
EXPLANATORY STATEMENT for
ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156
and

ASIC Corporations (Repeal) Instrument 2016/1157

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes *ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156* under subsections 741(1), 992B(1) and 1020F(1) of the *Corporations Act 2001* (the **Act**).

Paragraph 741(1)(a) of the Act provides that ASIC may exempt a person from a provision of Chapter 6D of the Act.

Paragraph 741(1)(b) of the Act provides that ASIC may declare that Chapter 6D of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

Paragraph 992B(1)(a) of the Act provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.8 of the Act.

Paragraph 1020F(1)(a) of the Act provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.9 of the Act.

ASIC makes *ASIC Corporations (Repeal) Instrument 2016/1157* under subsections 741(1), 992B(1) and 1020F(1) of the Act.

1. Background

A nominee and custody service is an arrangement that does not have the characteristics that normally mean a platform is a managed investment scheme. A nominee and custody service has the following features:

- (a) assets in which a client has an economic interest (or expects to derive a benefit) may be acquired or held by a custodian (which may or may not be the operator);
- (b) the client has the sole discretion to decide what (but not necessarily when) assets are acquired or disposed of, except where:
 - (i) there are prior written directions that the client has agreed not to vary, acquire or dispose of a particular asset in particular circumstances (other than a circumstance that is affected by a discretion of an operator); and

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- (ii) the client has authorised an operator or another person to give directions on their behalf, for the purpose of the other person receiving or securing payment of money owing by the client to the person; and
 - (c) the service is not an investor directed portfolio service (**IDPS**) or provided under an IDPS-like scheme.

Under the *Legislation Act 2003*, legislative instruments cease automatically, or 'sunset', after 10 years, unless action is taken to exempt or preserve the instrument. ASIC's current relief instrument relating to nominee and custody services, [CO 02/295] (**[CO 02/295]**), was due to sunset on 1 April 2017. ASIC has reviewed [CO 02/295] and has decided to extend the operation of [CO 02/295], with changes, by making the *ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156*.

ASIC considers that a nominee and custody service is generally not considered to be a managed investment scheme and therefore relief from the requirement to register a scheme in Chapter 5C of the Act is unnecessary. ASIC has formed the view that, other than the Chapter 5C relief, the relief in [CO 02/295] generally continues to form a necessary and useful part of the legislative framework because it reduces business costs that may be disproportionately burdensome by providing conditional relief from certain requirements in the Act relating to the fundraising and financial product disclosure provisions for:

- (a) persons who are operating, or are involved in the operation or promotion of, a nominee and custody service; and
- (b) persons who are offering securities or financial products for issue or sale resulting in acquisition of the securities or financial products by a custodian as part of the nominee and custody service.

2. Purpose of the instrument

An operator of a nominee and custody service will generally require an Australian financial services (**AFS**) licence to arrange for the issue of financial products on behalf of its client. Further, holders of assets held through a nominee and custody service will require an AFS licence authorising the provision of a custodial or depository service.

A nominee and custody services operator must comply with the requirements in *ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156*, which modifies the Act to require a nominee and custody service operator to meet certain obligations and be exempt from certain other obligations. *ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156* provides an exemption for persons who are involved in operating or promoting a nominee and custody service. These persons are exempt from:

- (a) the requirements of Parts 6D.2 and 6D.3 of the Act applying to offers of equitable interests in securities acquired through a nominee and custody service (this exemption applies to persons who do not issue the securities acquired through a nominee and custody service); and

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- (b) the financial product disclosure provisions and other provisions relating to the issue, sale and purchase of financial products in Part 7.9 of the Act and the hawking provisions in Division 8 of Part 7.8 of the Act relating to financial products acquired through a nominee and custody service.

ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156 also modifies Chapter 6D of the Act to provide that:

- (a) A person who makes an offer of accessible securities through a nominee and custody service that needs disclosure must promptly notify the operator or custodian if:
- (i) a supplementary or replacement document has been lodged in relation to the disclosure document; or
 - (ii) the person is prohibited under Division 1 of Part 6D.3 of the Act from making offers of securities under the disclosure document; or
 - (iii) the disclosure document is withdrawn before the expiry date specified in the disclosure document.
- (b) Nothing in this Part or Part 6D.3 of the Act requires a disclosure document for offers of accessible securities through a nominee and custody service to include information about the nominee and custody service or the rights attached to the accessible securities where they differ from the rights that a person would have if they acquired the accessible securities directly.

A person cannot rely on the exemption in *ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156* if ASIC has given a notice in writing to the person stating that it cannot rely on that subsection and has not withdrawn the notice.

The purpose of *ASIC Corporations (Repeal) Instrument 2016/1157* is to repeal [CO 02/295].

3. Operation of the instrument

Paragraph 5(1) of the *ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156* provides relief from fundraising, hawking and most of the financial product disclosure provisions of the Act to an operator of a nominee and custody service:

- (a) the operator is exempt from the requirements in Parts 6D.2 and 6D.3 from disclosures to investors about securities for an offer to issue equitable rights or interests in accessible securities arising because of an offer to hold, or arrange for the holding of, the accessible securities through the nominee and custody service; and
- (b) Division 8 of Part 7.8, or Part 7.9, of the Act in relation to a financial product that is an equitable right or interest in an accessible financial product arising because

of a holding, or an offer to hold or arrange for the holding of, the accessible financial product through the nominee and custody service. This exemption does not apply to accessible investments held through the nominee and custody service.

Paragraph 6(1) of the *ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156* provides a similar exemption to the exemption in paragraph 5(1) to a person (other than an operator) who is involved in the operation or promotion of a nominee and custody service.

Paragraphs 5(2) and 6(2) of the *ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156* provide that a person cannot rely on an exemption in the instrument if ASIC has given the person a notice in writing stating that the person cannot rely on the exemption.

Paragraph 8 of the *ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156* provides for the notification requirements for a person who makes an offer of accessible securities through a nominee and custody service that needs disclosure.

Paragraph 8 of the *ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156* provides for certain requirements that apply to nominee and custody service operators:

- (a) notional subsection 912AE(2) requires that an operator or a custodian acting on its behalf, must not acquire an interest in an unregistered managed investment scheme for a client as part of a nominee and custody service, where had the client acquired the interest itself directly, the scheme would have been required to be registered;
- (b) notional subsection 912AE(3) requires that an operator or a custodian acting on its behalf, must not acquire accessible securities for a client as part of a nominee and custody service, unless the operator reasonably believes the client has been given the relevant disclosure document and that it is not defective, or the client could have lawfully been offered, issued or sold the securities without being required to be given a disclosure document;
- (c) before an operator or a custodian acting on its behalf, acquires accessible financial products under a direction from a client, it must ensure that:
 - (i) under notional subsections 912AE(4)(a), (5), (6) and (7) of the Act, the client has been given the relevant product disclosure statement, except in certain circumstances including, where the operator reasonably believes the client has been given copy of the product disclosure statement that is not defective; or the accessible financial product could lawfully have been offered, issued or sold to the client directly without a product disclosure statement; and
 - (ii) under notional subsections 912AE(4)(b) and 912AE(8) of the Act, for acquisitions by the operator for retail clients, the operator reasonably believes that the issuer or seller of the financial product has a dispute resolution system that covers complaints against the issuer or seller by retail clients of the operator, and the issuer or seller complies with subsection 912A(2);

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- (d) notional section 912AE(9) of the Act requires that a nominee and custody services operator must take reasonable steps to facilitate resolution of disputes between investors and product issuers of accessible financial products, including informing members whether issuers have internal dispute resolution systems that are available to the investors; and
 - (e) notional subsection 912AE(10) of the Act provides for various definitions that apply to notional section 912AE, including for example the definition of an operator (the definition requires that the custody services operator must be a body corporate that holds an AFS licence specifically authorising it to provide a custodial or depository service).

Paragraph 9 of the *ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156* provides that an operator of a nominee and custody service or a custodian does not need to give a client a product disclosure statement for a regulated acquisition that complies with notional subsections 912AE(4)(a), (5), (6) and (7) of the Act.

Nominee and custody service operators must comply with the requirements in *ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156* or will be in breach of AFS licensee obligations to comply with the relevant financial services laws. Nominee and custody service operators must report breaches as required by section 912D of the Act.

ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156 operates from the day after it is registered under the *Legislation Act 2003*.

4. Consultation

ASIC consulted with stakeholders through Consultation Paper 264 *Remaking ASIC class order on nominee and custody services and proposed changes to platforms policy* (CP 264) which was issued for comment from 21 July 2016 until 1 September 2016.

CP 264 proposed amendments to ASIC's related policy for IDPS and IDPS-like schemes. A draft version of *ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156* was attached to CP 264. ASIC received two submissions in response to CP 264, one of which was confidential.

The Office of Best Practice Regulation advised that a Regulation Impact Statement is not required.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156

and

ASIC Corporations (Repeal) Instrument 2016/1157

ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156 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*.

ASIC Corporations (Repeal) Instrument 2016/1157 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

ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156 remakes ASIC Class Order [CO 02/295] as a new legislative instrument and provides exemptions from requirements in the *Corporations Act 2001* including:

- (a) Parts 6D.2 and 6D.3 applying to offers of equitable interests in securities acquired through a nominee and custody service;
- (b) financial product disclosure provisions and other provisions relating to the issue, sale and purchase of financial products in Part 7.9; and
- (c) hawking provisions in Division 8 of Part 7.8 relating to financial products acquired through a nominee and custody service.

ASIC Corporations (Repeal) Instrument 2016/1157 repeals ASIC Class Order [CO 02/295].

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.

Australian Securities and Investments Commission