

**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 13/1413].

Commencement

3. This instrument commences on the date it is registered under the *Legislative Instruments Act 2003*.

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 13/760] is amended by, in paragraph 4, amending notional section 912AA as follows:
 - (a) in paragraph (4)(a), after “applies” insert “or the licensee does not operate any registered schemes or IPDSs”;
 - (b) in subparagraph (4)(a)(ii), after “IDPSs” insert “(if any)”;
 - (c) at the beginning of paragraph (7)(c), insert “subject to subsections (7A) and (7B),”;
 - (d) after subsection (7) insert:

“(7A) Paragraph (7)(c) does not apply in relation to a custodian until:

 - (a) if the custodian was a custodian of the scheme or IDPS on 30 June 2013 (*continuing custodian*)—the earlier of 31 October 2015 and the date that the custodian first provides a copy of a report for the purposes of paragraph (7)(c) to the licensee or any other person; and
 - (b) if the custodian is not a continuing custodian and has not provided a copy of a report for the purposes of paragraph

(7)(c)—the earlier of 16 months after the date that the custodian first became a custodian of the scheme or IDPS and the date that the custodian first provides the licensee or any other person with a copy of a report for the purposes of paragraph (7)(c).

(7B) The first report obtained by a custodian for the purposes of paragraph (7)(c) may cover a period of less than 12 months if it covers the period from:

- (a) for a continuing custodian—1 July 2014; and
- (b) otherwise—the date that the custodian first provided a written assurance under paragraph (7)(a) to the licensee or any other person;

until the end of the period to which the report relates.”;

(e) in subsection (11) (definition of *special custody assets*):

- (i) in paragraph (g) (second occurring) omit “(g)”, substitute “(h)”; and
- (ii) in subparagraph (g)(iv) omit “.”, substitute “,”; and
- (iii) after paragraph (g) (second occurring), insert:

“(i) a derivative and any contractual right (the *margin repayment right*) for the payment of any balance owing to the responsible entity of the scheme in relation to dealings in derivatives including margining those dealings through transactions in a deposit taking facility notified to the responsible entity if all of the following apply:

- (i) the responsible entity has directed in writing the other party (the *counterparty*) to the derivative or, in case of a derivative acquired through a financial market, the market participant acting for the responsible entity, that any amounts payable by the counterparty or market participant in connection with the derivative to or at the direction of the responsible entity are to be made only:
 - (A) to the deposit taking facility (if any); or
 - (B) to an eligible custodian (a *Complying Custodian*) or a custodian (a *Complying Custodian*) that meets the requirements under subparagraph (5)(a)(iii) or a sub-custodian (a *Complying Custodian*) appointed by such a custodian; or

- (C) as the Complying Custodian directs;
- (ii) if there is a margin repayment right held as scheme property, the responsible entity has directed in writing the person liable to pay the balance to which the right relates that any amounts payable to or at the direction of the responsible entity that affect the amount of the balance to which the margin repayment rights relate are to be made only to a Complying Custodian or as directed by a Complying Custodian;
- (iii) a Complying Custodian and if the direction refers to a Complying Custodian, that Complying Custodian, is given a copy of each written direction given for the purposes of subparagraphs (i) and (ii) within one business day and is given authority to require the counterparty or market participant to provide:
 - (A) written confirmation that the direction remains in effect; and
 - (B) reasonable access on each business day in the place where the person given the direction is located to information about all transactions under the derivative, the acquisition or disposal of the derivative and transactions affecting the amount of the balance in relation to the margin repayment right to which the direction relates for at least one month after the transaction, acquisition or disposal;
- (iv) the Complying Custodian has contracted in writing with the responsible entity to:
 - (A) require the provision of, and where obtained, keep for seven years a copy of records to which access is given under subparagraph (iii) to it of all transactions under the derivative, the acquisition or disposal of the derivative or any transactions affecting the amount of the balance in relation to the margin repayment right to which the direction relates; and
 - (B) check whether it appears that:
 - (I) those transactions comply with the direction a copy of which has been given to the Complying Custodian under subparagraph (iii); and
 - (II) the Complying Custodian has been given copies of authorisations for those transactions that comply with requirements for confirming the identity of the person providing authorisation and the process of authorisation notified to the

Complying Custodian in writing by the responsible entity; and

- (III) a transaction has been entered in response to every authorisation a copy of which has been given to the Complying Custodian where the authorisation appears to meet the responsible entity's requirements notified to the Complying Custodian in writing;

and, if not, notify the responsible entity in writing and keep a copy of the notification for 7 years;

- (j) a security or interest in a managed investment scheme and any chose in action (*associated chose in action*) that is not a financial product related to the acquisition or holding of securities or interests in a managed investment scheme where all of the following apply:
 - (i) the security or interest is not of a class that is able to be traded on a financial market;
 - (ii) the security or interest or any associated chose in action may give rise to a liability for the holder under their terms;
 - (iii) the responsible entity reasonably considers that it is not reasonably practicable to ensure the exclusion of liability of the person holding the security or interest or any associated chose in action that may arise from that holding;
 - (iv) the responsible entity has given a written direction to:
 - (A) the issuer of the security, interest or associated chose in action; and
 - (B) any counterparties that may be liable to pay or arrange to pay the holder of the security, interest or associated chose in action;

that any payments that are to be made to the responsible entity under the security, interest or associated chose in action must be paid to a Complying Custodian, or as that Complying Custodian directs in writing;
 - (v) any certificates or other title documents and copies of the written directions are held by the Complying Custodian or by a person acting on its behalf, and the Complying Custodian has authority to require the issuer and any such counterparty to confirm in writing that the direction remains in effect;
 - (vi) the Complying Custodian has contracted in writing to keep for 7 years a copy of records relating to the security, interest

or associated chose in action that are available to it relating to the acquisition or disposal of the security, interest or associated chose in action or transactions under the security, interest or associated chose in action;

(vii) the Complying Custodian has contracted in writing to check whether it appears that:

(A) those transactions comply with the direction a copy of which has been given to the Complying Custodian under subparagraph (v); and

(B) the Complying Custodian has been given copies of authorisations for those transactions that comply with requirements for confirming the identity of the person providing authorisation and the process of authorisation notified to the Complying Custodian in writing by the responsible entity; and

(C) a transaction has been entered in response to every authorisation a copy of which has been given to the Complying Custodian where the authorisation appears to meet the responsible entity's requirements notified to the Complying Custodian in writing;

and, if not, notify the responsible entity in writing and keep a copy of the notification for 7 years;

(k) a deposit taking facility with an Australian ADI or a body (a *foreign ADI*) formed or incorporated outside Australia which is authorised to accept deposits and is prudentially regulated by a government or an agency of a government in relation to its deposit taking activities if the responsible entity reasonably considers that holding the deposit taking facility by another person would raise unreasonable operational difficulties or be impracticable where all of the following apply:

(i) the issuer of the deposit taking facility and the responsible entity have a written arrangement under which the issuer would not be likely to make any payments that are to be made under the facility to a person not approved by a Complying Custodian and which authorises the issuer to disclose at any time whether the arrangement remains current to the Complying Custodian;

(ii) a copy of the written arrangement is held by the Complying Custodian;

(iii) the Complying Custodian has reasonable access on each business day that the issuer is open for business to information about transactions for at least 2 years before that business day using the facility and access to all the

information that the responsible entity has a right to be given or is given in relation to the facility;

- (iv) the Complying Custodian has agreed to keep for 7 years all records relating to transactions under the facility to which access is given under subparagraph (iii);
- (v) the Complying Custodian has agreed to check whether it appears that:
 - (A) those transactions comply with the arrangement a copy of which has been given to the Complying Custodian under subparagraph (ii); and
 - (B) the Complying Custodian has been given copies of authorisations for those transactions that comply with requirements for confirming the identity of the person providing authorisation and the process of authorisation notified to the Complying Custodian by the responsible entity in writing; and
 - (C) a transaction has been entered in response to every authorisation a copy of which has been given to the Complying Custodian where the authorisation appears to meet the responsible entity's requirements notified to the Complying Custodian in writing;

and, if not, notify the responsible entity in writing and keep a copy of the notification for 7 years;

- (l) a deposit taking facility with an Australian ADI or a foreign ADI if the responsible entity reasonably considers that holding the deposit taking facility by another person would raise unreasonable operational difficulties or be impracticable where:
 - (i) the use of the facility for payments is intended by the responsible entity to be limited to the making of payments to a Complying Custodian who has been engaged to hold the scheme property and persons that the responsible entity or its agents believe are members of the scheme; and
 - (ii) the responsible entity does not permit any payments to be made from the facility except to the Complying Custodian, as directed by the Complying Custodian or in accordance with instructions made by a person that, except with the consent in writing of ASIC:
 - (A) carries on a business consisting of or including maintaining registers of members of registered schemes under Chapter 2C; and
 - (B) is not the responsible entity or its related body corporate; and

- (C) the responsible entity reasonably believes has net assets of at least \$250,000 as its net assets would appear in a balance sheet if lodged under Chapter 2M at that time or it appeared that the person has such net assets on the basis of its balance sheet most recently lodged under Chapter 2M; and
 - (D) the responsible entity reasonably believes has not and will not provide an instruction for a payment that results in the responsible entity being required to lodge a report under subsection 912D(1B);
- (m) a deposit taking facility with an Australian ADI or a foreign ADI where the issuer of the deposit taking facility:
- (i) is a Complying Custodian who holds other scheme property of the scheme or IDPS property of the IDPS; and
 - (ii) has agreed to ensure that staff that are involved with the provision of custodial services and not involved in the provision of banking services check whether each transaction complies with requirements for confirming the identity of the person providing authorisation and the process of authorisation notified to the Complying Custodian by the licensee in writing; and
 - (iii) keeps a copy of the records of each transaction including how it was authorised and any notification given under paragraph (ii) for 7 years; and
- (n) any chose in action that is not a financial product that is not reasonably practicable to assign other than to the relevant member or members of the scheme or to the clients of the IDPS (as applicable) or together with other property that is covered by any of paragraphs (a) to (m).”.

Dated this 21st day of November 2013

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