

ASIC Corporations (Removing Barriers to Electronic Disclosure) Instrument 2015/649 EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (*ASIC*) makes ASIC Corporations (Removing Barriers to Electronic Disclosure) Instrument 2015/649 under paragraphs 951B(1)(c) and 1020F(1)(c) of the *Corporations Act 2001* (the Act).

Paragraph 951B(1)(c) provides that ASIC may declare that Part 7.7 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 of that Part were omitted, modified or varied as specified in the declaration.

Paragraph 1020F(1)(c) 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 of that Part were omitted, modified or varied as specified in the declaration.

1. Background

Part 7.9 of the Act contains provisions relating to financial product disclosure. This includes provisions relating to the preparation, content and supply of Product Disclosure Statements (PDSs) for margin lending, superannuation and simple managed investment schemes.

A PDS is a document that explains to a retail investor what financial product they are buying. Generally, it must be given when the financial product is offered.

Part 7.7 of the Act contains provisions about financial services disclosure. This includes provisions relating to the preparation, content and supply of Statements of Advice (SOAs); and Financial Services Guides (FSGs).

An SOA sets out the advice given to a consumer by their licensed financial planner or adviser. It must include the basis on which the advice is given, details of the providing entity, and information on any payments or benefits the adviser or licensee will receive. An SOA is generally required to be provided to clients when personal financial advice is provided.

An FSG is generally required to be provided to retail clients who are provided with a financial service to aid the client in deciding whether to use any of the financial services offered. It must explain the financial service offered, the fees charged and how the person or company providing the service will deal with complaints.

2. Purpose of the instrument

The purpose of this instrument is to facilitate the use of innovative PDSs, FSGs and SOAs by giving relief from three current requirements in the Act and the *Corporations Regulations*

2001 (the Regulations) that relate to page length of PDSs, provision of copies of electronic disclosure documents on request, and placement of the title of electronic disclosure documents.

The instrument provides relief from the requirement in the shorter PDS regime that mandates the number of pages in a shorter PDS since this requirement would not be applicable to an innovative PDS that was not able to be printed.

Currently, various provisions of the Act require a provider to give a copy of a PDS to a client or other person on request. Since it could be impractical for a provider to send a copy of a more innovative PDS (such as an interactive PDS) to a postal address or to give it in person, we have given relief to allow a provider to give a copy of *any* current PDS in use for the relevant product or offer. This means that a provider could provide a copy of a different printed PDS instead of a more innovative PDS where the client or provider preferred to do so.

We have also given relief from the current requirement for certain language to be included on the cover or ‘at or near the front of’ a PDS, SOA or FSG so as to accommodate more innovative disclosure documents such as interactive PDSs. For example, our relief provides that the title ‘Product Disclosure Statement’ should be used ‘at or near the beginning of the PDS’ which could be at the top of a webpage, displayed on launch of an app or spoken at the beginning of a video.

The Act does not require, and we do not expect, that all products will have a disclosure document that is able to be printed. This is a decision that each provider will have to make in the context of their clients’ preferences and their overriding obligation to provide clear, concise and effective disclosure.

3. Operation of the instrument

Section 5

Section 5 of the instrument modifies the application of Schedules 10C, 10D and 10E of the Regulations so that the page length requirements specified for shorter PDSs in those Schedules are applicable only to PDSs to the extent that they are able to be printed. The other provisions of the shorter PDS regime still apply, including content requirements. This means that innovative PDSs also should be clear, concise and effective and contain a similar level of detail or volume of content (appropriate to the format chosen) to that which would be in a shorter printed PDS.

Section 6

Section 6 of the instrument modifies section 1015C of the Act for situations where a person responsible for a PDS relating to a margin lending, superannuation or simple managed investment scheme product receives a request from a person for a copy of a PDS that is in an electronic form that is not able to be printed, and the request does not nominate a relevant electronic means for delivery of the PDS. In this case, the requirement in regulations 7.9.11G, 7.9.11R and 7.9.11Z for the responsible person to provide a copy of the PDS to the requestor within 8 business days does not apply in relation to that request. Instead, the responsible person must notify the requestor within 8 business days that the PDS (or that particular PDS, where there is more than one in use for the product) is only available by electronic means and

the requestor must nominate a relevant electronic means for delivery. If there is another PDS in use for the same product that is able to be printed, the person responsible for the PDS must also notify the requestor that they may request that other PDS.

The modification to section 1015C defines *relevant electronic means* in relation to a PDS for a financial product to mean an electronic means which the responsible person for the PDS uses to make the PDS available to persons who acquire the financial product.

Section 6 modifies Schedules 10C, 10D and 10E of the Regulations so that if a PDS relating to a margin lending, superannuation or simple managed investment scheme product is in electronic form and some or all of it is not able to be printed, then the responsible person for the PDS must ensure that the PDS includes all of the following:

- A description of the electronic means by which the responsible person makes the PDS available to clients; and
- A statement that a client who requests a copy of the PDS must nominate one of those electronic means in order to receive a copy of the PDS; and
- If there is another PDS for the margin lending, superannuation or simple managed investment scheme product that is current and is able to be printed, a statement that that is the case and that a client may request a copy of that PDS.

Section 7

Section 7 of the instrument modifies various provisions of Parts 7.7 and 7.9 of the Act and associated regulations to provide that the title of disclosure documents required by those Parts may be inserted at the *beginning* of the disclosure as an alternative to being ‘on the cover of, or at or near the front of’ the disclosure document. This modification applies to FSGs, Supplementary FSGs, SOAs, PDSs, Supplementary PDSs, Replacement PDSs and combined FSG/PDS documents.

4. Documents incorporated by reference

There are no documents incorporated by reference.

5. Consultation

Before making the instrument ASIC consulted with relevant stakeholders on how to facilitate the use of more innovative electronic PDSs.

In November 2014, ASIC released Consultation Paper 224 *Facilitating electronic financial services disclosures* (CP 224). ASIC received 34 submissions to the proposals in CP 224 from industry bodies and a wide variety of financial services providers. The majority of proposals were supportive of ASIC’s proposal to give relief to facilitate more innovative electronic PDSs, such as interactive PDSs.

A Regulatory Impact Statement, approved by the Office of Best Practice Regulation (OBPR) and a Feedback Report detailing the various submissions received in relation to the proposals in CP 224 and ASIC’s response to those submissions, have also been prepared. These documents, together with CP 224 and the non-confidential submissions received in relation to CP 224, can be found on the ASIC website.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Removing Barriers to Electronic Disclosure) Instrument 2015/649

The instrument 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

The *Corporations Act 2001* (***Corporations Act***) requires Product Disclosure Statements, Statements of Advice and Financial Services Guides to be given to retail investors in financial products in various circumstances.

The instrument facilitates the use of more innovative forms of these documents by providing relief in relation to provisions of the Corporations Act that may limit the ability of issuers to provide documents in an electronic form.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.



ASIC

Australian Securities & Investments Commission

REGULATION IMPACT STATEMENT

Facilitating digital financial services disclosures

July 2015

About this Regulation Impact Statement

This Regulation Impact Statement (RIS) addresses ASIC's proposals for further facilitating digital disclosure by:

- providing relief to facilitate default digital delivery of financial services disclosures and more innovative Product Disclosure Statements (PDSs), Financial Services Guides (FSGs) and Statements of Advice (SOAs); and
- updating our regulatory guidance.

What this Regulation Impact Statement is about

- 1 This Regulation Impact Statement (RIS) addresses ASIC's proposals for facilitating digital disclosure by providing relief to facilitate default digital delivery of financial services disclosures and to remove barriers to the use of innovative Product Disclosure Statements (PDSs), Financial Services Guides (FSGs) and Statements of Advice (SOAs), as well as updating our regulatory guidance to reflect this.
- 2 In developing our final position, we have considered the regulatory and financial impact of our proposals. We are aiming to strike an appropriate balance between:
 - administering the law effectively and with minimal procedural requirements (reducing red tape); and
 - promoting investor trust and confidence in the financial system.
- 3 This RIS sets out our assessment of the regulatory and financial impacts of our proposed policy and our achievement of this balance. It deals with:
 - the likely compliance costs;
 - the likely effect on competition; and
 - other impacts, costs and benefits.

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A Introduction

Background

- 4 A key part of the legislative scheme governing financial products and services is the principle of disclosure. That is, in order for consumers to be in a position to make informed decisions about financial products and services, the providers of those products and services must give them all of the relevant information about those products or services, such as their key features, benefits and risks.
- 5 The provision of this information is mandated by the legislation (as modified by the regulations and existing ASIC instruments). The various provisions cover both:
- (a) upfront disclosure—the information that must be given at the beginning or before the purchase or entering a financial relationship, such as a PDSs; and
 - (b) ongoing disclosure—the information that is given during the course of ownership of the product or engagement with the service, such as a bank statement or annual superannuation update, or a notification of a change to the product or service.
- 6 The *Corporations Act 2001* (Corporations Act) itself is generally neutral as to the form of the disclosure for financial services—that is, the legislation does not preference one form for disclosure (such as printed documents) over another form (such as digital documents), as long as the information is provided to the consumer at a mandated point in time, meets content requirements, and, in some cases, meets overarching requirements, such as being ‘clear, concise and effective’.
- 7 However, as detailed below, the impact of the current legislative requirements, combined with ASIC’s current guidance on how to apply those requirements set out in Regulatory Guide 221 *Facilitating online financial services disclosures* (RG 221), mean that the default method for delivery of most disclosures is in printed form (either given personally or sent by post to an address). In other words, a printed disclosure document, sent to a postal address, remains the default method of delivering financial services disclosures.
- 8 Providers are also generally able to deliver upfront disclosures electronically, but while electronic versions of upfront disclosures are routinely made available, these are generally static, PDF duplicates of a printed document.

Legislative background

- 9 While most disclosures can be delivered digitally using a variety of delivery methods, this generally requires specific agreement from the client, as compared with delivering disclosure to a postal address, which does not require specific agreement.
- 10 The proposals discussed in this RIS relate to Pts 7.6–7.9 of the Corporations Act, which permit a wide range of financial services disclosures to be delivered digitally. The provisions that enable disclosures to be delivered digitally differ depending on the type of disclosure. This RIS does not address disclosures under the *National Consumer Credit Protection Act 2009*, such as credit card statements or mortgage disclosures.
- 11 FSGs, SOAs, PDSs and information statements for Commonwealth Government Securities (CGS) depository interests can be ‘given’ if they are sent to an electronic address or fax number ‘nominated’ by the client or the client’s agent: s940C(1)(a)(ii), 1015C(1)(a)(ii) and 1020AK(1)(a)(ii). The term ‘nominated’ is interpreted in RG 221 as a requirement for express consent, in the case of electronic addresses.
- 12 The following disclosures may be notified or given to a client in ‘electronic’ form or may be sent ‘electronically’ (interpreted in RG 221 as requiring express consent):
- (a) ongoing disclosure (s1017B(3)(b));
 - (b) periodic statements (s1017D(6)(b));
 - (c) confirmations of transactions (s1017F(6)(a)(ii));
 - (d) annual superannuation information (s1017DA(3) and reg 7.9.75A(3)(b));
 - (e) additional information provided by a superannuation trustee (s1017DA(3) and reg 7.9.75A(3)(b)); and
 - (f) unsolicited offers to purchase financial products off-market (s1019E(1), 1019G(3) and 1019J(2)).
- 13 The following disclosures may alternatively be ‘made available in any way agreed to’ by a client or their agent (meaning, provided the client agrees, the disclosure could be delivered digitally):
- (a) FSGs and SOAs (s940C(1)(a)(iii));
 - (b) PDSs (reg 7.9.02A);
 - (c) ongoing disclosure (reg 7.9.75A(1));
 - (d) periodic statements (reg 7.9.75A(2));
 - (e) annual superannuation information and additional information provided by a superannuation trustee (reg 7.9.75A(3)(c) and (d)); and
 - (f) additional information on request (s1017A(4)(b)).

- 14 Annual superannuation information can also be provided to members of a regulated superannuation fund by ‘making [it] available on a website that is maintained by or on behalf of the trustee’ in accordance with reg 7.9.75BA.
- 15 Confirmations of transactions can be provided ‘by means of a standing facility’ in accordance with s1017F(5)(b) and 1017F(5A).
- 16 Under Class Order [CO 13/763] *Investor directed portfolio services*, quarterly reports for an investor directed portfolio service (IDPS) can either be delivered electronically, or a client (with their consent) can be given access to their account on an electronic platform, where the Australian financial services (AFS) licensee has no reason to doubt that the client has substantially continuous access.

ASIC guidance

- 17 In 2010, ASIC issued RG 221. The purpose of the guide was to facilitate the use of electronic delivery of disclosure by explaining how the delivery methods in the law operate. ASIC also made Class Order [CO 10/1219] *Facilitating online delivery of PDSs, FSGs and SOAs* to enable delivery of some disclosures via hyperlinks and through references to website addresses, and to explain when consent is needed to send disclosures electronically.
- 18 Under the current law and ASIC’s current guidance, providers are able to deliver most ongoing disclosures by publishing them electronically (such as on a website) and giving a notification; however, generally the provider must first agree this method of delivery with the consumer.
- 19 As a result of the position that we took in our guidance, even where providers have an electronic address, they must generally obtain active consent from consumers in order to send disclosures to electronic addresses. As such, the default method of disclosure is printed disclosures sent to a postal address.

Summary of industry

- 20 These proposals may affect all product and service providers in the financial sector; however, the key sectors that provide disclosure documents are superannuation funds and banks (including wealth management businesses of banks).
- 21 According to Australian Prudential Regulation Authority (APRA) data, there are approximately 29 million superannuation member accounts with funds that have more than four members. We estimate that there are approximately 40 million bank customers in Australia.¹

¹ Figure estimated by ASIC from data including industry submissions, and bank annual reports and websites.

Assessing the problem

- 22 The overarching disclosure framework has significant shortcomings and limitations, including that, even when well designed, disclosure is ultimately less effective in addressing some market problems than others (e.g. conflicts of interest).²
- 23 The policy project outlined in this RIS is not attempting to address these broader problems, nor does it seek to assess and improve the efficacy of the disclosure regime.
- 24 Rather, this RIS is intended to address problems within this regime, around the format and the method of delivery of disclosure that are inhibiting the regime from operating efficiently, in that the regime does not allow participants to choose the most appropriate, effective or efficient method of communication.
- 25 These problems are chiefly regulatory impediments to technology neutral communication within the financial services disclosure regime.
- 26 Our estimates, based on information provided by industry, suggest that only around 34% of bank customers and around 8% of superannuation members currently receive financial services disclosures digitally, including by email and other digital methods.
- 27 If each of the remaining consumers received a single letter a year from their financial services provider, that would be around 55 million letters each year.

Regulatory settings unnecessarily limiting choice

- 28 The current regulatory and legislative settings create a disclosure regime for financial services that is not technology neutral but, rather, favours printed disclosure formats and posted or personal delivery over digital formats and digital delivery by making printed and posted disclosures the default. These regulatory settings create market inefficiency, in the form of additional transaction costs, because providers cannot choose to set their default method of delivery to digital delivery. This means that consumers need to actively opt in to receive digital disclosures.
- 29 Research suggests that a default option that will be retained unless the consumer actively chooses something else (i.e. ‘opts in’) results in more people choosing the default than would be the case if no default were set. In addition to this, behavioural research also suggests that defaults can be ‘sticky’, meaning that once the choice is set, even when consumers prefer or

² Financial System Inquiry, *Financial System Inquiry: Interim report*, July 2014 (Financial System Inquiry interim report), pp. 3-54–3-62, http://fsi.gov.au/files/2014/07/FSI_Report_Final_Reduced20140715.pdf.

would accept an alternative, behavioural biases can lead to inertia or retaining the status quo, meaning consumers might not actively seek to change disclosure preferences.³

30 At the time [CO 10/1219] was developed (2010), the regulatory distortion in favour of printed and posted disclosure was justified on the grounds of consumer protection—that is, ensuring that consumers, for whom at that time digital communications may have been a relatively new phenomenon, were only contacted digitally where they actively sought digital communications.

31 These regulatory settings for disclosure no longer accommodate provider and consumer expectations in the current environment where the majority of adult Australians are online (92%) and a majority of those online undertake financial transactions using the internet (72%).⁴

32 The increased use of digital communications (in particular, the internet) both in terms of percentage of population, and frequency of online engagement, mean that the regulatory benefit for a small number of consumers no longer justifies the imposition of additional regulatory burden on providers and consumers to engage digitally.

33 In addition to this, while the Corporations Act envisages the use of electronic addresses, it is drafted in a way that has not kept up with the variety and breadth of digital communications. This means providers are prevented or discouraged from using the most efficient and effective form of communication.

34 Further to this, the Financial System Inquiry notes that, ‘where changes in technology create difficulties in interpreting provisions, firms are likely to take a conservative view to minimise regulatory compliance risks’.⁵ This means that even where the law allows digital delivery, in some cases providers are still discouraged from using digital methods and formats due to a lack of clarity.

Regulatory settings inhibiting innovation

35 The regulatory settings that favour printed and posted disclosure are also a barrier to innovation, through the use of digital technology, in disclosure. These settings prevent providers from supplying disclosure in the forms that are demanded by consumers or that providers choose to supply, such as interactive web-based disclosures, apps, videos, games and audio presentations.

³ C Sunstein (2011), ‘Empirically informed regulation’, *University of Chicago Law Review*, vol. 78, pp. 1349–1429.

⁴ Australian Communications and Media Authority (ACMA), *Communications report 2013–14 series: Report 1—Australians’ digital lives*, March 2015, www.acma.gov.au/theACMA/Library/Corporate-library/Corporate-publications/communications-report.

⁵ Financial System Inquiry interim report, p. 4-42.

- 36 The current regulatory settings are inhibiting possibilities for providers to explore new ways of communicating and therefore for consumers to potentially benefit from these opportunities.
- 37 We expect that the removal of barriers to more innovative disclosure will result in more of these more innovative disclosures in the market. We think that technology provides opportunities to better engage or communicate with some consumers. As such, we hope that some additional consumer engagement and understanding will flow from the removal of barriers to this kind of disclosure.
- 38 The Financial System Inquiry final report noted that ‘consumers can more effectively use information that is accessible, engaging and understandable. Although there has been limited research on the benefits of new media compared with paper-based disclosure, new media offers opportunities for more engaging communication.’⁶

Why is ASIC action needed

- 39 Although intended to facilitate electronic communication,⁷ the legislation, regulations and ASIC’s current guidance have not kept up with consumer and industry demand and are impeding the efficient operation of the market.
- 40 ASIC action is needed to remove the regulatory barriers to digital disclosure described above.
- 41 The Government’s red-tape reduction and digital economy policies mean that there is a focus on what ASIC is doing to support digital commerce and to reduce red tape.
- 42 This proposal will support the goals of both of these policies by removing unnecessary red tape—in this case, consumers no longer needing to ‘opt in’ to digital delivery and by supporting digital commerce by increasing the use of digital communications in financial services.
- 43 Recent government inquiries also support the facilitation of more digital communication. For example, the Commission of Audit report⁸ made a recommendation that the Government set an ambitious e-government strategy, including making engagement with the Government electronic by default. The 2015–16 Budget built on this by setting up a new Digital Transformation Office. While the proposals discussed in this RIS do not go directly to digital engagement with Government, by further facilitating digital commerce, they will complement the Digital Transformation Agenda.

⁶ Financial System Inquiry, *Financial System Inquiry: Final report*, November 2014 (Financial System Inquiry final report), <http://fsi.gov.au/publications/final-report/chapter-4/innovative-disclosure/>.

⁷ Corporate Law Economic Reform Program Bill 1998, Explanatory Memorandum, paras 8.10–8.17; RG 221.1.

⁸ National Commission of Audit, *Towards responsible government: The report of the National Commission of Audit—Phase one*, www.ncoa.gov.au/report/phase-one/index.html.

- 44 The Financial System Inquiry final report also made two recommendations relevant to electronic communications. These recommendations are:
- (a) *Facilitate innovative disclosure*: remove regulatory impediments to innovative product disclosure and communication with consumers, and improve the way risks and fees are communicated to consumers. The first part of this recommendation was directed specifically at ASIC, with the second part, a legislative solution, to be implemented following evaluation of the success of ASIC measures.
 - (b) *Technology neutrality*: identify, in consultation with the financial sector, and amend priority areas of regulation to be technology neutral. Embed consideration of the principle of technology neutrality into development processes for future regulation. Ensure regulation allows individuals to select alternative methods to access services to maintain fair treatment for all consumer segments. This was a general recommendation to Government, not specifically directed at ASIC.
- 45 Our proposals will support the technology neutrality recommendation by seeking to align the treatment of digital and printed and postal methods of communications. In addition, our proposals will, by removing barriers that limit the form of disclosure, remove impediments to innovative product disclosure and communication.
- 46 Our proposals will enable providers to deliver ongoing disclosures digitally as a default. This will mean that more consumers are likely to receive disclosures digitally. This will save money and time for providers and be more convenient for a majority of consumers. It may also improve engagement with the content of the disclosures. For those consumers who prefer printed and posted disclosures, these proposals ensure that choice remains available.
- 47 These proposals are proactive and designed to lead to more positive outcomes and compliance cost savings.
- 48 It is important to note that Government action to remove barriers alone will not necessarily deliver the benefits of more digital disclosure because there are other, non-regulatory barriers to increased use of digital channels.
- 49 This is particularly the case for more innovative product disclosure, where costs and consumer demand for innovative disclosure are a factor in the incentives for providers to develop more innovative disclosure solutions. Nevertheless, it is important that regulatory requirements are not a factor in holding back the potential development of disclosure that better meets provider and consumer needs, where these requirements do not otherwise have regulatory benefit.

B Options and impact analysis

We consider that the options are:

Option 1—A combination of Options 2 and 3 (preferred option)

Option 2—Enable default digital delivery of financial services disclosure

Option 3—Remove barriers to more innovative PDS, SOAs and FSGs

Option 4—Make no changes to our guidance and provide no additional relief, thereby maintaining the status quo.

Option 1: Combined measures to remove barriers to digital disclosure (preferred option)

50 This option combines Options 2 and 3 detailed below and delivers maximum benefits for consumers and financial service and product providers by removing all legal and regulatory barriers that are preventing technology neutrality (preferring printed disclosure) for financial service and product disclosure that we are able to remove—that is, removing legal and legislative barriers to both:

- (a) enable default delivery of digital disclosure (i.e. a proposal about delivery of disclosure); and
- (b) allow for more innovative forms of PDSs, FSGs and SOAs (i.e. a proposal about the form of disclosure).

51 While most compliance cost savings are most likely to be realised as a result of implementing Option 2, combining Options 2 and 3 is designed to achieve a technology neutral approach to both the delivery and form of financial services disclosure. Achieving a technology neutral approach with respect to the delivery only would not address existing barriers that are inhibiting innovation in disclosure.

52 Delivering these two sets of changes together also sends a stronger message about ASIC's commitment to digital disclosure than either one of these alone.

53 On technology neutrality, the Financial System Inquiry final report (p. 270) noted the following:

A technology-neutral approach to regulation enables regulators and government to adapt to innovative developments and manage risks. It can also reduce compliance costs by removing unnecessary regulatory impediments and improving the stability and longevity of regulation. It can also give financial product providers greater flexibility to innovate to meet changing consumer expectations.

- 54 Taking steps to further facilitate digital delivery of disclosures, as well as more innovative documents, will result in more digital and less paper distribution and will reduce costs for business, increase convenience for consumers and may result in increased consumer engagement with and understanding of disclosure.
- 55 In some cases, default digital disclosure might result in some consumers not receiving disclosures. As the Financial System Inquiry final report (page 270) points out:
- Stakeholders note a potential consequence of technology-neutral regulation is that it risks excluding some community segments from the financial system. For example, by enabling businesses to shift to electronic service delivery as a default, older Australians or others with limited internet access may become excluded. As a result, it is important that regulation accommodates the ability of consumers to select alternative methods to access services, such as paper-based delivery.
- 56 In our consultations, consumer groups also raised concerns about the impact of our proposals on vulnerable and less digitally connected Australians.
- 57 Where possible, we have built into our proposals protections for these vulnerable consumers and included guidance to help providers reach their clients, without imposing disproportionate additional costs on those providers. For the new default method of delivery, we require that providers give consumers a clear opportunity to opt out of digital delivery, unless they have acquired a fully digital product or service. This opt-out from a default retains full choice for consumers.
- 58 In addition, we have given guidance to providers regarding email bounce-backs. As a matter of good practice, providers should monitor for undelivered or undeliverable emails and try an alternative method of delivery. We also encourage providers to use a method and form of delivery that best suits their client as part of their obligation to provide clear, concise and effective disclosure.
- 59 On the other hand, we also expect increased digital disclosure to result in some consumers, who might not receive or engage with a paper disclosure (under the current regime), to be more able or inclined to do so with a digital disclosure. While some consumers may change email addresses frequently, others, such as renters, may move postal addresses frequently but retain email addresses for longer periods. Some consumers may not have internet access or may not seek to engage with digital disclosures, while some others may be more inclined to engage with a disclosure that they can readily access from a mobile device.
- 60 It is important to note that these proposals build on what is already allowed under the legislation in terms of digital disclosure—most disclosures may already be sent digitally and in some cases by using a standing facility, such as a website.

61 Our aim is not to address the shortcomings associated with disclosure more broadly. As such, we are not intending to impose additional obligations on providers using digital formats that they would not be required to meet if they were delivering printed disclosures.

62 This means, as with postal addresses, the onus remains on the consumer to update their contact details (such as email addresses) if they change and, once given or made available, the consumer is free to read or not read the disclosure as they see fit. This is critical to the principle of technology neutrality.

63 Although we hope that this work might make disclosure more engaging and accessible for some, and free up resources to invest in better disclosure, our focus is not specifically on delivery form as a means to increase engagement with disclosure, but rather we are working to open up the possibility of increased engagement through new formats.

64 This work is also not intended to remedy existing risks associated with digital communications, including security and technology concerns. Nevertheless, we acknowledge that in an environment of more digital disclosure, these risks may affect more consumers, which is why we also propose updated guidance to mitigate these risks.

65 Specific impacts have been detailed under each option.

Option 2: Enable default digital delivery of financial services disclosures

66 This option has two complementary components. It:

- (a) gives providers an additional option for delivery of disclosures, which would enable them to meet the requirements of delivery if they publish disclosures digitally and then notify the client that the disclosure is available; and
- (b) makes it clear that if a financial services provider has an electronic address for a client, they do not need additional consent to use that address to deliver disclosures.

67 Together, these components ensure that providers will be able to set the default for their disclosures as digital if they choose to do so, as long as the consumer has the opportunity to opt out of digital disclosure (except for fully digital products).

Impact on industry

- 68 By removing the current regulatory barriers that require additional steps before disclosures can be delivered digitally (compared with postal delivery) we expect more consumers to receive disclosures digitally. We expect Option 2 will result in significant compliance cost savings for industry.
- 69 The superannuation and banking sectors are responsible for a majority of financial services and product distribution and were able to provide costing information. These sectors are also best placed to take advantage of greater digital disclosure opportunities. Additional savings might be realised by non-bank wealth management and financial services (such as advice) providers.
- 70 Based on information provided in the course of consultations, we estimate that, for banking customers, around 34% of customers are currently receiving communications digitally. For superannuation we estimate approximately 8% of members are currently receiving communications digitally.
- 71 Based on industry feedback and our analysis, we estimate that the compliance cost savings will be around \$299.1 million per annum over 10 years for the superannuation and banking sectors. This will primarily result from savings in printing and postage costs, but also incorporates time and delay savings for businesses, as well as record-keeping savings that we estimate will accrue to businesses.
- 72 Table 1 shows the total cost savings to industry, based on an assumed 80% take up of digital disclosure. This assumption is based on OBPR advice on consumer preferences for digital engagement with government, ACMA figures for internet use (92%), use of the internet for online banking and paying bills (77% of internet users),⁹ and consumers who report that they expect to deal with business and government services online (82%).¹⁰

Table 1: Total cost savings to business

| Sector | Cost savings |
|----------------|----------------------|
| Banking | \$214,155,997 |
| Superannuation | \$75,738,307 |
| Total | \$289,894,304 |

Source: ASIC, industry response to Consultation Paper 224 *Facilitating electronic financial services disclosures* (CP 224), APRA data, Reserve Bank of Australia (RBA) data and Australia Post.

⁹ ACMA, *Communications report 2013–14*, www.acma.gov.au/theACMA/Library/Corporate-library/Corporate-publications/communications-report.

¹⁰ ACMA, *Communications report 2011–12*, www.acma.gov.au/theACMA/Library/Corporate-library/Corporate-publications/communications-report-2011-12.

73 Table 2, Table 3 and Table 4 show the assumptions underlying the above cost estimates. There are additional savings from the wealth management operations of banks, being a total of approximately \$69 million a year. Additional details have not been included due to commercial sensitivity.

Table 2: Maximum savings estimates—Printing and postage costs

| | Small letters per year | Large letters per year | Cost of small letter | Cost of large letter | Total number of accounts | Annual cost of paper disclosure (total) | Assuming digital disclosures cost 5%, maximum annual cost savings are estimated at: |
|------------------------------|------------------------|------------------------|----------------------|----------------------|--------------------------|---|---|
| Banking—transaction accounts | 6 | 1 | \$1.32 | \$2.53 | 40,345,982 | \$421,060,755 | \$400,007,717 |
| Banking—wealth management | n/a | n/a | n/a | n/a | n/a | \$68,998,734 | \$65,548,797 |
| Superannuation | 1 | 1 | \$1.32 | \$2.53 | 28,794,934 | \$110,728,519 | \$105,192,093 |

Source: ASIC, industry response to CP 224, APRA, RBA and Australia Post.

Table 3: Savings estimates—Banking

| Email take-up rate | 80% | 46% ¹¹ |
|---|---------------|----------------------|
| 100% take-up saving | \$465,556,514 | \$465,556,514 |
| Actual saving (after accounting for email take-up rate) | \$372,445,212 | \$214,155,997 |

Source: ASIC, industry response to CP 224, APRA, RBA and Australia Post.

Table 4: Savings estimates—Superannuation

| Email take-up rate | 80% | 72% ¹² |
|---|---------------|---------------------|
| 100% take-up saving | \$105,192,093 | \$105,192,093 |
| Actual saving (after accounting for email take-up rate) | \$84,153,675 | \$75,738,307 |

Source: ASIC, industry response to CP 224, APRA and Australia Post.

74 These compliance cost savings are estimates only and are provided to give an indication of expected compliance cost savings. They are highly

¹¹ Assuming 80% total take-up, less 34% of consumers already digitally engaged.

¹² Assuming 80% total take-up, less 8% of consumers already digitally engaged.

dependent on assumptions, which have been made with input from industry participants, but nevertheless remain our assumptions.

75 Consultation suggests that, in many cases, providers will rely only on greater use of existing systems. We also understand from our consultations that any additional costs would be minor. Consequently, this compliance cost savings estimate does not incorporate a value for costs required to implement systems changes for providers.

Impact on consumers

76 The impact on consumers will be minimal because these proposals do not change the existing range of possible delivery methods, but merely make it possible for digital disclosure to be the default method of delivery. Except for fully digital products, which include as part of their terms and conditions that they are fully online and as such will have disclosures only available digitally, consumers may opt out of digital delivery.

77 Nevertheless, we expect fewer consumers to opt out of digital delivery compared with those who have previously opted in. Given continually increasing use of digital technology, particularly the internet and smartphones, we would expect these new digital disclosure recipients to fall into three broad categories (not including those consumers who opt out of digital disclosure):

- (a) those who prefer digital disclosure, but have not made the effort to opt in;
- (b) those who are indifferent to the method of disclosure; and
- (c) those who do not access the disclosure because of a lack of access to digital technology, not accessing relevant digital technology or because an addressed disclosure or message advising of the disclosure does not reach the consumer.

78 For the first two categories of consumer, digital disclosure will be a net positive. The benefits of this option include ease and convenience of use by consumers, including enabling disclosures to be viewed on mobile devices.

79 There are also time savings for consumers because issuers can deliver disclosures in real time, rather than waiting for post. Digital disclosure may assist people to be more organised with information and allow easier retrieval for review because digital information can be easier to file, categorise and search than paper.

80 The cost saving estimates in Table 5 are based on an assumed 12 minutes to opt in or out, and 2 minutes to shift channels. This is based on industry submissions, our knowledge of these processes and advice from OBPR.

Storage costs are estimated from commercially available costs of storing paper records and electronic data.

Table 5: Costs and savings for consumers

| Arising from | Saving/cost |
|---|--------------------|
| Reduced time needed for channel shifting | \$3,798,179 |
| Increased time needed for opting out (paper preference) | -\$8,020,346 |
| Reduced time needed for opting in (digital preference) | \$11,394,536 |
| Reduced costs of storage | \$2,033,233 |
| Total | \$9,205,602 |

Source: ASIC, industry submissions to CP 224, record storage facilities, Telstra data storage information and OBPR.

- 81 Only 6% of Australians have never accessed the internet, but in the third category (paragraph 77(c)), we expect that there may be a small number of consumers for whom a switch to default digital disclosure results in disclosure not being received or accessed. In some cases, this may have a neutral impact for particular consumers who are unlikely to engage with an alternative form of disclosure (such as printed).
- 82 However, to help ensure consumers do not miss out on important information, the default delivery method must provide opportunities to change delivery methods.
- 83 Our proposal under this option also includes guidance to providers to ensure that providers are aware that, regardless of the form of the disclosure, their obligation is to give it to their clients. If those clients are not able to access digital disclosures, the provider should provide an alternative method of disclosure to that client. It also includes guidance to providers as to how to make the transition for existing clients to digital disclosure—with appropriate notification and time to opt out.
- 84 We also encourage providers to monitor access to and engagement with digital disclosures—something that cannot be done with printed and posted disclosure, which can help identify those customers who are not receiving or engaging with disclosure.
- 85 As with all disclosure, we encourage providers to undertake consumer testing to identify what works and what does not in improving consumer engagement. The opportunity to do this is increased given the data generated from digital disclosure. This proposal will also free up resources that could be used for this purpose.

Other indirect impacts

- 86 The reduced use of paper and postage also has environmental benefits.
- 87 As the proposal is expected to reduce the use of postage and printing, there may be impacts on postal providers and through the paper manufacture value chain. To the extent printing is currently not conducted in-house for providers, there may be an indirect cost to printing businesses.

Option 3: Remove barriers to more innovative PDSs, SOAs and FSGs

- 88 This option makes minor changes to the legislative regime governing these disclosure documents to facilitate the development and use of more innovative formats for these disclosures.
- 89 In particular, this option will remove potential legal barriers to the use of more innovative PDSs, FSGs and SOAs, including providing relief from:
- (a) various provisions that require a copy of the PDS to be given on request;
 - (b) the requirement for certain PDSs under the shorter PDS regime to be a particular page length; and
 - (c) provisions that require the use of certain words on the cover or ‘at or near the front of’ a disclosure.
- 90 These particular parts of the legislation are ‘paper-centric’ and it is difficult to apply these to more innovative disclosure formats such as video or disclosures via apps.
- 91 In addition, we propose to update our guidance to explain how we see other parts of the legislation applying in the digital context. For example, we propose to make clear that it is open to a provider to have more than one version of a disclosure for the same product, such as a printable version and an interactive digital version.
- 92 We also propose to update our guidance to explain how general disclosure requirements, such as the requirement for disclosure to be ‘clear, concise and effective’, apply in the digital context.
- 93 The benefits of the measures to remove barriers to innovative disclosure are less likely to be realised immediately; rather, these changes are aimed towards ‘future-proofing’ the regulatory regime so that it can accommodate more innovative disclosures in ways that are not yet imagined.

Impact on consumers

- 94 We expect more innovative digital formats to go some way to improving consumer engagement with, and understanding of, disclosure. Digital disclosure has the potential to assist investor understanding by allowing interactivity and alternative presentation formats (such as video and audio).
- 95 By making the legislative regime more technology neutral, these proposals will enable providers to use a range of channels to communicate mandated disclosures to their clients. This means that providers are not restricted by the legislative regime and are able to use the formats and channels that work best.
- 96 As communications increasingly become digitised, our proposed updated guidance will also help to protect consumers by suggesting how we think providers can meet their general disclosure obligations in the digital context.

Impact on industry

- 97 These proposals will have no direct substantive cost impact on industry because they are intended to be facilitative. We expect that some industry participants will take advantage of our removal of barriers to develop more innovative disclosures. Where they choose to do this, we would expect industry to incur development costs; however, these will be to a degree and level of the particular participant's choosing since there will be no obligation on industry to develop innovative disclosures if they do not wish to.

Option 4: Take no action (status quo)

- 98 This option would see the default for disclosure delivery stay as printed and posted for most disclosures and would mean legal barriers would continue to inhibit more innovative disclosure formats.
- 99 Failing to take action to facilitate digital disclosure by making changes to achieve a technologically neutral legal framework may result in some providers being prevented from providing the disclosure options to their clients that their clients demand or that are most efficient for the provider.

Impact on industry

- 100 Without our proposals, the legal framework will remain biased towards printed and posted disclosures. This means that cost savings/red tape reduction will not be realised and industry will not be able to meet consumer demand.

Impact on consumers

- 101 These proposals are proactive and designed to lead to more positive outcomes, rather than mitigating or preventing any risks. However, retaining the status quo may result in a small detriment to investor and financial consumer confidence because a non-technology neutral system means that some consumers are currently missing out on the benefits of digital disclosure.
- 102 Statistics suggest that internet usage, including mobile internet usage, continues to rise.¹³ Although internet penetration overall is now rising at a slower rate, people are engaging more intensively online, and people are increasingly comfortable and expect to be able to conduct their everyday business digitally.
- 103 In addition, as more and more business is transacted digitally, there is a risk that consumers who do not wish to, or who are unable to, transact and communicate digitally, miss out on important information or opportunities. This regime puts in place safeguards to help ensure that consumers are given the opportunity to opt out of digital disclosure if they so choose, and provides guidance on good practice as financial services increasingly use digital channels.

¹³ For increased internet usage and the shift to mobile internet usage, see ABS 8153.0, *Internet activity, Australia*, June 2014 'Type of access connection', www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/8153.0Main%20Features1June%202014?opendocument&tabname=Summary&prodno=8153.0&issue=June%202014&num=&view=. For engaging more online, see ACMA, *Communications report 2013–14 series: Report 1—Australians' digital lives*, March 2015, www.acma.gov.au/theACMA/Library/Corporate-library/Corporate-publications/communications-report.

C Consultation

- 104 In Consultation Paper 224 *Facilitating electronic financial services disclosures* (CP 224), which also functioned as our options-stage Regulation Impact Statement, we consulted on proposals to further facilitate electronic financial services disclosure.
- 105 CP 224 was released on 14 November 2014. Submissions closed on 30 January 2015. Through CP 224, we proposed to:
- (a) *Amend our guidance on using digital addresses in RG 221*: Our current guidance suggests that additional, more stringent obligations apply where a provider wishes to use an electronic address for delivery (i.e. as compared with using a postal address), so that the provider must seek express consent to deliver to a digital address. In CP 224, we proposed to update our guidance in RG 221 to make it clear that there is no such additional requirement for digital delivery within the legislation.
 - (b) *Provide an additional method of delivery for most Ch 7 disclosures (where not already permitted)*: We proposed to provide additional relief to allow providers to make disclosure available on a website or other facility and notify clients that the disclosure is available.
 - (c) *Provide relief and guidance to overcome technical barriers to providing innovative PDSs*, including good practice principles to help ensure consumers receive clear, concise and effective disclosure when delivered in this format. We also consulted on whether ASIC should likewise address similar technical barriers to the provision of digital FSGs and SOAs.
- 106 We received 34 responses to CP 224 from businesses, industry representatives, consumer representatives and individuals.
- 107 We met with industry and consumer representatives, both during and after the formal consultation period. We also met with some individual financial services providers to obtain more detailed feedback on some of our proposals and sought further detailed information about cost savings.
- 108 We have reflected the feedback from submissions in our final recommendations.
- 109 Submissions received were generally supportive of the principle of further facilitating digital disclosure, with consumer representatives tending to qualify support with the need to ensure that proposals are implemented in a way that does not compromise consumer outcomes.
- 110 Submissions detailed a number of benefits expected to result from our proposals—in particular, speed, convenience, reliability and security, and minimising cost and environmental impacts.

- 111 Submissions from consumer groups in particular also acknowledged that moving to an increasingly digital environment is inevitable, and supported ASIC managing this change through good practice guidance.
- 112 The key risk from these proposals, as noted in some submissions, is to investor and financial consumer trust and confidence. While the overarching goal is to remove barriers to making disclosure more efficient and more innovative, there is a possibility that some consumers will be less likely to receive or read, consume and understand disclosure material delivered digitally if they have not specifically requested disclosure in that way.
- 113 Consumer representatives noted that any risks associated with more digital disclosure would be most acute for certain groups of consumers, including older Australians, those who live remotely, those on lower incomes and those with lower literacy.
- 114 On the other hand, some consumers will also be *more* likely to read, consume and understand disclosure material delivered digitally.
- 115 Submissions (including from consumer groups) supported the overarching goal and the principle of facilitating digital disclosure, provided consumers had the opportunity to choose how to receive disclosures, subject to clear understanding of the terms and conditions they agreed at the time of purchasing the financial product or service.
- 116 We considered these risks and our recommended proposals require that, where a provider chooses to use digital delivery as a default, consumers must be given a reasonable opportunity to opt out of this method of delivery.

D Conclusion and recommended option

- 117 Overall, we see that the significant compliance cost savings, as well as the small consumer benefit we expect to arise from these proposals, outweigh the small potential consumer detriment, particularly when our mitigating measures are taken into account.
- 118 On balance, and given the other benefits of this proposal, we think the risk of consumer detriment, which is small, is outweighed by the likely benefits.
- 119 The failure to grant relief and publish updated guidance (particularly after consultation) could result in ASIC being insufficiently progressive and supportive of business, particularly given the strong support for both our proposals and for technology neutral regulation in general, including in the Financial System Inquiry final report.
- 120 As such, our recommended option is Option 1, the combined measures to facilitate digital disclosure.
- 121 Following consultation, we included an additional relief measure in our recommended option to give certainty to a trustee of a superannuation fund that obtains an email address for a member as part of an employer-nominated superannuation arrangement, that the trustee can use that address to deliver disclosure ('employer-provided email addresses').
- 122 Following consultation, we also include in our recommended option further detail in our updated guidance giving more clarity on certain issues, such as employer-provided email addresses and the use of client contact details, and ensuring our expectations about consumer protections are conveyed, particularly during the transition to digital disclosure.

E Implementation and review

- 123 The recommended option will be implemented using two ASIC instruments. The instruments will replace [CO 10/1219].
- 124 The first instrument will provide for the additional delivery method described in Option 1 above, as well as giving relief to make clear that superannuation providers are able to use an electronic address provided by an employer in the course of the employee being joined to an employer-nominated (default) superannuation fund.
- 125 Specifically, the instrument will do this by allowing providers to provide digital disclosure by default if they so choose, as long as consumers can opt out of this and elect to receive disclosure via an alternative format. Providers will need to notify their clients that disclosure will be made via a digital facility, and clients will have the opportunity to opt out.
- 126 This instrument also allows a trustee of an employer-nominated superannuation fund to use an email address for the client provided by the employer to satisfy the trustee's disclosure obligations, as long as the disclosure is accompanied by a statement to the effect that the client can request an alternative form of delivery. This is to address a technical barrier in the law to the use of employer-provided email addresses in certain circumstances, which was identified during our consultation.
- 127 The second instrument removes several technical barriers to the use of more innovative forms of disclosure by exempting digital content from page length requirements for certain PDSs, enabling the provider to send a different PDS where a copy of a PDS is requested, and providing relief from various requirements that specify that certain words must be used 'on the cover of', or 'at or near the front of', a disclosure.
- 128 In addition, ASIC will release updated guidance in Regulatory Guide 221 *Facilitating digital financial services disclosures* (RG 221).
- 129 The new instruments made as part of the implementation of the recommended option will be reviewed as part of the normal sunseting process.
- 130 In addition, given the Financial System Inquiry's recommendations on digital disclosure, we expect ongoing consideration of methods to further facilitate digital disclosure.

F Regulatory Burden and Cost Offset (RBCO) Estimate table

Average annual compliance costs (from business as usual)

| Costs (\$m) | Business | Community organisations | Individuals | Total cost |
|--------------------|------------------|--------------------------------|--------------------|-------------------|
| Total by sector | \$-289.9 million | \$0 | \$-9.2 | \$-299.1 million |
