

# **EXPLANATORY STATEMENT for ASIC Corporations (Amendment) Instrument 2017/1138**

Prepared by the Australian Securities and Investments Commission

## *Corporations Act 2001*

The Australian Securities and Investments Commission (**ASIC**) makes *ASIC Corporations (Amendment) Instrument 2017/1138* (the **Amendment Instrument**) under subsection 1020F(1) of the *Corporations Act 2001* (the **Act**).

Subsection 1020F(1) of the Act provides that ASIC may:

- (a) exempt a person or financial product or a class of persons or financial products from all or specified provisions of Part 7.9 of the Act; or
- (b) declare that Part 7.9 of the Act applies in relation to a person or 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 Amendment Instrument amends ASIC Class Order [CO 14/1252] (**JCO 14/1252**).

## **1. Background**

Schedule 10 to the *Corporations Regulations 2001* (the **Regulations**) was introduced in 2005 and sets out requirements for the disclosure of fees and costs of superannuation and managed investment products in Product Disclosure Statements and in periodic statements that must be given to product holders.

Stronger Super reforms introduced from 1 July 2013 included a number of amendments to the Regulations. Some of the amendments caused unintended

inconsistencies in terminology between Schedule 10 and Schedules 10D and 10E to the Regulations that apply to short form superannuation Product Disclosure Statements and registered managed investment scheme Product Disclosure Statements, respectively. The Stronger Super reforms also included some minor drafting anomalies that could be interpreted in a way that did not reflect the intention with which they were made.

In 2013/14, ASIC undertook a review of industry fee and cost disclosure practices. A key finding of this review was that some industry participants were adopting various interpretations of Schedule 10 to the Regulations, in particular interpretations of ‘indirect costs’ for superannuation products and of ‘management costs’ for managed investment products. For example, some products issuers had formed the view that, contrary to the intention of the Regulations, the Regulations do not require costs associated with investing through interposed vehicles to be included in their products’ indirect costs or management costs. In response to the review, after consultation with industry and relevant stakeholders, on 8 December 2014 ASIC made [CO 14/1252] which revised some of the definitions in Schedule 10, including the indirect cost and management cost definitions, and clarified the costs that must be disclosed, in keeping with the intended effect of Schedule 10 to the Regulations. [CO 14/1252] also addressed some provisions that could be interpreted in an anomalous way that were included in the Regulations as part of the Stronger Super reforms.

Following the release of [CO 14/1252], ASIC consulted on revisions to ASIC Regulatory Guide 97: *Disclosing fees and costs in PDSs and periodic statements (RG 97)*. In response to this consultation ASIC received feedback from industry indicating that amendments to [CO 14/1252] were required.

ASIC has since made a number of legislative instruments clarifying:

- (a) the definitions of ‘interposed vehicle’ and ‘indirect cost’;
- (b) how derivative fees and costs need to be disclosed as part of indirect costs;
- (c) the requirements for periodic statements.

ASIC has also defined borrowing costs, to assist in cost disclosure.

On 1 November 2017, in response from feedback across the industry around challenges with the implementation of [CO 14/1252] and RG 97, ASIC announced that it would work with an external expert to conduct a review of the fees and costs disclosure regime (*Review*) to ensure that it is best meeting in practice the objective of greater transparency for consumers. The Review is expected to be concluded in the first half of 2018.

## 2. Purpose of the instrument

The purpose of the Amendment Instrument is to amend [CO 14/1252] which modifies the Act and Schedule 10 to the Regulations.

Currently Schedule 10 to the Regulations as modified by [CO 14/1252] provides for certain disclosure obligations arising in relation to periodic statements for reporting periods prior to 30 June 2018 to operate differently to the disclosure obligations applying for reporting periods on or after 30 June 2018. Similarly currently Schedule 10 as modified by [CO 14/1252] provides for superannuation trustees to deal with property costs in PDSs given before 30 September 2018 by disclosing these in the Additional Explanation of Fees and Costs rather than including these as part of investment fees (as would occur for PDSs given on or after 30 September 2018). These disclosure obligations were intended to be interim arrangements, in recognition of the need to change internal systems in relation to the production of periodic statements and to allow additional time for discussions with the industry about how to calculate property costs.

The Amendment Instrument extends the time period for these interim arrangements for an additional year. The Review currently underway may potentially recommend that ASIC make modifications to Schedule 10 of the Regulations, via amendments to [CO 14/1252], which ASIC would need to consider. ASIC wishes to extend the time period for the interim arrangements so that industry are not required to incur additional time and expense where there is uncertainty as to whether or what further amendments to disclosure obligations may be made.

### **3. Operation of the instrument**

[CO 14/1252] makes various modifications to the provisions of Schedule 10 of the Regulations. The Amendment Instrument amends [CO 14/1252] as specified in Schedule 1 to the Amendment Instrument.

Items 4, 5 and 7 of Schedule 1 to the Amendment Instrument extend the time period for compliance with Schedule 10 of the Regulations as modified by [CO 14/1252] which set out ongoing requirements in relation to the disclosure of certain costs in periodic statements for superannuation products.

Item 6 of Schedule 1 to the Amendment Instrument extends the time period for compliance with Schedule 10 of the Regulations as modified by [CO 14/1252] which set out ongoing requirements in relation to the disclosure of certain costs in periodic statements for both superannuation products and managed investment products.

Item 8 of Schedule 1 to the Amendment Instrument extends the time period for compliance with Schedule 10 of the Regulations as modified by [CO 14/1252] which sets out ongoing requirements in relation to the disclosure of certain costs in periodic statements for managed investment products.

Items 1, 2, 3 and 9 of Schedule 1 to the Amendment Instrument extend the time period for compliance with Schedule 10 of the Regulations as modified by [CO

14/1252] and modifies [CO 14/1252] itself in relation to requiring property operating costs to be disclosed as part of the investment fee or indirect costs in a Product Disclosure Statement for superannuation products.

#### **4. Consultation**

The amendments made by the Amendment Instrument are in response to an application made by a group of industry bodies which represent a significant group of superannuation trustees and responsible entities of managed investment schemes.

The Office of Best Practice Regulation has advised that a RIS is not required in order to make the Amendment Instrument.

## Statement of Compatibility with Human Rights

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

### ASIC Corporations (Amendment) Instrument 2017/1138

ASIC Corporations (Amendment) Instrument 2017/1138 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 (Amendment) Instrument 2017/1138 amends ASIC Class Order [CO 14/1252].

[CO 14/1252] relates to Schedule 10 to the Corporations Regulations 2001 (the Regulations). Schedule 10 sets out requirements for the disclosure of fees and costs of superannuation and managed investment products in Product Disclosure Statements and in periodic statements that must be given to members.

Currently [CO 14/1252] provides for certain disclosure obligations arising in relation to periodic statements for reporting periods prior to 30 June 2018 to operate differently to the disclosure obligations applying for reporting periods on or after 30 June 2018. Similarly currently [CO 14/1252] provides for superannuation trustees to deal with property costs in PDSs given before 30 September 2018 by disclosing these in the Additional Explanation of Fees and Costs rather than including these as an investment fee (as must occur for PDSs given on or after 30 September 2018). These disclosure obligations were intended to be interim arrangements.

On 1 November 2017, in response from feedback across the industry around challenges with the implementation of [CO 14/1252] and Regulatory Guide 97: *Disclosing fees and costs in PDSs and periodic statements*, ASIC announced that it would work with an external expert to conduct a review of the fees and costs disclosure regime (*Review*) to ensure that it is best meeting in practice the objective of greater transparency for consumers. The Review is expected to be concluded in the first half of 2018.

The Review may potentially recommend that ASIC make amendments to [CO 14/1252], which ASIC would need to consider. ASIC wishes to extend the time period for the interim arrangements so that industry are not required to additionally incur time and expense where there is uncertainty as to whether further amendments to disclosure obligations will be made.

#### 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**