

# ASIC CORPORATIONS (AMENDMENT) INSTRUMENT 16/1212

## 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 16/1212 (Instrument) (under paragraphs 1020F(1)(a) and (c) of the *Corporations Act 2001* (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.

Paragraph 1020F(1)(c) of the Act 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 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.

The Instrument amends ASIC Class Order [CO 13/1621] (**Class Order**).

### 1. Background

Paragraph 1016A(2)(a) of the Act requires a person (the **issuer** or **seller**) to only make a *restricted issue* or a *restricted sale* of a *relevant financial product* to a person (the **recipient**) if the issue or sale is made pursuant to an *eligible application* made to the issuer or seller by the recipient. In this explanatory statement, the terms in *italics* are defined in the Act.

In particular, *relevant financial product* includes a *managed investment product*, which captures an interest in a *registered scheme*. Further, *eligible application* is broadly an application made using an application form that was included in, or accompanied, the relevant Product Disclosure Statement (**PDS**) that was given to the applicant and not *defective* as at the time when the application was made, or its copy or direct derivation.

### Relief under the Class Order applicable to simple managed investment schemes

ASX Limited ACN 008 624 691 and ASX Settlement Pty Limited ACN 008 504 532 (collectively, **ASX**) sought relief from section 1016A to facilitate the introduction of its 'ASX Managed Fund Service' that has since been renamed as 'mFund Settlement Service' (**mFund**). The mFund is a service where 'settlement participants' receive an investor's instruction to acquire or redeem interests in a registered scheme and complete an application form on the Clearing House Electronic Sub-register System (**CHESS**) that would electronically transmit the information to the responsible entity. However, mFund is not a

Explanatory Statement –  
**ASIC CORPORATIONS (AMENDMENT) INSTRUMENT 16/1212**

*licensed market*, the registered scheme would not be *listed* and interests in the scheme are not *quoted* or *admitted to quotation* and cannot be *traded* on mFund. Rather, the registered schemes will be ‘admitted to participate’ in mFund by ASX.

In May 2013, ASIC consulted on granting the relief the ASX sought from the application form requirements in section 1016A for mFund in Consultation Paper 208: *ASX Managed Funds Service: Relief from the application form requirement (CP 208)*. Submissions received in response to the consultation were largely supportive of ASIC granting the relief. Following industry consultation, ASIC issued the Class Order.

**Amendment to the Class Order to extend the relief to beyond the simple managed investment schemes**

After operating mFund since May 2014, the ASX wished to expand the types of funds that can be allowed to operate through mFund. Initially, mFund was restricted to only simple managed investment schemes.

The ASX proposed to expand the universe of eligible funds to a broader range of managed investment schemes that will be subject to certain admission controls, operational controls and additional disclosure requirements.

As part of this expansion, the ASX submitted a formal application for ASIC to modify the Class Order in September 2016. This modification is necessary because by not making provision for supplementary PDSs, the Class Order only catered to simple managed investment schemes that are offered pursuant to shorter PDSs. In contrast, the issuers of the expanded products offer their products by issuing long form PDSs. Long form PDSs may be supplemented by issuing a supplementary PDS.

**2. Purpose of this instrument**

The purpose of the Instrument is to amend Class Order [CO 13/1621] so that the mFund system can be used by issuers of products other than simple managed investment schemes. This means that an issuer can now provide either (in the case of a simple managed investment scheme) a PDS, or else, (in the case of a non simple managed investment scheme) a PDS and any supplementary PDSs that supplements the PDS, electronically to an acquirer (investor).

**3. Operation of this instrument**

The Instrument amends the Class Order to refer to a PDS and any supplementary PDS that supplements the PDS.

The result of the amendment is that a responsible entity can issue an interest in a registered scheme to the investor in response to a message received electronically on behalf of the investor through mFund system and to rely on an electronic confirmation accompanying the application that the investor was given the PDS, or the PDS and any supplementary PDSs that supplement the PDS, before the message was sent to the responsible entity.

Explanatory Statement –  
**ASIC CORPORATIONS (AMENDMENT) INSTRUMENT 16/1212**

Schedule 1 is the operative part of the Instrument. In Schedule 1:

Item 1 in Schedule 1 introduces new numbering (i) and (ii) to separate the original statements “has been prepared by the responsible entity” and “was not defective at the time the Application was made”.

Item 2 in Schedule 1 modifies paragraph 7 of the Class Order. The modification to Paragraph 7 inserts notional subsection 1016(2C) of the Act. Notional subsection 1016(2C) applies notional subsection 1016(2A) in relation to a PDS that has been supplemented by one or more Supplementary PDS as if a reference to a PDS were a reference to a PDS and each supplementary PDS which supplements it.

Furthermore, notional subsection 1016(2C) applies notional subsection 1016(2A) in relation to a PDS that has been supplemented by one or more Supplementary PDS as if a reference to a date of the PDS were a reference to the most recent supplementary PDS which supplements it. Instead of the identification of the PDS by the date of the PDS, the identification of what is provided to an acquirer is now the date of the PDS, or the most recent date of a supplementary PDS that supplements the PDS.

Item 3 in Schedule 1 amends the date of the ASX Settlement Operating Rules and ASX Operating Rules that are referred to in the Class Order. The ASX had amended the ASX Settlement Operating Rules and ASX Operating Rules to incorporate certain admission controls, operational controls and additional disclosure requirements to cater to the expanded range of products available in mFund. The amended date is to refer to the new versions of the rules.

Item 4 in Schedule 1 reorders the definitions in paragraph 8 of the Class Order alphabetically.

Item 5 in Schedule 1 inserts a new paragraph 9 into the Class Order. Paragraph 9 of the Class Order applies paragraphs 5 and 6 of the Class Order in relation to a PDS that has been supplemented by one or more supplementary PDS as if a reference to a PDS in those paragraphs was a reference to a PDS and each supplementary PDS which supplements it.

Furthermore, the newly inserted paragraph 9 of the Class Order applies paragraphs 5 and 6 (other than sub-subparagraph 5(b)(ii)) of the Class Order in relation to a PDS that has been supplemented by one or more supplementary PDS as if a reference to the date of a PDS was a reference to the date of the most recent supplementary PDS that supplements it. The exception in sub-subparagraph 5(b)(ii) applies because in determining whether a PDS is defective for the purposes of sub-subparagraph 5(b)(ii), information in a supplementary PDS that supplements the PDS is taken to be contained in the PDS: see the definition of *defective* in subsection 1016A(1) of the Act.

#### **4. Consultation**

ASX’s consultation with mFund issuers and brokers indicates general support for the expansion and the proposed amendment to the Class Order. The ASX also undertook a

December 2016

Page 3

Explanatory Statement –  
**ASIC CORPORATIONS (AMENDMENT) INSTRUMENT 16/1212**

further consultation with six issuers in relation to the amendment to the Class Order made by this Instrument. The outcome of this consultation was that the issuers were supportive of the changes and did not have any issue with the proposed system.

We made a preliminary assessment that the Class Order modification is minor and machinery in impact and therefore does not require a RIS. The OBPR approved of our assessment as not requiring a RIS as reference OBPR 21594 on 5 December 2016.

Explanatory Statement –  
**ASIC CORPORATIONS (AMENDMENT) INSTRUMENT 16/1212**

**Statement of Compatibility with Human Rights**

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

**ASIC CORPORATIONS (AMENDMENT) INSTRUMENT 16/1212**

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 of the Instrument**

ASIC Class Order [CO 13/1621] (***Class Order***) provides conditional relief from the application form requirement in the *Corporations Act 2001* for responsible entities that offer interests in registered managed investment schemes through an electronic application and settlement facility known as mFund and operated by ASX Limited or by ASX Limited and ASX Settlement Pty Limited.

Originally, the mFund facility only permitted the offer of interests in simple managed investment schemes and, consistently with the regime applying to simple managed investment schemes, the Class Order only contemplated that a Product Disclosure Statement (and not a Supplementary Product Disclosure Statement) would be used in relation to such offers.

In order to facilitate the operation of mFund beyond simple managed investment schemes, the Instrument amends the Class Order to make provision for both a Product Disclosure Statement and a Supplementary Product Disclosure Statement to be used in relation to offers of interests in schemes that are not simple managed investment schemes.

**Human rights implications**

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

**Conclusion**

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