

ASIC Corporations (Amendment) Instrument 2016/103

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (*ASIC*) makes *ASIC Corporations (Amendment) Instrument 2016/103* (the **amending instrument**) 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.

Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of the Act), where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

1. Background

ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647 (the **principal instrument**) facilitates digital financial services disclosure by providing relief to enable product issuers to more easily deliver disclosure documents electronically.

This principal instrument further facilitates the electronic delivery of financial services disclosure documents by enabling electronic delivery to be the 'default' option for disclosure, if the provider chooses, subject to safeguards designed to ensure investors and consumers do not miss the opportunity to choose an alternative method of delivery.

The principal instrument enables a provider to make financial service disclosures electronically to investors provided it has first sent a notice to the investor of its intention to do so and the investor has not opted out of receiving disclosures electronically.

If the investor has not opted out within 7 days, the provider may use the method described in the principal instrument to satisfy their disclosure obligation. That is, the provider may make the disclosure available electronically and notify the investor or consumer (the 'publish and notify' method). This notification may be in printed or electronic form and should contain a

statement that the provider has made the relevant disclosure available by electronic means, and include instructions on how the investor can use the electronic means to access the disclosure.

The provider may choose to provide the disclosure concurrently with the notification, but would not satisfy their obligation to deliver the disclosure until the 7 day period had passed without an opt-out requirement.

The principal instrument also enables a default superannuation fund trustee to meet its obligation to deliver a PDS to an employer supplied email address, without the member's consent, when certain conditions are met.

2. Purpose of the instrument

The purpose of the amending instrument is to amend the principal instrument in three key respects.

First, to simplify the disclosure notification involved in the 'publish and notify' method of disclosure that the principal instrument creates where the provider does not intend to issue a disclosure within the first 7 days.

Second, to enable default superannuation fund trustees to use the 'publish and notify' method of disclosure, using an employer provided electronic address, in relation to disclosures under sections 1015C, 1017B, 1017D and 1017DA of the Act.

Finally, to ensure that successor funds can use an employer provided email address that was provided to a predecessor fund.

3. Operation of the instrument

The amending instrument amends subsection 5(1) of the principal instrument by amending the notional definition of *nominated electronic means* inserted into section 761A of the Act by subsection 5(1) so that:

- (a) the first notification required under the 'publish and notify' method need not include the message that an election not to receive disclosure via the nominated electronic means will apply to any disclosures made during the first 7 days where the provider has no grounds for believing it will send such a disclosure; and
- (b) default superannuation fund trustees may use the electronic address for a member provided by an employer to disclose to the member using the 'publish and notify' method of disclosure, provided that the trustee has no reasonable grounds to believe that the address is not a current address and certain other conditions are satisfied.
- (c) successor default superannuation funds can use the electronic address for a member where the address has been supplied by the employer to a predecessor fund.

The amending instrument amends subsection 5(9) of the principal instrument in relation to superannuation fund trustees who use an electronic address for a member provided by an employer. When the trustee is using the 'publish and notify' method, the instrument requires that, if within 14 days of sending a notice under that method, the trustee has reasonable grounds for believing that the electronic address is not current, the trustee must make the relevant disclosure by another method. The amending instrument also amends subsection 5(9) of the principal instrument to allow successor default superannuation funds to use the electronic address for a member where the address has been supplied by the employer to a predecessor fund

4. Consultation

ASIC engaged in targeted consultation on the amending instrument as the amendments made by the instrument are of a minor nature. ASIC engaged in comprehensive consultation on the principal instrument and the policy underlying the principal instrument in *Consultation Paper 224 Facilitating Electronic Financial Services Disclosure* and through various individual and group meetings. The Office of Best Practice Regulation has confirmed that a RIS is not required as the amending instrument is of a minor and technical nature only.

Statement of Compatibility with Human Rights

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

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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 principal instrument further facilitates digital financial services disclosure by providing relief to enhance the ability to product issuers to make disclosure documents available electronically.

The amending instrument simplifies a notification requirement and extends the relief to certain superannuation trustees.

Human rights implications

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

Conclusion

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