

ASIC CLASS ORDER [CO 13-762]

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes ASIC Class Order [CO 13-762] under subsections 341(1), [601QA\(1\)](#), [741\(1\)](#), 926A(2), 992B(1) and [1020F\(1\)](#) of the *Corporations Act 2001* (the Act).

Subsection 341(1) of the Act provides that ASIC may make an order in writing in respect of a specified class of companies, registered schemes or disclosing entities, relieving directors, the companies, registered schemes or disclosing entities themselves, or auditors of the companies, registered schemes or disclosing entities from all or a specified requirements of Parts 2M.2, 2M.3 and 2M.4 (other than Division 4) of the Act.

Paragraph 601QA(1)(b) of the Act provides that ASIC may declare that Chapter 5C of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

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 926A(2)(c) of the Act provides that ASIC may declare that Part 7.6 (other than Divisions 4 and 8) 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.

Paragraph 992B(1)(a) of the Act provides that ASIC may exempt a person or class or 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.

Paragraph 1020F(1)(c) of the Act provides that ASIC may declare that Part 7.9 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.

1. Background

A review of ASIC's policy on the regulation of platforms was initiated by ASIC to address existing and emerging issues in the platforms sector. The platforms sector has changed and grown significantly since our policy was first developed, and continues to develop, expand and present new challenges. Given this, we recognised a corresponding need to review and update our regulation of investor directed portfolio services (IDPS) and IDPS operated through a registered managed investment scheme (IDPS-like schemes) (together, referred to as platforms).

The review of our regulation of platforms follows a consultation paper published in March 2012, setting out our proposals and supporting rationale for reviewing our regulatory approach to platforms: see Consultation Paper 176 *Review of ASIC policy on platforms: Update to RG 148* (CP 176).

As part of this review, ASIC proposed to retain key aspects of its current regulatory approach to IDPS-like schemes, including continuing to require Product Disclosure Statements (PDS) for IDPS-like schemes and requiring that clients of such schemes continue to have access to the same standards of information about products available through the scheme that they would have had if they were acquiring those products directly. In addition, ASIC proposed certain changes to its regulatory approach, for example, enhanced disclosure about the differences between investing in an IDPS-like scheme and investing directly.

On 28 June 2013, ASIC released RG 148 *Platforms that are managed investment schemes* (RG 148) to explain our objectives when regulating platforms, set out the requirements for operating a platform and the disclosure obligations of operators of IDPS and responsible entities of IDPS-like schemes, and provide guidance to people who provide financial product advice on platforms.

2. Purpose of the class order

When regulating a platform that is an IDPS-like scheme, ASIC requires that the responsible entity of the IDPS-like scheme hold an Australian financial services (AFS) licence with an authorisation to operate an IDPS-like scheme. Responsible entities of IDPS-like schemes must also comply with the requirements in ASIC Class Order 13-762 *Investor directed portfolio services provided through a registered managed investment scheme* ([CO 13-762]), which replaces ASIC Class Order 02-296 *Investor directed portfolio-like services provided through a registered managed investment scheme* ([CO 02-296]).

ASIC treats interests in IDPS-like schemes as financial products under the Act and applies the financial product advice provisions of the Act where advice is given about using them or investing through them. When regulating advice about using platforms, ASIC expects advisers to comply with the financial product advice provisions of the Act.

The purpose of this class order is to update our current regulation of IDPS-like schemes to address complexities existing in current regulatory settings and emerging

issues, treat platform operators similarly where there is no regulatory basis for different treatment, and promote confident and informed investors, including by ensuring that they receive adequate disclosure and advice about IDPS-like schemes and investments available through them.

3. Operation of the class order

This class order revokes [CO 02-296] for responsible entities that are not authorised to operate an IDPS-like scheme before 1 July 2013. The revised requirements in [CO 13-762] apply from 1 July 2013 to AFS licensees that are authorised to operate an IDPS-like scheme from that date.

ASIC Class Order [CO 02-296] (issued on 11/3/2002, including amendments up to [CO 07-480] (issued on 2/7/2007)) will continue to apply to operators authorised to operate an IDPS-like scheme on or before 30 June 2013 until 1 July 2014 when it will be superseded by the provisions of [CO 13-763]. Responsible entities of IDPS-like schemes may opt in earlier to the revised regulatory framework by providing written notification to ASIC that they will rely on the class order, together with publishing notification on their website.

Summary of key requirements for responsible entities of IDPS-like schemes contained in [CO 13-762]

ASIC Class Order [CO 13-762] stipulates that an IDPS-like scheme is a registered managed investment scheme, which has a constitution that has provisions to the effect that members may:

- direct that an amount of money be invested in specific investments available through the scheme; and
- receive capital and income distributions from the scheme determined by reference to amounts received by the responsible entity or custodian corresponding to their interests in the scheme and acquired in accordance with their directions.

Continuing requirements for responsible entities of IDPS-like schemes in [CO 13-762]

- (a) Relief from the fundraising and financial product disclosure provisions remain to the extent that these provisions require disclosures about the investments available through the scheme in the PDS. Responsible entities of IDPS-like schemes must comply with the financial product disclosure provisions by including in the Product Disclosure Statement (PDS) for the IDPS-like scheme all other information required by the financial product disclosure provisions about the IDPS-like scheme (except for information about investments).
- (b) Disclosure of whether withdrawal requests are allowed for by the scheme's constitution is required. The constitution of the IDPS-like scheme needs to specify how withdrawal requests will be dealt with where more than one

member has an interest in an investment subject to a minimum holding requirement or where giving effect to the request might otherwise adversely affect other members.

- (c) Relief is provided from including in the PDS information about all the investments available through the IDPS- like scheme.
- (d) A statement must be included in a PDS setting out a members' right to disclosure in relation to accessible investments and that a member will have the right to elect to receive copies of communications sent to holders of accessible investments, including those communications which the holder may elect to receive.
- (e) Except where relief is provided, a PDS or a disclosure document must be given if an investor acquires an investment through an IDPS-like scheme, including by way of an allocation of entitlements relating to an investment to the interest of the member in the IDPS-like scheme or an increased investment in a financial product in respect of which a member's interest in the IDPS-like scheme has been allocated entitlements.
- (f) A responsible entity of an IDPS-like scheme must give to a member on request a copy of all communications that are required by law to be given to the holder of an accessible investment by the responsible entity or a custodian.
- (g) Relief from the requirement to give cooling-off rights under Div 5 of Pt 7.9 of the Act is provided where the requirements of [CO 13/762] are met.
- (h) Where cooling-off rights are exercised, the responsible entity of an IDPS-like scheme must take reasonable steps to realise the investments and repay the investor, after deducting any losses in value to the investments on realisation relative to what was paid for them, and any fees and costs that could be deducted on exercise of cooling-off rights under Div 5 of Pt 7.9 of the Act.
- (i) A responsible entity of an IDPS-like scheme must comply with quarterly reporting obligations or, alternatively, electronic reporting on a substantially continuous basis.
- (j) A responsible entity of an IDPS-like scheme must provide an annual investor statement and audit report.
- (k) A responsible entity of an IDPS-like scheme may give documents to a member by giving the document to the member's agent who is associated with the responsible entity.
- (l) There remains a prohibition on investment where the custodian is a related body corporate.

New requirements for responsible entities of IDPS-like schemes in [CO 13-762]

- (m) The PDS for the IDPS-like scheme must make specific disclosures, which include:
- (i) any key differences in the rights available to members of the IDPS-like scheme, as opposed to investing directly – at a minimum, the disclosure must cover cooling-off rights, voting rights and withdrawal rights under section 724 and section 1016E of the Act relating to accessible investments;
 - (ii) the consequences for members who do not opt in to continuing to receive financial product advice;
 - (iii) how and to whom members may make a complaint – for example, for complaints about:
 - (A) platform operation – the platform operator;
 - (B) investments acquired through the platform – the product issuer (as available); and
 - (C) financial product advice about using platforms and investments acquired through them – the AFS licensee for whom the adviser was acting; and
 - (iv) how the responsible entity will determine which investments are selected for inclusion on an IDPS-like scheme, including the process applied and the factors considered for selecting investments.
- (n) The application form accompanying the PDS for an IDPS-like scheme must contain a prominent consumer warning acknowledgement, with cross references to the relevant parts of the PDS, and proximate to where the investor signs or submits their acceptance or agreement, which identifies the key areas of difference between acquiring a financial product directly and through an IDPS-like schemes (including any differences in respect of rights) and, if applicable, any adverse effect on the members if they do not opt in to receive financial product advice about using the IDPS-like schemes or investing through it.
- (o) Exemption from section 1012IA of the Act is provided if the members have already been given a PDS for the same financial product held through the IDPS-Like scheme and have access, and are aware that they have access, to the most current PDS in use or a PDS that does not differ from the most current in use in a way that is materially adverse from the member's viewpoint and the responsible entity has no reason to believe is defective.
- (p) Exemption from s1012IA of the Act also continues to apply to dividend or distribution reinvestment plans and regular savings plans. Under the terms of a regular savings plan, the member will be given access to disclosures that the responsible entity reasonably believes are current, as soon as reasonably practicable and in any event within five business days of acquisition.

- (q) A responsible entity of an IDPS-like scheme must have in place a voting policy that includes information about the responsible entity's voting practices on company and scheme resolutions available to members free of charge on request.
- (r) A responsible entity of an IDPS-like scheme must have in place a policy for members who do not opt in to receive financial product advice, available to members free of charge on request.
- (s) If a product issuer of accessible financial products gives a notice in writing to the responsible entity of an IDPS-like scheme stating that it will comply with the internal dispute resolution requirements in [CO13-762], it must comply with the standards and requirements prescribed in [CO 13-762].
- (t) A responsible entity of an IDPS-like scheme must take reasonable steps to facilitate resolution of disputes between its members and product issuers of accessible financial products, including informing members whether issuers have internal dispute resolution systems that are available to the members.
- (u) A responsible entity of an IDPS-like scheme must comply with the requirements in [CO 13-762] or will be in breach of the general AFS licensee obligation to comply with the financial services laws. A responsible entity of an IDPS-like scheme must report breaches as required by 912D of the Act.

4. Documents incorporated by reference

The class Order incorporates by reference the following documents:

- (a) ASIC Class Order [02-295] – that:
 - (i) provides an exemption from the fundraising, financial product disclosure and managed investments provisions of the Act for persons who are operating, or are involved in the operation or promotion of, a nominee and custody service, subject to some conditions; and
 - (ii) provides an exemption from the fundraising and financial product disclosure provisions of the Act for 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. This exemption is also subject to some conditions. This document is available on ASIC's website at www.asic.gov.au.
- (b) ASIC Class Order [02-296] – that:
 - (i) provides an exemption from the fundraising and financial product disclosure provisions of the Act for a responsible entity and a person who causes or authorises the issue of a prospectus or Product Disclosure Statement for an interest in a registered managed investment scheme

through which IDPS-like services are provided. The exemption is subject to some conditions and disclosure requirements;

- (ii) modifies the Act as it applies to the restriction on withdrawal of interests from a registered managed investment scheme through which IDPS-like services are provided; and
 - (iii) provides an exemption from the fundraising and financial product disclosure provisions of the Act for persons who are offering or issuing accessible securities through a registered managed investment scheme through which IDPS-like services are provided subject to some conditions. This document is available on ASIC's website at www.asic.gov.au.
- (c) ASIC Class Order [13-763] – that modifies the Act as it applies to a person operating or involved in the operation or promotion of an IDPS, and to a person offering or issuing accessible securities through an IDPS. This document is available on ASIC's website at www.asic.gov.au and is registered on the Federal Register of Legislative instruments.

5. Consultation

In March 2012, a consultation paper was published setting out our proposals and supporting rationale for reviewing our regulatory approach to platforms: see CP 176. The consultation process closed on 20 April 2012.

A summary of key submissions made in response to CP 176 and further targeted consultation, together with our consideration of those responses, can be found in Report 351 *Response to submissions on CP 176 Review of ASIC policy on platforms: Update to RG 148* (REP 351).

The Office of Best Practice has also approved the attached Regulation Impact Statement for this class order.

Statement of Compatibility with Human Rights

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

ASIC Class Order [CO 13-762]

This class order 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 class order

ASIC Class Order [CO 13-762] updates our current regulation of IDPS-like schemes to address complexities existing in current regulatory settings and emerging issues concerning platforms generally. The objective of [CO 13-762] is to:

- (a) promote investor confidence and help investors make informed decisions about IDPS-like schemes;
- (b) apply the minimum appropriate regulation to responsible entities of IDPS-like schemes, consistent with the framework for the regulation of financial services and products in the Act; and
- (c) treat IDPS and IDPS-like schemes similarly where there is no regulatory basis for different treatment.

Human rights implications

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

Conclusion

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