

**Australian Securities and Investments Commission
Corporations Act 2001—Paragraph 926A(2)(c)—Amendment**

Enabling Legislation

1. The Australian Securities and Investments Commission makes this instrument under paragraph 926A(2)(c) of the *Corporations Act 2001* (the *Act*).

Title

2. This instrument is ASIC Class Order [CO 13/1412].

Commencement

3. This instrument commences on the later of:
 - (a) the date it is registered under the *Legislative Instruments Act 2003*;
 - (b) 2 January 2014.

Note: An instrument is registered when it is recorded on the Federal Register of Legislative Instruments (*FRLI*) in electronic form: see *Legislative Instruments Act 2003*, section 4 (definition of *register*). The FRLI may be accessed at <http://www.frli.gov.au/>.

Amendment

4. ASIC Class Order [CO 13/763] is amended by, in paragraph 6, amending notional section 912AD as follows:

- (a) omit subsection (22), substitute:
 - “(22) The licensee must do all things necessary to ensure that all IDPS property held by:
 - (a) the licensee is held on trust for the relevant client or clients of the IDPS; or
 - (b) a person the licensee directly or indirectly engages is held in a way so that the relevant client or clients of the IDPS have a beneficial interest in the IDPS property (whether directly or indirectly);

Note: This requirement could be satisfied by a custodian holding IDPS property on trust for the licensee and the licensee holding the beneficial interest in that property on trust for the relevant client or clients of the IDPS.

unless the IDPS property is held under Division 2 or 4 of Part 7.8 or either of the following apply:

- (c) both of the following apply:

- (i) the IDPS property is located in a place outside of this jurisdiction where trusts are not known to the law;
 - (ii) it is reasonable for the IDPS property to be held in accordance with the law in that place; or
- (d) both of the following apply:
- (i) the IDPS property is located in a place outside of this jurisdiction and it is not reasonable for the property to be held on trust in accordance with the law in that place;
 - (ii) the licensee has documented in writing that:
 - (A) it is satisfied that the property is held in a manner that, having regard to the relevant laws, provides reasonably effective protection in case of insolvency of the person holding the property; and
 - (B) the basis on which the licensee is satisfied.
- (22A) If the licensee was authorised to operate an IDPS before 2 January 2014:
- (a) subsection (22) does not apply to the licensee until 2 January 2015; and
 - (b) until 2 January 2015, the licensee must ensure that all accessible investments held by it or by a custodian it engages (not including assets held by a client) are held on trust for the relevant client or clients of the IDPS.”;
- (b) after subsection (40), insert:
- “Arranging for another person to hold IDPS property*
- (40A) A licensee that engages a custodian to hold IDPS property must ensure that:
- (a) if the licensee holds a beneficial interest in the IDPS property on behalf of the relevant client or clients, it has a written agreement with the custodian that meets the requirements of paragraphs (c) to (e) except:
 - (i) to the extent that, in relation to IDPS property held outside of this jurisdiction, the licensee holds documents that demonstrate that it is not reasonably practicable to engage another person to hold the IDPS property who is willing to include such matters in the agreement; or
 - (ii) where the custodian is controlled by the licensee and the licensee is liable to the relevant client or

clients for the acts and omissions of the custodian as if they were the acts or omissions of the licensee; and

- (b) if the licensee does not hold a beneficial interest in the IDPS property on behalf of the relevant client or clients:
 - (i) it has a written agreement with the custodian that meets the requirements of paragraphs (c) to (e); and
 - (ii) it does all things necessary to ensure that the custodian has a written agreement with each person that the custodian engages to hold the IDPS property and the written agreement meets the requirements of paragraphs (c) to (e) as if the person were the custodian and the custodian were the licensee except:
 - (A) to the extent that, in relation to IDPS property held outside of this jurisdiction, the licensee holds documents that demonstrate that it is not reasonably practicable to engage another person to hold the IDPS property who is willing to include such matters in the agreement; or
 - (B) where the person is controlled by the custodian and the custodian is liable to its client for the acts and omissions of the person as if they were the acts or omissions of the custodian; and
- (c) the agreement with the custodian has provisions:
 - (i) specifying reasonable rights that the licensee has for the ongoing review and monitoring of the custodian and any sub-custodian and the standards against which their performance will be assessed; and
 - (ii) to the effect that the custodian must certify to the licensee in writing at least every 13 months that the custodian believes on reasonable grounds that the custodian and each sub-custodian have met since the date of the previous statement in writing or the commencement of the agreement, and the custodian has no reason to believe that the custodian and each sub-custodian will not continue to meet:
 - (A) in the case of the custodian, the terms of the agreement; and
 - (B) in any case, the requirements that the licensee must do all things necessary to ensure under subsections (40C) to (40J) and paragraphs (40K)(a), (c) and (e) are met by the custodian or the sub-custodian in relation

to IDPS property held by the custodian or a sub-custodian (except to the extent that the licensee is not complying with a requirement under paragraph (40D)(a) or (b) and the custodian is not aware of any non-compliance);

other than:

- (C) as disclosed in writing to the licensee; or
- (D) that the custodian reasonably believes are trivial, and

the custodian acknowledges that it or the sub-custodian must continue to meet those obligations; and

- (iii) to the effect that the custodian must acknowledge to the licensee on request that the IDPS property to which the agreement relates is held for the licensee or the relevant client or clients and notify any other person where the custodian is aware to do so might protect the rights or equitable interest of the licensee or the client or clients that the property is so held, unless the licensee directs in writing otherwise; and
- (iv) specifying how instructions will be given by the licensee to the custodian; and
- (v) to the effect that the custodian must not take or grant a security interest, mortgage, lien or other encumbrance over, or in relation to, the IDPS property held under the agreement unless it is accordance with the agreement and does not cover unpaid fees of the custodian; and
- (vi) specifying how the custodian will maintain records of the IDPS property to which the agreement relates and the transactions in relation to that IDPS property including by whom, when and how transactions were authorised; and
- (vii) specifying procedures for reconciliation each business day or if it is ordinary and reasonable commercial practice to reconcile certain property less frequently, in accordance with that practice, by checking information the custodian is given as to the existence and quantity of the IDPS property against the records of the custodian and for reporting by the custodian concerning the outcomes of the reconciliation in case of any unreconciled matter; and
- (viii) to the effect that the custodian must provide all reasonable access and assistance to any auditor

engaged to audit the licensee's financial statements or statements and records concerning clients' holdings or transactions;

- (ix) to the effect that the custodian will provide the licensee with written notice of and contact information for any other person holding IDPS property or to be appointed by the custodian:
 - (A) as soon as reasonably practicable; and
 - (B) in any event before the property is held, except in exceptional circumstances identified in the agreement; and
- (x) to the effect that the licensee may terminate the agreement without:
 - (A) payment other than in relation to entitlements previously accrued or the reasonable expenses involved in transfer of the assets to the licensee or another custodian; and
 - (B) limiting any right to damages the licensee may have under the agreement, including recovering expenses referred to in sub-subparagraph (A) if the custodian is in breach;

if the licensee has reasonable grounds for believing that:

- (C) there is or has been an act or omission of the custodian or a sub-custodian that results in the custodian being in breach of the agreement; and
 - (D) as a result of the act or omission, to a material extent the custodian or a sub-custodian is not complying with or is unlikely to comply with the requirements that the licensee must do all things necessary to ensure under subsections (40C) to (40J) and paragraphs (40K)(a), (c) and (e) are met by the custodian or the sub-custodian in relation to IDPS property held by the custodian or that the custodian arranged to be held, having regard to any remedy provided or that may be expected to be provided by the custodian or the sub-custodian; and
- (xi) to the effect that on termination of the engagement, the IDPS property must be transferred to the licensee or as the licensee directs within a

reasonable period subject to reasonable provisions for the obligations of the parties at termination, including the payment of outstanding fees and charges to the custodian and any costs of the transfer; and

- (xii) to the effect that the custodian must notify material or systemic breaches of the agreement by it or by the licensee in writing to the licensee within a reasonable time of becoming aware of the breach; and
- (xiii) specifying the terms on which the custodian is authorised to engage a person to hold the IDPS property to which the agreement relates and providing that any such engagement must be either:
 - (A) under a written agreement meeting the requirements of paragraphs (c) to (e) (including this sub-subparagraph and sub-subparagraph (B)) as if the person engaged were the custodian and the custodian were the licensee except to the extent that, in relation to assets held outside of this jurisdiction, the custodian has provided written reasons to the licensee as to why it reasonably considers that it is not practicable to engage a person that is willing to include such matters in the agreement; or
 - (B) an arrangement with a related body corporate of the custodian, where the custodian has a written agreement with the licensee that it is liable to its client for the acts and omissions of that the related body corporate as if those acts and omissions were the acts or omissions of the custodian; and
- (xiv) to the effect that the custodian must establish and maintain business continuity arrangements that are reasonable for a business of the nature, scale and complexity of the custodian's business; and
- (xv) to the effect that the custodian must not disclose any confidential information relating to the IDPS, apart from any disclosure to ASIC or as required or permitted by law or by the licensee in writing; and
- (d) the agreement with the custodian has reasonable liability provisions and does not include provisions that exclude the liability of the custodian for direct loss that it would have if the exclusion were not included except in particular circumstances that the licensee considers to be reasonable and contains, if appropriate, reasonable indemnity

provisions in relation to losses caused to the licensee, as IDPS operator or to the relevant client or clients by the custodian's acts and omissions that relate to that agreement; and

- (e) it does not, under the agreement with the custodian or otherwise, permit the granting of a security interest, mortgage, lien or other encumbrance in favour of the custodian or its associates unless the licensee reasonably believes for reasons it has recorded in writing that any conflict that may arise as a result of the security interest, mortgage, lien or encumbrance will not materially increase the risks that the custodian will fail to meet its obligations and the licensee must keep the written record of reasons for 7 years after the security interest, mortgage, lien or encumbrance has ceased.
- (40B) A licensee that complies with subsection (40A) in relation to an arrangement with a custodian is taken to comply with any condition on its Australian financial services licence concerning the arrangement.

Minimum standards for licensees

- (40C) The licensee must:
- (a) have reasonable procedures for giving instructions to a custodian it engages or where there is no custodian, custodial staff in relation to the accessible investments that include how the instructions are given, and reasonable controls to ensure that the instructions are properly authorised and carried out; and
 - (b) ensure that it and do all things necessary to ensure that any person the licensee directly or indirectly engages to hold IDPS property:
 - (i) as far as practicable identifies the IDPS property as property held on behalf of the person for whom it is held; and
 - (ii) holds the IDPS property separately from property in which the licensee or the person holding the IDPS property has an interest and from the property of any other person, other than clients of the IDPS, except in relation to:
 - (A) Australian or foreign currency; or
 - (B) a deposit taking facility of a body carrying on a business of accepting money on deposit including rights under that facility; or
 - (C) securities; or
 - (D) derivatives;

held separately from property in which the licensee or person holding the IDPS property has an interest other than as a trustee for a person other than the licensee, except where property is not held separately to comply with paragraph (40D)(f).

- (40D) The licensee must do all things necessary to ensure that, if IDPS property is not held separately from property in which the licensee or a person it directly or indirectly engages has an interest and separately from the property of any person other than clients of the IDPS:
- (a) the licensee has put in place, and keeps for 7 years after it was last relied on, a written policy in relation to not holding IDPS property separately which sets out its reasons why that policy is appropriate having regard to any extent to which it might expose its clients to the risks arising from the IDPS property not being held separately and its duties to each client; and
 - (b) the licensee reviews the policy at least every 13 months, prepare a written record of the outcome of the review and keep that record for 7 years; and
 - (c) adequate records are kept at all times showing each client's entitlement to IDPS property that includes the IDPS property not held separately; and
 - (d) reconciliation procedures are performed on each business day in relation to the IDPS property not held separately or if because of the nature of the property, it is ordinary and reasonable commercial practice in the place where the property is located to reconcile property of that kind less frequently, as frequently as would be performed in accordance with that practice; and
 - (e) not holding the IDPS property separately does not restrict the capacity of the licensee to exercise its powers in relation to the IDPS property in accordance with its duties including in relation to voting rights; and
 - (f) if the property that includes the IDPS property is not sufficient to meet the entitlements of all persons in relation to that property, the insufficiency ceases by the second business day after the insufficiency arises, whether through the provision of additional property by the licensee or otherwise.
- (40E) The licensee must do all things necessary to ensure that it, if it holds IDPS property, and any custodian it engages to hold IDPS property has an organisational structure that supports compliance with subparagraph (40C)(b)(ii).
- (40F) The licensee must do all things necessary to ensure that it, if it holds IDPS property, and any custodian it engages to hold IDPS

property segregates custodial staff from persons performing other functions, in a way that minimises the potential for conflict, if a conflict of interest exists or might arise between:

- (a) their duties as custodial staff; and
- (b) the interests served or advanced by persons who perform duties to make investment decisions, trading decisions or other discretionary decisions resulting in the transfer or disposal of IDPS property other than discretionary decisions in relation to holding a deposit account with a corporation that is regulated for the taking of deposits where the balance of the deposit account is payable on demand and discretionary decisions relating to buying or selling foreign currency.

(40G) The licensee must do all things necessary to ensure that it and any custodian it engages to hold IDPS property has a documented policy that is:

- (a) approved by its directors or governing body, or a senior manager authorised to give approval on behalf of the directors or governing body or in the case of a custodian that is a foreign company that is carrying on business in this jurisdiction or registered under Division 2 of Part 5B.2, its most senior officer or employee in this jurisdiction with responsibility for managing the functions of custodial staff; and
- (b) designed to ensure that custodial staff are not influenced because of a conflict mentioned in subsection (40F) to act other than in accordance with their duties.

(40H) The licensee must undertake reasonable checks to find out and document if there has been any attempt to inappropriately influence custodial staff and take reasonable action in the event this happens.

(40I) The licensee must do all things necessary to ensure that it and any custodian it engages to hold IDPS property structures its business so that:

- (a) custodial staff can report to the directors of the licensee directly or through other custodial staff; and
- (b) the duties of:
 - (i) direct managers of custodial staff; and
 - (ii) indirect managers of custodial staff that are not the most senior officer of the licensee or the most senior officer or employee of the custodian in this jurisdiction or, for a custodian, the jurisdiction in which the custodian is based; and
 - (iii) custodial staff;

do not extend to other functions that may create conflicts of interest including that custodial staff and those managers are not responsible for investment decisions, trading decisions or other discretionary decisions resulting in the transfer or disposal of IDPS property, other than discretionary decisions in relation to holding a deposit account with a corporation that is regulated for the taking of deposits where the balance of the deposit account is payable on demand and discretionary decisions relating to buying and selling foreign currency; and

- (c) custodial staff and persons involved in investment decisions, trading decisions or other discretionary decisions resulting in the transfer or disposal of IDPS property, other than discretionary decisions in relation to holding a deposit account with a corporation that is regulated for the taking of deposits where the balance of the deposit account is payable on demand and discretionary decisions relating to buying and selling foreign currency are located sufficiently separately during the performance of their duties to reduce, so far as reasonably practicable, the risk of inappropriate influence on decisions relating to holding of IDPS property.
- (40J) The licensee must, for its custodial staff ensure that, and for custodial staff of any custodian do all things necessary to ensure that the custodian ensures that:
- (a) custodial staff have the knowledge and skills necessary to perform their duties properly; and
 - (b) ongoing training and educational programs are provided to custodial staff that provide reasonable assurance that they have knowledge that remains at a level necessary for performing their assigned duties including knowledge of the licensee's obligations under this Part to the extent relevant to enable the custodial staff to perform their particular duties; and
 - (c) custodial staff have the necessary time and authority to perform their duties as custodial staff; and
 - (d) resources are made available to custodial staff to the extent necessary for them to adequately perform their duties as custodial staff.
- (40K) The licensee must:
- (a) if the licensee has engaged a custodian, also comply with subsections (40E) to (40J) as if any sub-custodian were the custodian, except to the extent that, in relation to IDPS property outside of this jurisdiction, it is not reasonably practicable for the licensee to do all things necessary to ensure that the sub-custodian does a particular thing; and

Note: For example, if the custodian engaged a sub-custodian, the licensee would need to do all things necessary to ensure that the requirements of subsections (40E) to (40J) were satisfied in relation to the custodian, the sub-custodian and their custodial staff, subject to the exception in relation to property outside this jurisdiction.

- (b) keep for 7 years records demonstrating how it complies with subsections (22) and (40C) to (40J) and paragraph(40K)(a); and
- (c) set out in writing and implement a reasonable process to monitor and assess the performance, by any custodian it engages, of its obligations as a custodian and must do all things necessary to ensure that a custodian it engages sets out in writing and implements a reasonable process to monitor and assess the performance of its obligations by any sub-custodian; and
- (d) not permit a custodian it engages or a sub-custodian to be involved in discretionary decisions concerning a deposit account, unless the licensee is satisfied that the custodian or sub-custodian has set out in writing and implements reasonable processes for:
 - (i) determining which account to use; and
 - (ii) monitoring performance by the issuer of the account of the issuer's obligations in relation to that account; and
 - (iii) taking action in case of failure of the issuer of the account of the issuer's obligations in relation to that account; and
- (e) ensure that it keeps records of the IDPS property in a way that enables the holding of the IDPS property to be conveniently and properly audited by an auditor of the IDPS operator and do all things necessary to ensure that any custodian or sub-custodian keeps such records in relation to any IDPS property that is held by the custodian or the sub-custodian; and
- (f) set out in writing and implement a reasonable process for determining if it should hold IDPS property or engage a custodian, unless either choice is determined by its contractual obligations, and if it is to engage a custodian, which person will be the custodian and on what terms. The process must involve the application of a reasonable written policy approved by the directors which addresses potential conflicts of interest and other considerations relevant to the interests of each client; and
- (g) do the following:
 - (i) review the appropriateness of the written policies and processes that the licensee is required to ensure

exists under paragraphs (c), (d) and (f) at least once in every 13 months; and

- (ii) as directed by ASIC in writing, arrange for a report on the effectiveness or the reasonableness of any of the processes or policies to be prepared and given to ASIC.

The written direction may specify who is to prepare the report and the time by which it must be given to ASIC.

(40L) A licensee that complies with subsections (40C) to (40K) is taken to comply with conditions (if any) of its Australian financial services licence that refer to ASIC Policy Statement 133 or ASIC Regulatory Guide 133 as applying on a certain date.

(40M) If a licensee was authorised to operate an IDPS before 2 January 2014:

- (a) subsections (40A) and (40B) do not apply to the licensee until 1 November 2015; and
- (b) subsections (40C) to (40L) do not apply to the licensee until 2 January 2015.”;

- (c) in subsection (42), insert the following definitions in alphabetical order:

“**custodial staff** means natural persons who under an arrangement with the licensee or a custodian have duties relating to holding IDPS property, record keeping relating to IDPS property, checking authorisations for instructions to transact or functions incidental to these functions other than making investment decisions, trading decisions or other discretionary decisions resulting in the transfer or disposal of IDPS property, other than discretionary decisions in relation to holding a deposit account with a corporation that is regulated for the taking of deposits where the balance of the deposit account is payable on demand and discretionary decisions relating to buying or selling foreign currency.”

“**sub-custodian** means, in relation to a custodian engaged by the licensee, a person directly or indirectly engaged by the custodian to hold IDPS property.”;

- (d) after subsection (43), insert the following:

“(44) For the purposes of subsections (22), (40A) to (40M), the definition of **sub-custodian** in subsection (42) and this subsection:

- (a) a person (**first person**) engages another person if the first person engages or authorises the other person; and
- (b) a person (**first person**) indirectly engages another person (**second person**) if:
 - (i) the first person engages a person and that person engages the second person; or

- (ii) a person who is indirectly engaged by the first person under subparagraph (i) or this subparagraph (ii) engages the second person.”.

Dated this 21st day of November 2013

Signed by Anthony Graham
as a delegate of the Australian Securities and Investments Commission