the receivable:

(D) exceeds amounts invested by the entity, IDPS or scheme in, or lent (other than by way of a deposit with an Australian ADI in the ordinary course of its banking business) directly or indirectly by the entity, IDPS or scheme to:

(I) the licensee;

(II) a body corporate the licensee controls;

(III) a body corporate that controls the licensee; or

(IV) a body corporate that the licensee's controller controls; and

(E) if receivable by way of fees, represents no more than the amount of fees owing for the previous 3 months; and

(F) if receivable under rights of reimbursement for expenditure by the licensee, has not been receivable for more than 3 months; and

(f) an asset mentioned in paragraph (c) to the extent it is a managed investment product unless any part of the amount invested is, in substance, directly or indirectly, invested in the licensee.

first financial year means the financial year in which the calculation date occurs.

IDPS means an investor directed portfolio service, consisting of a number of functions including a custody, settlement and reporting system and service with the following features:

(a) the clients of the service have the sole discretion to decide what (but not necessarily when) assets will be acquired or disposed of, except where:

(i) there are any prior written directions to acquire or dispose of a particular asset in particular circumstances that the client has

Authorised Version F2017C00173 registered 07/03/2017

agreed not to vary (other than on the exercise of any discretion on the part of an operator); or

(ii) the client has authorised the operator or another person to give directions on their behalf, for the purpose of the other person receiving or securing payment of moneys owing by the client to the person; and

(b) subject to any prior contrary directions in order to ensure payment of moneys for which the client is liable, a client may direct the operator to:

(i) take reasonable steps to transfer assets to or to the order of the client;

(ii) realise assets held on account for the client and either:

(A) pay the proceeds to or to the order of the client; or

(B) if the operator and the client agree, hold the proceeds under the IDPS in an account with an Australian ADI designated as a trust account,

unless the assets cannot be transferred or realised under law or the terms of their issue; and

(c) except where otherwise mentioned in paragraph (a) or (b), any discretion of the holder of assets held through the service may be exercised only in accordance with the directions from time to time of the relevant client; and

(d) the service is provided in such a way that clients are led to expect, and are likely to receive, benefits in the form of:

(i) access to investments that the client could not otherwise access directly; or

(ii) cost reductions by using assets contributed by the client or derived directly or indirectly from assets contributed by the client with assets contributed by other clients or derived directly or indirectly from assets contributed by other clients.

IDPS property means property acquired or held through an IDPS other than property held by a client.

liquid assets means in relation to a financial services licensee:

(a) cash or cash equivalents other than a commitment of the kind referred to in paragraph (d) of the definition of ***cash or cash equivalents***; and

(b) assets that the licensee can reasonably expect to realise for its market value within 6 months,

Authorised Version F2017C00173 registered 07/03/2017

that are free from encumbrances and, in the case of receivables, free from any right of set-off.

market participant means a participant as defined in section 761A in relation to a financial market:

(a) in the licensed financial market operated by ASX Limited that is required to comply with, and complies with, the rules of the *ASIC Market Integrity Rules (ASX Market) 2010* that impose financial requirements, taking into account any waiver by ASIC; or

(b) in the licensed financial market operated by Chi-X Australia Pty Limited that is required to comply with, and complies with, the rules of the *ASIC Market Integrity Rules (Chi-X Australia Market) 2011* that impose financial requirements, taking into account any waiver by ASIC; or

(c) in the licensed financial market (***ASX 24 Market***) operated by Australian Securities Exchange Limited that:

(i) restricts its financial services business to participating in the ASX 24 Market and incidental business; and

(ii) is required to comply with, and complies with, the rules of the *ASIC Market Integrity Rules (ASX 24 Market) 2010* that impose financial requirements, taking into account any waiver by ASIC.

NTA means adjusted assets minus adjusted liabilities.

revenue means revenue within the meaning given by the accounting standards.

stapled group means the group of entities consisting of:

(a) one or more stapled issuers who are issuers of securities that must be transferred together; and

(b) all wholly-owned entities of the stapled issuers.

stapled issuer means an entity a security of which under the terms on which it is traded on a prescribed financial market, must be transferred together with a security of one or more other entities.

value of assets means the value of assets determined as follows:

(a) in the case of assets that would be recognised in preparing a balance sheet under Chapter 2M—the value as if at that time such a balance sheet was being prepared; and

(b) in the case of IDPS property—its market value.”.

Authorised Version F2017C00173 registered 07/03/2017

Notes to ASIC Class Order [CO 12/752]

Note 1

ASIC Class Order [CO 12/752] (in force under s926A(2)(c) of the *Corporations Act 2001*) as shown in this compilation comprises that class order amended as indicated in the tables below.

Table of Instruments

Instrument number	Date of FRL registration	Date of commencement	Application, saving or transitional provisions
[CO 12/752]	13/8/2012 (*see* F2012L01674)	31/1/2013	
[CO 14/757]	7/8/2014 (*see* F2014L01082)	7/8/2014	-
2016/1182	15/12/2016 (*see* F2016L01957)	20/12/2016	-

Table of Amendments

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

Provision affected	How affected
Para 4 (notional subsection 912AB(11))	am. [CO 14/757] and 2016/1182

Authorised Version F2017C00173 registered 07/03/2017