

# ASIC Class Order [CO 13/761]

## About this compilation

### Compilation No. 2

This is a compilation of ASIC Class Order [CO 13/761] 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.

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## 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 13/761].

### Declaration

4. Part 7.6 (other than Divisions 4 and 8) of the Act applies in relation to financial services licensees as if that Part were modified or varied by, after section 912AB (as notionally inserted by ASIC Class Order [CO 12/752]), inserting:

**“Section 912AC Adequate financial resources for custodial or depository services providers**

- (1) This section applies to a financial services licensee that:
  - (a) holds an Australian financial services licence authorising it to provide a custodial or depository service; and
  - (b) is not:
    - (i) a body regulated by APRA that is not required to comply with paragraph 912A(1)(d); 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; and
  - (b) net tangible assets that apply because it provides a custodial or depository service; and
  - (c) the obligation to lodge an opinion by a registered company auditor on the financial requirements for licensees that are authorised to provide a custodial or depository service 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 in relation to having available adequate financial resources.

### *Cash needs requirement*

- (3) The licensee must:
- (a) prepare a projection of the licensee's cash flows over at least the next 12 months based on the licensee's reasonable estimate of what is likely to happen over this period; and
  - (b) have the projection approved in writing at least quarterly by the following persons as satisfying the requirements of paragraph (a):
    - (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;
    - (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:
    - (i) the projection ceases to cover at least the next 12 months; or
    - (ii) there is reason to suspect that an updated projection would differ materially from the current projection or show that the licensee was not meeting the requirements in subparagraphs (i) and (ii) of paragraph (e); and
  - (e) document whether, 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 (7).

*Net tangible assets*

(4) Unless subsection (5) applies, the licensee must hold at all times NTA of:

- (a) if the licensee is not an incidental provider – at least the greater of:
  - (i) \$10 million; or
  - (ii) 10% of average revenue; and
- (b) if the licensee is an incidental provider – at least the greater of:
  - (i) \$150,000; or
  - (ii) 10% of average revenue.

Note: If subsection (5) applies, there is no NTA requirement.

(5) This subsection applies if the licensee is an incidental provider and all the financial products or beneficial interests in financial products to which the custodial or depository services provided by the licensee relate are held by:

- (a) a financial services licensee that is authorised to provide a custodial or depository service and that the licensee reasonably believes:
  - (i) is not an incidental provider; and
  - (ii) complies with the requirements of this section; or
- (b) a sub-custodian appointed by such a financial services licensee; or
- (c) an eligible custodian.

(6) If the licensee:

- (a) has obtained a written assurance within the preceding 13 months from a financial services licensee (*other licensee*) that is authorised to provide a custodial or depository service that, at the time the assurance is given, the other licensee complies with the requirements of this section and is not an incidental provider; and
- (b) has no reason to suspect that the other licensee does not currently comply with those requirements or is an incidental provider;

the licensee is taken to have the reasonable belief referred to in paragraph (5)(a) in relation to the other licensee.

(7) Unless subsection (5) applies, the licensee must hold at all times:

- (a) cash or cash equivalents in an amount that is at least 50% of the NTA that it is required to hold under subsection (4); and
- (b) liquid assets in an amount that is at least 100% of the required NTA.

Money that is in an account held by the licensee for the purposes of section 981B cannot be counted towards either requirement. Other cash or cash equivalents that are also liquid assets can be counted for both paragraph (a) and paragraph

(b).

- (8) Following a request in writing from a financial services licensee (***appointing licensee***) that has appointed it to provide a custodial or depository service, stating that the information requested is likely to be required for the appointing licensee to determine if it complies with this section or section 912AA (as notionally inserted by ASIC Class Order [CO 13/760]), the licensee must provide the appointing licensee within a reasonable time with a written statement:

(a) regarding its compliance with the requirements of this section; and

(b) stating whether it is an incidental provider;

at the time the statement is given.

- (9) If the licensee lodges a report to ASIC under subsection 912D(1B) relating to a breach of this section, it must immediately notify each appointing licensee in writing.

#### *Audit opinion*

- (10) The licensee must lodge with ASIC a report (the ***audit opinion***) 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 in writing that states whether during any part of the period for which the licensee was authorised to provide a custodial or depository service:

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

- (i) complied with paragraph (3)(b) and subsections (4) and (7) (or did not need to comply with subsections (4) and (7) on the basis that subsection (5) applied) 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 used 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 projections prepared under paragraph (3)(a) and the document prepared under paragraph (3)(e), the auditor has no reason to believe that:

- (i) the licensee did not have adequate systems for managing the risk of having insufficient financial resources to comply with subsections (4) and (7) of this section (if applicable) and other financial requirements in conditions on its licence; or

Note: Paragraph 912A(1)(h) requires a licensee (other than a body regulated by APRA) to have adequate risk management systems.

- (ii) the licensee failed to comply with paragraph (3)(c); or

- (iii) the licensee will not have access when needed to enough financial resources to meet its liabilities over the projected term of at least the next 12 months; or
  - (iv) the licensee will not 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 (7); or
  - (v) the assumptions the licensee adopted for its projection in paragraph (3)(a) were unreasonable; and
- (c) if the licensee sought to comply with the NTA requirement in paragraph (4)(b) on the basis that it was an incidental provider, the auditor has no reason to believe that licensee did not satisfy the requirement in paragraph (b) of the definition of ***incidental provider*** in subsection (12).
- (11) The audit opinion must be lodged:
- (a) for each financial year of the licensee— with the balance sheet that the licensee is required to lodge under section 989B; and
  - (b) for any period of time that ASIC directs— by no later than the date ASIC directs in writing the audit opinion to be lodged.

(12) In this section:

***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; or
      - (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; or
    - (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 lodgement 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 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 lodgement 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 (other than assets that are encumbered merely to support a guarantee provided by the licensee) 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:
  - (i) a guarantee limited to an amount recoverable out of any scheme property (and in the case of a scheme which is not registered, out of any contributions, money, property or income that would be scheme property if the scheme were registered) of a managed investment scheme operated by the licensee; or
  - (ii) a guarantee of the obligations of another member of a stapled group, except where the licensee is the responsible entity of a registered scheme that is not part of the 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.

**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;
- (q) a foreign market approved in writing for the purpose of this definition by ASIC.

**average revenue** means:

- (a) for a financial services licensee in its first financial year - the licensee's 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 a custodial or depository service—the aggregate of the licensee's:
  - (i) estimate of its revenue for the second financial year to date; and
  - (ii) forecast of its revenue for the remainder of the second financial year; and
- (c) for a financial services licensee in its third financial year of being authorised to provide a custodial or depository service—the average of:
  - (i) the aggregate of the licensee's:
    - (A) estimate of its revenue for the third financial year to date; and
    - (B) forecast of its revenue for the remainder of the third financial year; and
  - (ii) the licensee's revenue for its second financial year in which it was authorised to provide a custodial or depository service; and
- (d) for all subsequent financial years of a financial services licensee—the average of:
  - (i) the aggregate of the licensee's:
    - (A) estimate of its revenue for the current financial year to date; and
    - (B) 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 was authorised to provide a custodial or depository service.

**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
- (d) a commitment by an eligible provider to provide cash upon request within 5 business days:



- (i) which will not expire within the next 6 months and which cannot be withdrawn by the provider without giving at least 6 months written notice to the person to whom the commitment is made; and
- (ii) in relation to which any cash provided is not repayable for at least six months.

**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.

**custodial or depository services revenue** means, in relation to a financial services licensee, the aggregate of the licensee's:

- (a) estimate of the revenue attributable to custodial or depository services provided by the licensee and its related bodies corporate for the current financial year to date; and
- (b) forecast of such revenue for the remainder of the financial year;

determined on the basis that such revenue must at least include the cost of providing those services.

**eligible custodian** means:

- (a) an Australian ADI; or
- (b) a market participant or a clearing participant; or
- (c) a sub-custodian appointed by a person referred to in paragraph (a) or (b).

**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, in relation to a financial services licensee:

- (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, a certain amount (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 (excluding, 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
  - (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 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
- (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; or
    - (II) a body corporate the licensee controls; or
    - (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.

***financial services business revenue*** means, in relation to a financial services licensee, the aggregate of the licensee's:

- (a) estimate of the revenue attributable to the financial services business of the licensee and its related bodies corporate for the current financial year to date, excluding any revenue attributable to custodial or depository services provided by the licensee or a related body corporate; and
- (b) forecast of such revenue for the remainder of the financial year;

determined on the basis that the revenue attributable to custodial or depository services must at least include the cost of providing those services.

***first financial year*** means, in relation to a financial services licensee, the financial year in which the calculation date occurs.

***IDPS*** has the same meaning as in ASIC Class Order [CO 13/763].

***IDPS property*** means, in relation to an IDPS, property acquired or held through the IDPS, other than property held by a client of the IDPS.

**incidental provider** means a financial services licensee that is authorised to provide a custodial or depository service:

- (a) that does not provide any custodial or depository services other than services which:
  - (i) are a need of the person to whom the services are provided because of, or in order to obtain the provision of other financial services by the licensee or its related bodies corporate; and
  - (ii) do not form part of an IDPS; and
- (b) whose custodial or depository services revenue is less than 10% of its financial services business revenue.

**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 their market value within 6 months,

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 operated by Australian Securities Exchange Limited (**ASX 24 Market**), 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 or managed investment products that must be transferred together; and
- (b) all wholly-owned entities of the stapled issuers.

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

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

- (a) in the case of assets that would be recognised in preparing a balance sheet for members under Chapter 2M – the value as if at that time such a balance sheet was being prepared; and
- (b) in the case of any other scheme property or IDPS property– its market value.”.

### **Transitional**

- 5. Paragraph 4 does not apply until 1 July 2014 to a financial services licensee that held an Australian financial services licence covering the provision of a custodial or depository service on 30 June 2013.

## Notes to ASIC Class Order [CO 13/761]

### Note 1

ASIC Class Order [CO 13/761] (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 13/761]	29/6/2013 ( <i>see</i> F2013L01275)	1/7/2013	
[CO 14/757]	7/8/2014 ( <i>see</i> F2014L01082)	7/8/2014	-
2016/1182	15/12/2016 ( <i>see</i> F2016L01957)	20/12/2016	-

### Table of Amendments

ad. = added or inserted    am. = amended    LA = *Legislation Act 2003*    rep. = repealed    rs. = repealed and substituted

Provision affected	How affected
Para 3 .....	rep. s48D LA
Paragraph 4 (notional subsection 912AC(10)).....	am. [CO 14/757] and 2016/1182