

**ASIC CLASS ORDER [CO 14/923]
EXPLANATORY STATEMENT**

Prepared by the Australian Securities and Investments Commission
Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes ASIC Class Order [CO14/923] under paragraph 926A(2)(c) of the *Corporations Act 2001* (the **Act**).

Paragraph 926A(2)(c) of the Act provides that ASIC may declare that the provisions to which this paragraph applies apply 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

Future of Financial Advice (FOFA) Reforms

In April 2010, the Australian Government announced the FOFA reform package, which aimed to improve the trust and confidence of retail investors in the financial advice sector.

The *Corporations Amendment (Future of Financial Advice) Act 2012* and the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* amend the Act to implement the FOFA reforms.

Division 2 of Pt 7.7A of the Act requires advice providers providing personal advice to:

- (a) act in the best interests of the client (s961B);
- (b) provide the client with appropriate advice (s961G);
- (c) warn the client if their advice is based on incomplete or inaccurate information (s961H); and
- (d) where there is a conflict with their own interests, or those of one of their related parties, prioritise the interests of the client (s961J).

The obligations in Div 2 of Pt 7.7A—collectively referred to in this explanatory statement as the ‘best interests duty and related obligations’—are designed to ensure that retail clients receive advice that meets their objectives, financial situation and needs, and that advice providers act in the best interests of their clients in providing them with advice. These obligations replaced the previous requirements for licensees and authorised representatives to ensure that advice is appropriate for the client (s945A) and to warn clients if the advice is based on incomplete or inaccurate information (s945B).

The FOFA reforms also introduced new conduct obligations with respect to:

- (a) an opt-in requirement for advice providers to renew their clients' ongoing fee arrangements at least every two years, and to give clients a Fee Disclosure Statement where there is an ongoing fee arrangement (Div 3 of Pt 7.7A); and
- (b) the ban on conflicted and other remuneration (Div 4 of Pt 7.7A).

The Government has since made amendments to the FOFA provisions in Pt 7.7A of the Act under the Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014.

AFS licence condition on record-keeping

ASIC's standard licence condition on record-keeping for personal advice in Pro Forma 209 *Australian financial services licence conditions (PF 209)* does not apply to new records created by AFS licensees after 1 July 2013.

The terms of the licence condition refer to the previous obligation in s945A, which was repealed by the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012*.

2. Purpose of the class order

ASIC Class Order [CO 14/923] will modify Division 3 of Part 7.6 of the Act, as it applies to all financial services licensees, to insert a new section 912G that imposes record-keeping requirements for AFS licensees when the licensee or their representative (including an advice provider) give personal advice to retail clients.

Under section 912G, licensees must ensure that, in relation to the provision of personal advice, certain records are kept that demonstrate compliance with the best interests duty and related obligations under Division 2 of Pt 7.7A of the Act, rather than the previous obligation in s945A which was repealed under FOFA.

It is important for AFS licensees to keep records of personal advice provided to clients by the licensee or its representatives because having good record-keeping systems in place will support the ongoing provision of quality advice to clients.

Keeping records will also help licensees to supervise their representatives, including advice providers, when they provide advice to clients. The ongoing supervision by a licensee of their representatives is critical to ensure that they continue to comply with the requirements in the law.

In addition, keeping records will help consumers to hold the licensee or advice provider accountable for the quality of advice they receive. It would also be difficult for external dispute resolution bodies, such as the Financial Ombudsman Service (FOS), to consider and resolve any disputes between clients and the licensee or their representatives without reviewing records kept by the licensee.

3. Operation of the class order

Paragraph 1 – Enabling legislation

This paragraph specifies the modification power in paragraph 926A(2)(c) of the Act under which ASIC makes this class order instrument.

Paragraph 2 – Title of the class order

This paragraph specifies the title of the class order.

Paragraph 3 – Commencement of the class order

This paragraph specifies that the class order commences on the day it is registered under the *Legislative Instruments Act 2003*. The class order does not have retrospective application.

Paragraph 4 – Declaration

This paragraph declares that Part 7.6 of the Act (except Divisions 4 and 8) apply in relation to all financial services licensees as if Division 3 of that Part has been modified or varied by inserting a new section 912G that imposes record-keeping requirements for AFS licenses in relation to personal advice.

Subsection 912G(1) states that the record-keeping requirements imposed under the section applies in relation to personal advice given to retail clients by the AFS licensee or a representative of the AFS licensee. A representative of the AFS licensee includes an authorised representative of the licensee or an advice provider employed by the licensee.

Personal advice has the same meaning given by the definition set out in subsection 766B(3) of the Act.

Subsection 912G(2) specifies the records that AFS licensees must ensure are kept in relation to the provision of personal advice given to retail clients by the licensee or their representatives. Under this section, licensees must ensure that records of the following matters are kept:

- (a) the information relied on and the action taken by the provider that indicates the provider has, in accordance with subsection 961B(1), acted in the best interests (the ***best interests duty***) of the client in relation to the advice;
- (b) if the safe harbour is relied on to demonstrate that the best interests duty has been satisfied—the information relied on and the action taken by the provider that satisfies the steps in subsection 961B(2) of the Act;
- (c) the advice given, including the reasons why, under section 961G, it would be reasonable to conclude that the advice is appropriate to the client, had the provider has satisfied the best interests duty under section 961B; and
- (d) where the provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the interests of any person mentioned in subsections 961J(1)—the information relied on and the action taken by the provider to indicate that the provider has given priority to the client's interests when giving the advice.

For the purposes of this subsection, the keeping of records that satisfy the record-keeping obligation in paragraph 912G(2)(b) will satisfy the record-keeping obligation in paragraph 912G(2)(a).

Subsection 912G(3) specifies that records should be kept for a period of at least seven years after the day the personal advice is provided to the client.

Subsection 912G(4) specifies that the record-keeping obligations under this class order do not apply to personal advice where the modified best interests duty applies to the provision of personal advice:

- (a) in the circumstances covered by subsection 961B(3) and 961B(4) of the Act; or
- (b) in the circumstances prescribed by the regulations in which the provider is not required to prove that the provider has taken the steps mentioned in paragraphs 961B(2)(d), (e) and (f) to satisfy the best interests duty.

For example, this subsection applies to the provision of personal advice where the subject matter of the advice sought relates only to a basic banking product or a general insurance product.

Subsection 912G(5) specifies that the record-keeping obligations in subsections 912G(2)(a)–(c) of this class order do not apply in following circumstances:

- (a) the provision of personal advice for which a Statement of Advice is not required to be given to the client; or
- (b) the provision of personal advice for which a record of the advice is kept in accordance with subsection 946B(3A) of the Act.

Paragraph 5 – Effect of Declaration

This paragraph specifies that the declaration made under paragraph 4 of this class order applies only to the provision of personal advice that is given to retail clients on or after 23 March 2015.

4. Consultation

ASIC consulted publicly on the proposal to update the record-keeping obligations for AFS licensees when giving personal advice in the form of Consultation Paper 214 *Updated record-keeping obligations for AFS licensees (CP 214)*. CP 214 was issued on 31 July 2013 and consultation took place over a 12 week period. ASIC received eight submissions on CP 214 from industry associations and one industry compliance specialist.

ASIC continued to engage with respondents to CP 214 and other stakeholders after the close of the consultation period to finalise the class order instrument.

ASIC also engaged with the Department of the Treasury before making this class order.

This class order gives effect to the proposal in CP 214 to update the record-keeping obligations for AFS licensees and their representatives when giving personal advice to the client so that it refers to the best interests duty and related obligations in Div 2 of Pt 7.7A, rather than the previous obligation in s945A which was repealed under FOFA.

Statement of Compatibility with Human Rights

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

ASIC Class Order [CO 14/923]

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*.

Overview of the class order

ASIC Class Order [CO 14/923] will modify Division 3 of Part 7.6 of the Act, as it applies to all financial services licensees, to insert a new section 912G that imposes record-keeping requirements for AFS licensees when the licensee or their representative (including an advice provider) give personal advice to retail clients. Under section 912G, licensees must ensure that, in relation to the provision of personal advice, certain records are kept that demonstrate compliance with the best interests duty and related obligations under Division 2 of Pt 7.7A of the Act.

Human rights implications

This class order does not raise any issues with respect to the applicable human rights or freedoms recognised or declared by section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*