

ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647

ASIC Corporations (Repeal) Instrument 2015/681

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (*ASIC*) makes ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647 (the *principal instrument*) and ASIC Corporations (Repeal) Instrument 2015/681 (the *repealing instrument*) under paragraphs 951B(1)(c) and 1020F(1)(c) of the *Corporations Act 2001* (the Act).

Paragraph 951B(1)(c) provides that ASIC may declare that Part 7.7 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 of that Part were omitted, modified or varied as specified in the declaration.

Paragraph 1020F(1)(c) 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 of that Part were omitted, modified or varied as specified in the declaration.

1. Background

Parts 7.6–7.9 of the Act permit a wide range of financial services disclosure documents to be delivered electronically. These disclosure documents include a Financial Services Guide (FSG), Supplementary FSG, Product Disclosure Statement (PDS), Supplementary PDSs, Replacement PDSs, additional product information on request, Statement of Advice (SOA), CGS depository interest information statements, periodic statements, certain additional disclosures by trustees of superannuation entities, and ongoing disclosure by issuers of material changes and significant events relating to a financial product.

An FSG is a document that explains to a retail investor what financial services they can access from a provider. Generally, it must be given before the services are offered. A Supplementary FSG is a document that updates the information contained in the FSG or corrects a misleading or deceptive statement or an omission in the FSG.

A PDS is a document that explains to a retail investor what financial product they are buying. Generally, it must be given when the financial product is offered. A product provider is also obliged to provide further information relating to the product on request. A Supplementary PDS corrects, updates or amends the information in a PDS. A Replacement PDS replaces an earlier PDS.

An SOA is a document that explains to a retail investor what personal advice they are being given in relation to financial services or financial products. Generally it must be given at the same time as the advice.

A CGS Depository Interest Information Statement is a document prepared by the Commonwealth that contains information about CGS depository interests in a class. It is provided to a retail investor in circumstances where personal advice given to the retail investor recommends acquisition of CGS depository interests. (Division 5C of Part 7.9)

Periodic statements are documents provided to retail investors to help them understand their investment in superannuation, managed investment, retirement savings, first home saver, investment life insurance, margin lending or deposit accounts. A periodic statement is provided for a period (not exceeding one year) that is determined by the issuer of these products. (Subsections 1017D (1) and (2))

Trustees of superannuation entities are required to provide additional information to holders (or former holders) of a superannuation product, including in relation to their benefit entitlement, and the management, financial condition and investment performance of the entity. (Subsection 1017DA (1))

In addition, the Act requires ongoing disclosure by issuers of financial products to retail clients of material changes and significant events relating to those products. (Subsection 1017B (1))

2. Purpose of the instruments

Prior to the principal instrument, while most financial services disclosures could be delivered electronically, ASIC's guidance combined with legal requirements meant that the default method of delivery was a printed disclosure document sent by post or given in person.

For example, ASIC Class Order [CO 10/1219] which allows PDSs, FSGs, Supplementary FSGs and SOAs to be delivered electronically required prior consent from the client or the client's agent for such delivery. This discouraged providers from delivering disclosures electronically or investors from adopting electronic disclosure.

This instrument will further facilitate the electronic delivery of financial services disclosure documents by enabling electronic delivery to be the 'default' option for disclosure, if the provider chooses, subject to safeguards designed to ensure investors and consumers do not miss the opportunity to choose an alternative method of delivery. The principal instrument further enhances the online facilitation enabled by Class Order [CO 10/1219] and replaces it.

The instrument enables a provider to make financial service disclosures electronically to investors provided it has first sent a notice to the investor of its intention to do so and the investor has not opted out of receiving disclosures electronically.

If the investor has not opted out within 7 days, the provider may use the method described in the Instrument to satisfy their disclosure obligation. That is, the provider may make the disclosure available electronically and notify the investor or consumer. This notification may be in printed or electronic form and should contain a statement that the provider has made the relevant disclosure available by electronic means, and include instructions on how the

investor can use the electronic means to access the disclosure.

The provider may choose to provide the disclosure concurrently with the notification, but would not satisfy their obligation to deliver the disclosure until the 7 day period had passed without an opt-out requirement.

The principal instrument provides for methods of disclosure that are in addition to those currently permitted under the Act and the Corporations Regulations 2001 (*Regulations*). The instrument does not restrict any alternative methods of disclosure permitted under the Act and the Regulations.

The instrument also enables a default superannuation fund trustee to meet its obligation to deliver a PDS to an employer supplied email address, without the member's consent, when certain conditions are met.

The purpose of the repealing instrument is to discontinue ASIC's previous policy, as implemented by ASIC Class Order [CO10/1219]. The principal instrument carries over and expands the policy as implemented in the class order.

3. Operation of the instruments

Principal instrument: Section 5

Subsection 5 (1) of the principal instrument amends section 761A of the Act by inserting a definition of '*nominated electronic means*'. A provider makes a financial services disclosure or other relevant communication available to an investor or consumer ('client') by a '*nominated electronic means*' if the following requirements are satisfied:

- (a) Either:
 - a. the provider has given a notice (in a printed or electronic form) to the client advising that the provider will, in the future, make disclosures by an electronic means unless the client elects to opt out, and the client has not opted out within 7 days; or
 - b. the provider has gained the client's agreement to this method of disclosure; and
- (b) the provider sends a disclosure notice that contains a statement that the provider has made the disclosure electronically and includes instructions on how the investor can access the electronic disclosure each time a new disclosure is published (this statement can be sent concurrently with the first notice, but will not be effective disclosure until 7 days have passed with the client not opting out, or the client has otherwise agreed).

The above 'publish and notify' method provides relief from the requirement for prior express client agreement to receive digital disclosure in this way while preserving the client's right to opt out. The 'publish and notify' method is a new method of disclosure delivery introduced by the instrument that is additional to the electronic and other delivery options currently allowed under the Act. The method is available in situations where the provider wishes to publish a disclosure document in a digital medium (for example, their website or an app) rather than send the entire disclosure document to the client (either electronically as an attachment or a hard copy by post).

There are two kinds of notices required under this method. The first establishes the ‘publish and notify’ regime with the client and need only be given once in relation to the relevant method. This notice provides that the provider will make disclosures digitally unless the client elects to opt out within 7 days.

The second kind of notice is recurrent and is given each time a new disclosure (such as a periodic statement) is published electronically.

Each notice alerting the client to a new disclosure must include information on where to find the disclosure and how to access it; for example, a hyperlink or web address of the web page where the disclosure is available or the name and navigation options within the app.

Providers whose current practice and future intent is to send the entire disclosure document electronically as an attachment or by post need not rely on the ‘publish and notify’ method.

Subsection 5(2) of the instrument modifies section 940C of the Act to provide that a provider may make available an FSG, Supplementary FSG or SOA to a client, or a client’s agent, by a nominated electronic means, as an additional option for delivery.

Subsection 5(3) of the instrument modifies regulation 7.7.01 of the Regulations to include a Supplementary FSG in addition to an FSG.

Subsection 5(4) of the instrument modifies subsection 1015C(1) of the Act to additionally provide that a provider may make available a PDS to a client, or a client’s agent, by a nominated electronic means.

Subsection 5(6) of the instrument modifies subsection 1020AK(1) of the Act to additionally provide that a provider may make available a CGS depository interest information statement ‘to a client, or a client’s agent, by nominated electronic means. It also allows the statement to be given by any way that is agreed that allows the regulated person to be satisfied on reasonable grounds that the statement has been received, to align the treatment of CGS Depository Interest Information Statements with other disclosures.

Subsection 5(7) of the instrument modifies subsection 1017A(4) of the Act to provide that a provider may make available further information about the product on request by nominated electronic means.

Subsection 5(8) of the instrument modifies regulation 7.9.75A of the Regulations to provide that a product issuer may make ongoing disclosure of material changes and significant events in relation to the product by nominated electronic means. Periodic Statements and additional information required to be provided by trustees of superannuation entities under paragraphs 1017DA(1) and (2) of the Act may also be made available to a client or a client’s agent by nominated electronic means.

Subsection 5(9) of the instrument modifies the Regulations to provide that a trustee of a standard employee sponsored superannuation fund may send disclosures to an electronic address provided by the (member) client’s employer, provided all of the following are satisfied:

- (a) the employer provided the electronic address to the trustee as part of providing contact details for the client in relation to membership of the superannuation fund;
- (b) the trustee gives the client reasonable opportunity to request an alternative method of receiving the PDS; and

- (c) the trustee has no reasonable grounds to believe that the address is not a current address, and has no reason to form that such a view within 14 days of sending the notice.

Repealing instrument: Schedule 1

Schedule 1 of the repealing instrument repeals ASIC Class Order [CO10/1219] which implemented ASIC's previous policy on facilitating online disclosure.

4. Documents incorporated by reference

There are no documents incorporated by reference.

5. Consultation

Before making the instruments, ASIC consulted with relevant stakeholders on how to further facilitate the electronic delivery of financial services disclosure documents.

In November 2014, ASIC released Consultation Paper 224 *Facilitating electronic financial services disclosures* (CP 224). ASIC received 34 submissions to the proposals in CP 224 from industry bodies and a wide variety of financial services providers. The majority of proposals were supportive of ASIC's proposal to make digital delivery of financial services disclosure the 'default' method of delivery, while preserving consumer choice by providing clients the option to opt out.

A Regulatory Impact Statement, approved by the Office of Best Practice Regulation (OBPR) and a Feedback Report detailing the various submissions received in relation to the proposals in CP 224 and ASIC's response to those submissions, have also been prepared. These documents, together with CP 224 and the non-confidential submissions received in relation to CP 224, can be found on the ASIC website.

Statement of Compatibility with Human Rights

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

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The instruments are 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

Although the Corporations Act permits a wide range of financial services disclosure documents to be delivered electronically, existing legal requirements mean that the default method of delivery is a printed disclosure document sent by post or given in person.

The principal instrument further facilitates digital financial services disclosure by providing relief to enhance the ability to product issuers to make disclosure documents available electronically.

ASIC Corporations (Repeal) Instrument 2015/681 repeals Class Order [CO 10/1219] which gave effect to ASIC's previous policy in this area.

Human rights implications

Neither of the legislative instruments engage any of the applicable rights or freedoms.

Conclusion

The legislative instruments are compatible with human rights as they do not raise any human rights issues.



ASIC

Australian Securities & Investments Commission

REGULATION IMPACT STATEMENT

Facilitating digital financial services disclosures

July 2015

About this Regulation Impact Statement

This Regulation Impact Statement (RIS) addresses ASIC's proposals for further facilitating digital disclosure by:

- providing relief to facilitate default digital delivery of financial services disclosures and more innovative Product Disclosure Statements (PDSs), Financial Services Guides (FSGs) and Statements of Advice (SOAs); and
- updating our regulatory guidance.

What this Regulation Impact Statement is about

- 1 This Regulation Impact Statement (RIS) addresses ASIC's proposals for facilitating digital disclosure by providing relief to facilitate default digital delivery of financial services disclosures and to remove barriers to the use of innovative Product Disclosure Statements (PDSs), Financial Services Guides (FSGs) and Statements of Advice (SOAs), as well as updating our regulatory guidance to reflect this.
- 2 In developing our final position, we have considered the regulatory and financial impact of our proposals. We are aiming to strike an appropriate balance between:
 - administering the law effectively and with minimal procedural requirements (reducing red tape); and
 - promoting investor trust and confidence in the financial system.
- 3 This RIS sets out our assessment of the regulatory and financial impacts of our proposed policy and our achievement of this balance. It deals with:
 - the likely compliance costs;
 - the likely effect on competition; and
 - other impacts, costs and benefits.

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A Introduction

Background

- 4 A key part of the legislative scheme governing financial products and services is the principle of disclosure. That is, in order for consumers to be in a position to make informed decisions about financial products and services, the providers of those products and services must give them all of the relevant information about those products or services, such as their key features, benefits and risks.
- 5 The provision of this information is mandated by the legislation (as modified by the regulations and existing ASIC instruments). The various provisions cover both:
- (a) upfront disclosure—the information that must be given at the beginning or before the purchase or entering a financial relationship, such as a PDSs; and
 - (b) ongoing disclosure—the information that is given during the course of ownership of the product or engagement with the service, such as a bank statement or annual superannuation update, or a notification of a change to the product or service.
- 6 The *Corporations Act 2001* (Corporations Act) itself is generally neutral as to the form of the disclosure for financial services—that is, the legislation does not preference one form for disclosure (such as printed documents) over another form (such as digital documents), as long as the information is provided to the consumer at a mandated point in time, meets content requirements, and, in some cases, meets overarching requirements, such as being ‘clear, concise and effective’.
- 7 However, as detailed below, the impact of the current legislative requirements, combined with ASIC’s current guidance on how to apply those requirements set out in Regulatory Guide 221 *Facilitating online financial services disclosures* (RG 221), mean that the default method for delivery of most disclosures is in printed form (either given personally or sent by post to an address). In other words, a printed disclosure document, sent to a postal address, remains the default method of delivering financial services disclosures.
- 8 Providers are also generally able to deliver upfront disclosures electronically, but while electronic versions of upfront disclosures are routinely made available, these are generally static, PDF duplicates of a printed document.

Legislative background

- 9 While most disclosures can be delivered digitally using a variety of delivery methods, this generally requires specific agreement from the client, as compared with delivering disclosure to a postal address, which does not require specific agreement.
- 10 The proposals discussed in this RIS relate to Pts 7.6–7.9 of the Corporations Act, which permit a wide range of financial services disclosures to be delivered digitally. The provisions that enable disclosures to be delivered digitally differ depending on the type of disclosure. This RIS does not address disclosures under the *National Consumer Credit Protection Act 2009*, such as credit card statements or mortgage disclosures.
- 11 FSGs, SOAs, PDSs and information statements for Commonwealth Government Securities (CGS) depository interests can be ‘given’ if they are sent to an electronic address or fax number ‘nominated’ by the client or the client’s agent: s940C(1)(a)(ii), 1015C(1)(a)(ii) and 1020AK(1)(a)(ii). The term ‘nominated’ is interpreted in RG 221 as a requirement for express consent, in the case of electronic addresses.
- 12 The following disclosures may be notified or given to a client in ‘electronic’ form or may be sent ‘electronically’ (interpreted in RG 221 as requiring express consent):
- (a) ongoing disclosure (s1017B(3)(b));
 - (b) periodic statements (s1017D(6)(b));
 - (c) confirmations of transactions (s1017F(6)(a)(ii));
 - (d) annual superannuation information (s1017DA(3) and reg 7.9.75A(3)(b));
 - (e) additional information provided by a superannuation trustee (s1017DA(3) and reg 7.9.75A(3)(b)); and
 - (f) unsolicited offers to purchase financial products off-market (s1019E(1), 1019G(3) and 1019J(2)).
- 13 The following disclosures may alternatively be ‘made available in any way agreed to’ by a client or their agent (meaning, provided the client agrees, the disclosure could be delivered digitally):
- (a) FSGs and SOAs (s940C(1)(a)(iii));
 - (b) PDSs (reg 7.9.02A);
 - (c) ongoing disclosure (reg 7.9.75A(1));
 - (d) periodic statements (reg 7.9.75A(2));
 - (e) annual superannuation information and additional information provided by a superannuation trustee (reg 7.9.75A(3)(c) and (d)); and
 - (f) additional information on request (s1017A(4)(b)).

- 14 Annual superannuation information can also be provided to members of a regulated superannuation fund by ‘making [it] available on a website that is maintained by or on behalf of the trustee’ in accordance with reg 7.9.75BA.
- 15 Confirmations of transactions can be provided ‘by means of a standing facility’ in accordance with s1017F(5)(b) and 1017F(5A).
- 16 Under Class Order [CO 13/763] *Investor directed portfolio services*, quarterly reports for an investor directed portfolio service (IDPS) can either be delivered electronically, or a client (with their consent) can be given access to their account on an electronic platform, where the Australian financial services (AFS) licensee has no reason to doubt that the client has substantially continuous access.

ASIC guidance

- 17 In 2010, ASIC issued RG 221. The purpose of the guide was to facilitate the use of electronic delivery of disclosure by explaining how the delivery methods in the law operate. ASIC also made Class Order [CO 10/1219] *Facilitating online delivery of PDSs, FSGs and SOAs* to enable delivery of some disclosures via hyperlinks and through references to website addresses, and to explain when consent is needed to send disclosures electronically.
- 18 Under the current law and ASIC’s current guidance, providers are able to deliver most ongoing disclosures by publishing them electronically (such as on a website) and giving a notification; however, generally the provider must first agree this method of delivery with the consumer.
- 19 As a result of the position that we took in our guidance, even where providers have an electronic address, they must generally obtain active consent from consumers in order to send disclosures to electronic addresses. As such, the default method of disclosure is printed disclosures sent to a postal address.

Summary of industry

- 20 These proposals may affect all product and service providers in the financial sector; however, the key sectors that provide disclosure documents are superannuation funds and banks (including wealth management businesses of banks).
- 21 According to Australian Prudential Regulation Authority (APRA) data, there are approximately 29 million superannuation member accounts with funds that have more than four members. We estimate that there are approximately 40 million bank customers in Australia.¹

¹ Figure estimated by ASIC from data including industry submissions, and bank annual reports and websites.

Assessing the problem

- 22 The overarching disclosure framework has significant shortcomings and limitations, including that, even when well designed, disclosure is ultimately less effective in addressing some market problems than others (e.g. conflicts of interest).²
- 23 The policy project outlined in this RIS is not attempting to address these broader problems, nor does it seek to assess and improve the efficacy of the disclosure regime.
- 24 Rather, this RIS is intended to address problems within this regime, around the format and the method of delivery of disclosure that are inhibiting the regime from operating efficiently, in that the regime does not allow participants to choose the most appropriate, effective or efficient method of communication.
- 25 These problems are chiefly regulatory impediments to technology neutral communication within the financial services disclosure regime.
- 26 Our estimates, based on information provided by industry, suggest that only around 34% of bank customers and around 8% of superannuation members currently receive financial services disclosures digitally, including by email and other digital methods.
- 27 If each of the remaining consumers received a single letter a year from their financial services provider, that would be around 55 million letters each year.

Regulatory settings unnecessarily limiting choice

- 28 The current regulatory and legislative settings create a disclosure regime for financial services that is not technology neutral but, rather, favours printed disclosure formats and posted or personal delivery over digital formats and digital delivery by making printed and posted disclosures the default. These regulatory settings create market inefficiency, in the form of additional transaction costs, because providers cannot choose to set their default method of delivery to digital delivery. This means that consumers need to actively opt in to receive digital disclosures.
- 29 Research suggests that a default option that will be retained unless the consumer actively chooses something else (i.e. ‘opts in’) results in more people choosing the default than would be the case if no default were set. In addition to this, behavioural research also suggests that defaults can be ‘sticky’, meaning that once the choice is set, even when consumers prefer or

² Financial System Inquiry, *Financial System Inquiry: Interim report*, July 2014 (Financial System Inquiry interim report), pp. 3-54–3-62, http://fsi.gov.au/files/2014/07/FSI_Report_Final_Reduced20140715.pdf.

would accept an alternative, behavioural biases can lead to inertia or retaining the status quo, meaning consumers might not actively seek to change disclosure preferences.³

30 At the time [CO 10/1219] was developed (2010), the regulatory distortion in favour of printed and posted disclosure was justified on the grounds of consumer protection—that is, ensuring that consumers, for whom at that time digital communications may have been a relatively new phenomenon, were only contacted digitally where they actively sought digital communications.

31 These regulatory settings for disclosure no longer accommodate provider and consumer expectations in the current environment where the majority of adult Australians are online (92%) and a majority of those online undertake financial transactions using the internet (72%).⁴

32 The increased use of digital communications (in particular, the internet) both in terms of percentage of population, and frequency of online engagement, mean that the regulatory benefit for a small number of consumers no longer justifies the imposition of additional regulatory burden on providers and consumers to engage digitally.

33 In addition to this, while the Corporations Act envisages the use of electronic addresses, it is drafted in a way that has not kept up with the variety and breadth of digital communications. This means providers are prevented or discouraged from using the most efficient and effective form of communication.

34 Further to this, the Financial System Inquiry notes that, ‘where changes in technology create difficulties in interpreting provisions, firms are likely to take a conservative view to minimise regulatory compliance risks’.⁵ This means that even where the law allows digital delivery, in some cases providers are still discouraged from using digital methods and formats due to a lack of clarity.

Regulatory settings inhibiting innovation

35 The regulatory settings that favour printed and posted disclosure are also a barrier to innovation, through the use of digital technology, in disclosure. These settings prevent providers from supplying disclosure in the forms that are demanded by consumers or that providers choose to supply, such as interactive web-based disclosures, apps, videos, games and audio presentations.

³ C Sunstein (2011), ‘Empirically informed regulation’, *University of Chicago Law Review*, vol. 78, pp. 1349–1429.

⁴ Australian Communications and Media Authority (ACMA), *Communications report 2013–14 series: Report 1—Australians’ digital lives*, March 2015, www.acma.gov.au/theACMA/Library/Corporate-library/Corporate-publications/communications-report.

⁵ Financial System Inquiry interim report, p. 4-42.

- 36 The current regulatory settings are inhibiting possibilities for providers to explore new ways of communicating and therefore for consumers to potentially benefit from these opportunities.
- 37 We expect that the removal of barriers to more innovative disclosure will result in more of these more innovative disclosures in the market. We think that technology provides opportunities to better engage or communicate with some consumers. As such, we hope that some additional consumer engagement and understanding will flow from the removal of barriers to this kind of disclosure.
- 38 The Financial System Inquiry final report noted that ‘consumers can more effectively use information that is accessible, engaging and understandable. Although there has been limited research on the benefits of new media compared with paper-based disclosure, new media offers opportunities for more engaging communication.’⁶

Why is ASIC action needed

- 39 Although intended to facilitate electronic communication,⁷ the legislation, regulations and ASIC’s current guidance have not kept up with consumer and industry demand and are impeding the efficient operation of the market.
- 40 ASIC action is needed to remove the regulatory barriers to digital disclosure described above.
- 41 The Government’s red-tape reduction and digital economy policies mean that there is a focus on what ASIC is doing to support digital commerce and to reduce red tape.
- 42 This proposal will support the goals of both of these policies by removing unnecessary red tape—in this case, consumers no longer needing to ‘opt in’ to digital delivery and by supporting digital commerce by increasing the use of digital communications in financial services.
- 43 Recent government inquiries also support the facilitation of more digital communication. For example, the Commission of Audit report⁸ made a recommendation that the Government set an ambitious e-government strategy, including making engagement with the Government electronic by default. The 2015–16 Budget built on this by setting up a new Digital Transformation Office. While the proposals discussed in this RIS do not go directly to digital engagement with Government, by further facilitating digital commerce, they will complement the Digital Transformation Agenda.

⁶ Financial System Inquiry, *Financial System Inquiry: Final report*, November 2014 (Financial System Inquiry final report), <http://fsi.gov.au/publications/final-report/chapter-4/innovative-disclosure/>.

⁷ Corporate Law Economic Reform Program Bill 1998, Explanatory Memorandum, paras 8.10–8.17; RG 221.1.

⁸ National Commission of Audit, *Towards responsible government: The report of the National Commission of Audit—Phase one*, www.ncoa.gov.au/report/phase-one/index.html.

- 44 The Financial System Inquiry final report also made two recommendations relevant to electronic communications. These recommendations are:
- (a) *Facilitate innovative disclosure*: remove regulatory impediments to innovative product disclosure and communication with consumers, and improve the way risks and fees are communicated to consumers. The first part of this recommendation was directed specifically at ASIC, with the second part, a legislative solution, to be implemented following evaluation of the success of ASIC measures.
 - (b) *Technology neutrality*: identify, in consultation with the financial sector, and amend priority areas of regulation to be technology neutral. Embed consideration of the principle of technology neutrality into development processes for future regulation. Ensure regulation allows individuals to select alternative methods to access services to maintain fair treatment for all consumer segments. This was a general recommendation to Government, not specifically directed at ASIC.
- 45 Our proposals will support the technology neutrality recommendation by seeking to align the treatment of digital and printed and postal methods of communications. In addition, our proposals will, by removing barriers that limit the form of disclosure, remove impediments to innovative product disclosure and communication.
- 46 Our proposals will enable providers to deliver ongoing disclosures digitally as a default. This will mean that more consumers are likely to receive disclosures digitally. This will save money and time for providers and be more convenient for a majority of consumers. It may also improve engagement with the content of the disclosures. For those consumers who prefer printed and posted disclosures, these proposals ensure that choice remains available.
- 47 These proposals are proactive and designed to lead to more positive outcomes and compliance cost savings.
- 48 It is important to note that Government action to remove barriers alone will not necessarily deliver the benefits of more digital disclosure because there are other, non-regulatory barriers to increased use of digital channels.
- 49 This is particularly the case for more innovative product disclosure, where costs and consumer demand for innovative disclosure are a factor in the incentives for providers to develop more innovative disclosure solutions. Nevertheless, it is important that regulatory requirements are not a factor in holding back the potential development of disclosure that better meets provider and consumer needs, where these requirements do not otherwise have regulatory benefit.

B Options and impact analysis

We consider that the options are:

Option 1—A combination of Options 2 and 3 (preferred option)

Option 2—Enable default digital delivery of financial services disclosure

Option 3—Remove barriers to more innovative PDS, SOAs and FSGs

Option 4—Make no changes to our guidance and provide no additional relief, thereby maintaining the status quo.

Option 1: Combined measures to remove barriers to digital disclosure (preferred option)

50 This option combines Options 2 and 3 detailed below and delivers maximum benefits for consumers and financial service and product providers by removing all legal and regulatory barriers that are preventing technology neutrality (preferring printed disclosure) for financial service and product disclosure that we are able to remove—that is, removing legal and legislative barriers to both:

- (a) enable default delivery of digital disclosure (i.e. a proposal about delivery of disclosure); and
- (b) allow for more innovative forms of PDSs, FSGs and SOAs (i.e. a proposal about the form of disclosure).

51 While most compliance cost savings are most likely to be realised as a result of implementing Option 2, combining Options 2 and 3 is designed to achieve a technology neutral approach to both the delivery and form of financial services disclosure. Achieving a technology neutral approach with respect to the delivery only would not address existing barriers that are inhibiting innovation in disclosure.

52 Delivering these two sets of changes together also sends a stronger message about ASIC's commitment to digital disclosure than either one of these alone.

53 On technology neutrality, the Financial System Inquiry final report (p. 270) noted the following:

A technology-neutral approach to regulation enables regulators and government to adapt to innovative developments and manage risks. It can also reduce compliance costs by removing unnecessary regulatory impediments and improving the stability and longevity of regulation. It can also give financial product providers greater flexibility to innovate to meet changing consumer expectations.

- 54 Taking steps to further facilitate digital delivery of disclosures, as well as more innovative documents, will result in more digital and less paper distribution and will reduce costs for business, increase convenience for consumers and may result in increased consumer engagement with and understanding of disclosure.
- 55 In some cases, default digital disclosure might result in some consumers not receiving disclosures. As the Financial System Inquiry final report (page 270) points out:
- Stakeholders note a potential consequence of technology-neutral regulation is that it risks excluding some community segments from the financial system. For example, by enabling businesses to shift to electronic service delivery as a default, older Australians or others with limited internet access may become excluded. As a result, it is important that regulation accommodates the ability of consumers to select alternative methods to access services, such as paper-based delivery.
- 56 In our consultations, consumer groups also raised concerns about the impact of our proposals on vulnerable and less digitally connected Australians.
- 57 Where possible, we have built into our proposals protections for these vulnerable consumers and included guidance to help providers reach their clients, without imposing disproportionate additional costs on those providers. For the new default method of delivery, we require that providers give consumers a clear opportunity to opt out of digital delivery, unless they have acquired a fully digital product or service. This opt-out from a default retains full choice for consumers.
- 58 In addition, we have given guidance to providers regarding email bounce-backs. As a matter of good practice, providers should monitor for undelivered or undeliverable emails and try an alternative method of delivery. We also encourage providers to use a method and form of delivery that best suits their client as part of their obligation to provide clear, concise and effective disclosure.
- 59 On the other hand, we also expect increased digital disclosure to result in some consumers, who might not receive or engage with a paper disclosure (under the current regime), to be more able or inclined to do so with a digital disclosure. While some consumers may change email addresses frequently, others, such as renters, may move postal addresses frequently but retain email addresses for longer periods. Some consumers may not have internet access or may not seek to engage with digital disclosures, while some others may be more inclined to engage with a disclosure that they can readily access from a mobile device.
- 60 It is important to note that these proposals build on what is already allowed under the legislation in terms of digital disclosure—most disclosures may already be sent digitally and in some cases by using a standing facility, such as a website.

61 Our aim is not to address the shortcomings associated with disclosure more broadly. As such, we are not intending to impose additional obligations on providers using digital formats that they would not be required to meet if they were delivering printed disclosures.

62 This means, as with postal addresses, the onus remains on the consumer to update their contact details (such as email addresses) if they change and, once given or made available, the consumer is free to read or not read the disclosure as they see fit. This is critical to the principle of technology neutrality.

63 Although we hope that this work might make disclosure more engaging and accessible for some, and free up resources to invest in better disclosure, our focus is not specifically on delivery form as a means to increase engagement with disclosure, but rather we are working to open up the possibility of increased engagement through new formats.

64 This work is also not intended to remedy existing risks associated with digital communications, including security and technology concerns. Nevertheless, we acknowledge that in an environment of more digital disclosure, these risks may affect more consumers, which is why we also propose updated guidance to mitigate these risks.

65 Specific impacts have been detailed under each option.

Option 2: Enable default digital delivery of financial services disclosures

66 This option has two complementary components. It:

- (a) gives providers an additional option for delivery of disclosures, which would enable them to meet the requirements of delivery if they publish disclosures digitally and then notify the client that the disclosure is available; and
- (b) makes it clear that if a financial services provider has an electronic address for a client, they do not need additional consent to use that address to deliver disclosures.

67 Together, these components ensure that providers will be able to set the default for their disclosures as digital if they choose to do so, as long as the consumer has the opportunity to opt out of digital disclosure (except for fully digital products).

Impact on industry

- 68 By removing the current regulatory barriers that require additional steps before disclosures can be delivered digitally (compared with postal delivery) we expect more consumers to receive disclosures digitally. We expect Option 2 will result in significant compliance cost savings for industry.
- 69 The superannuation and banking sectors are responsible for a majority of financial services and product distribution and were able to provide costing information. These sectors are also best placed to take advantage of greater digital disclosure opportunities. Additional savings might be realised by non-bank wealth management and financial services (such as advice) providers.
- 70 Based on information provided in the course of consultations, we estimate that, for banking customers, around 34% of customers are currently receiving communications digitally. For superannuation we estimate approximately 8% of members are currently receiving communications digitally.
- 71 Based on industry feedback and our analysis, we estimate that the compliance cost savings will be around \$299.1 million per annum over 10 years for the superannuation and banking sectors. This will primarily result from savings in printing and postage costs, but also incorporates time and delay savings for businesses, as well as record-keeping savings that we estimate will accrue to businesses.
- 72 Table 1 shows the total cost savings to industry, based on an assumed 80% take up of digital disclosure. This assumption is based on OBPR advice on consumer preferences for digital engagement with government, ACMA figures for internet use (92%), use of the internet for online banking and paying bills (77% of internet users),⁹ and consumers who report that they expect to deal with business and government services online (82%).¹⁰

Table 1: Total cost savings to business

Sector	Cost savings
Banking	\$214,155,997
Superannuation	\$75,738,307
Total	\$289,894,304

Source: ASIC, industry response to Consultation Paper 224 *Facilitating electronic financial services disclosures* (CP 224), APRA data, Reserve Bank of Australia (RBA) data and Australia Post.

⁹ ACMA, *Communications report 2013–14*, www.acma.gov.au/theACMA/Library/Corporate-library/Corporate-publications/communications-report.

¹⁰ ACMA, *Communications report 2011–12*, www.acma.gov.au/theACMA/Library/Corporate-library/Corporate-publications/communications-report-2011-12.

73 Table 2, Table 3 and Table 4 show the assumptions underlying the above cost estimates. There are additional savings from the wealth management operations of banks, being a total of approximately \$69 million a year. Additional details have not been included due to commercial sensitivity.

Table 2: Maximum savings estimates—Printing and postage costs

	Small letters per year	Large letters per year	Cost of small letter	Cost of large letter	Total number of accounts	Annual cost of paper disclosure (total)	Assuming digital disclosures cost 5%, maximum annual cost savings are estimated at:
Banking—transaction accounts	6	1	\$1.32	\$2.53	40,345,982	\$421,060,755	\$400,007,717
Banking—wealth management	n/a	n/a	n/a	n/a	n/a	\$68,998,734	\$65,548,797
Superannuation	1	1	\$1.32	\$2.53	28,794,934	\$110,728,519	\$105,192,093

Source: ASIC, industry response to CP 224, APRA, RBA and Australia Post.

Table 3: Savings estimates—Banking

Email take-up rate	80%	46%¹¹
100% take-up saving	\$465,556,514	\$465,556,514
Actual saving (after accounting for email take-up rate)	\$372,445,212	\$214,155,997

Source: ASIC, industry response to CP 224, APRA, RBA and Australia Post.

Table 4: Savings estimates—Superannuation

Email take-up rate	80%	72%¹²
100% take-up saving	\$105,192,093	\$105,192,093
Actual saving (after accounting for email take-up rate)	\$84,153,675	\$75,738,307

Source: ASIC, industry response to CP 224, APRA and Australia Post.

74 These compliance cost savings are estimates only and are provided to give an indication of expected compliance cost savings. They are highly

¹¹ Assuming 80% total take-up, less 34% of consumers already digitally engaged.

¹² Assuming 80% total take-up, less 8% of consumers already digitally engaged.

dependent on assumptions, which have been made with input from industry participants, but nevertheless remain our assumptions.

75 Consultation suggests that, in many cases, providers will rely only on greater use of existing systems. We also understand from our consultations that any additional costs would be minor. Consequently, this compliance cost savings estimate does not incorporate a value for costs required to implement systems changes for providers.

Impact on consumers

76 The impact on consumers will be minimal because these proposals do not change the existing range of possible delivery methods, but merely make it possible for digital disclosure to be the default method of delivery. Except for fully digital products, which include as part of their terms and conditions that they are fully online and as such will have disclosures only available digitally, consumers may opt out of digital delivery.

77 Nevertheless, we expect fewer consumers to opt out of digital delivery compared with those who have previously opted in. Given continually increasing use of digital technology, particularly the internet and smartphones, we would expect these new digital disclosure recipients to fall into three broad categories (not including those consumers who opt out of digital disclosure):

- (a) those who prefer digital disclosure, but have not made the effort to opt in;
- (b) those who are indifferent to the method of disclosure; and
- (c) those who do not access the disclosure because of a lack of access to digital technology, not accessing relevant digital technology or because an addressed disclosure or message advising of the disclosure does not reach the consumer.

78 For the first two categories of consumer, digital disclosure will be a net positive. The benefits of this option include ease and convenience of use by consumers, including enabling disclosures to be viewed on mobile devices.

79 There are also time savings for consumers because issuers can deliver disclosures in real time, rather than waiting for post. Digital disclosure may assist people to be more organised with information and allow easier retrieval for review because digital information can be easier to file, categorise and search than paper.

80 The cost saving estimates in Table 5 are based on an assumed 12 minutes to opt in or out, and 2 minutes to shift channels. This is based on industry submissions, our knowledge of these processes and advice from OBPR.

Storage costs are estimated from commercially available costs of storing paper records and electronic data.

Table 5: Costs and savings for consumers

Arising from	Saving/cost
Reduced time needed for channel shifting	\$3,798,179
Increased time needed for opting out (paper preference)	-\$8,020,346
Reduced time needed for opting in (digital preference)	\$11,394,536
Reduced costs of storage	\$2,033,233
Total	\$9,205,602

Source: ASIC, industry submissions to CP 224, record storage facilities, Telstra data storage information and OBPR.

- 81 Only 6% of Australians have never accessed the internet, but in the third category (paragraph 77(c)), we expect that there may be a small number of consumers for whom a switch to default digital disclosure results in disclosure not being received or accessed. In some cases, this may have a neutral impact for particular consumers who are unlikely to engage with an alternative form of disclosure (such as printed).
- 82 However, to help ensure consumers do not miss out on important information, the default delivery method must provide opportunities to change delivery methods.
- 83 Our proposal under this option also includes guidance to providers to ensure that providers are aware that, regardless of the form of the disclosure, their obligation is to give it to their clients. If those clients are not able to access digital disclosures, the provider should provide an alternative method of disclosure to that client. It also includes guidance to providers as to how to make the transition for existing clients to digital disclosure—with appropriate notification and time to opt out.
- 84 We also encourage providers to monitor access to and engagement with digital disclosures—something that cannot be done with printed and posted disclosure, which can help identify those customers who are not receiving or engaging with disclosure.
- 85 As with all disclosure, we encourage providers to undertake consumer testing to identify what works and what does not in improving consumer engagement. The opportunity to do this is increased given the data generated from digital disclosure. This proposal will also free up resources that could be used for this purpose.

Other indirect impacts

- 86 The reduced use of paper and postage also has environmental benefits.
- 87 As the proposal is expected to reduce the use of postage and printing, there may be impacts on postal providers and through the paper manufacture value chain. To the extent printing is currently not conducted in-house for providers, there may be an indirect cost to printing businesses.

Option 3: Remove barriers to more innovative PDSs, SOAs and FSGs

- 88 This option makes minor changes to the legislative regime governing these disclosure documents to facilitate the development and use of more innovative formats for these disclosures.
- 89 In particular, this option will remove potential legal barriers to the use of more innovative PDSs, FSGs and SOAs, including providing relief from:
- (a) various provisions that require a copy of the PDS to be given on request;
 - (b) the requirement for certain PDSs under the shorter PDS regime to be a particular page length; and
 - (c) provisions that require the use of certain words on the cover or ‘at or near the front of’ a disclosure.
- 90 These particular parts of the legislation are ‘paper-centric’ and it is difficult to apply these to more innovative disclosure formats such as video or disclosures via apps.
- 91 In addition, we propose to update our guidance to explain how we see other parts of the legislation applying in the digital context. For example, we propose to make clear that it is open to a provider to have more than one version of a disclosure for the same product, such as a printable version and an interactive digital version.
- 92 We also propose to update our guidance to explain how general disclosure requirements, such as the requirement for disclosure to be ‘clear, concise and effective’, apply in the digital context.
- 93 The benefits of the measures to remove barriers to innovative disclosure are less likely to be realised immediately; rather, these changes are aimed towards ‘future-proofing’ the regulatory regime so that it can accommodate more innovative disclosures in ways that are not yet imagined.

Impact on consumers

- 94 We expect more innovative digital formats to go some way to improving consumer engagement with, and understanding of, disclosure. Digital disclosure has the potential to assist investor understanding by allowing interactivity and alternative presentation formats (such as video and audio).
- 95 By making the legislative regime more technology neutral, these proposals will enable providers to use a range of channels to communicate mandated disclosures to their clients. This means that providers are not restricted by the legislative regime and are able to use the formats and channels that work best.
- 96 As communications increasingly become digitised, our proposed updated guidance will also help to protect consumers by suggesting how we think providers can meet their general disclosure obligations in the digital context.

Impact on industry

- 97 These proposals will have no direct substantive cost impact on industry because they are intended to be facilitative. We expect that some industry participants will take advantage of our removal of barriers to develop more innovative disclosures. Where they choose to do this, we would expect industry to incur development costs; however, these will be to a degree and level of the particular participant's choosing since there will be no obligation on industry to develop innovative disclosures if they do not wish to.

Option 4: Take no action (status quo)

- 98 This option would see the default for disclosure delivery stay as printed and posted for most disclosures and would mean legal barriers would continue to inhibit more innovative disclosure formats.
- 99 Failing to take action to facilitate digital disclosure by making changes to achieve a technologically neutral legal framework may result in some providers being prevented from providing the disclosure options to their clients that their clients demand or that are most efficient for the provider.

Impact on industry

- 100 Without our proposals, the legal framework will remain biased towards printed and posted disclosures. This means that cost savings/red tape reduction will not be realised and industry will not be able to meet consumer demand.

Impact on consumers

- 101 These proposals are proactive and designed to lead to more positive outcomes, rather than mitigating or preventing any risks. However, retaining the status quo may result in a small detriment to investor and financial consumer confidence because a non-technology neutral system means that some consumers are currently missing out on the benefits of digital disclosure.
- 102 Statistics suggest that internet usage, including mobile internet usage, continues to rise.¹³ Although internet penetration overall is now rising at a slower rate, people are engaging more intensively online, and people are increasingly comfortable and expect to be able to conduct their everyday business digitally.
- 103 In addition, as more and more business is transacted digitally, there is a risk that consumers who do not wish to, or who are unable to, transact and communicate digitally, miss out on important information or opportunities. This regime puts in place safeguards to help ensure that consumers are given the opportunity to opt out of digital disclosure if they so choose, and provides guidance on good practice as financial services increasingly use digital channels.

¹³ For increased internet usage and the shift to mobile internet usage, see ABS 8153.0, *Internet activity, Australia*, June 2014 'Type of access connection', www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/8153.0Main%20Features1June%202014?opendocument&tabname=Summary&prodno=8153.0&issue=June%202014&num=&view=. For engaging more online, see ACMA, *Communications report 2013–14 series: Report 1—Australians' digital lives*, March 2015, www.acma.gov.au/theACMA/Library/Corporate-library/Corporate-publications/communications-report.

C Consultation

- 104 In Consultation Paper 224 *Facilitating electronic financial services disclosures* (CP 224), which also functioned as our options-stage Regulation Impact Statement, we consulted on proposals to further facilitate electronic financial services disclosure.
- 105 CP 224 was released on 14 November 2014. Submissions closed on 30 January 2015. Through CP 224, we proposed to:
- (a) *Amend our guidance on using digital addresses in RG 221*: Our current guidance suggests that additional, more stringent obligations apply where a provider wishes to use an electronic address for delivery (i.e. as compared with using a postal address), so that the provider must seek express consent to deliver to a digital address. In CP 224, we proposed to update our guidance in RG 221 to make it clear that there is no such additional requirement for digital delivery within the legislation.
 - (b) *Provide an additional method of delivery for most Ch 7 disclosures (where not already permitted)*: We proposed to provide additional relief to allow providers to make disclosure available on a website or other facility and notify clients that the disclosure is available.
 - (c) *Provide relief and guidance to overcome technical barriers to providing innovative PDSs*, including good practice principles to help ensure consumers receive clear, concise and effective disclosure when delivered in this format. We also consulted on whether ASIC should likewise address similar technical barriers to the provision of digital FSGs and SOAs.
- 106 We received 34 responses to CP 224 from businesses, industry representatives, consumer representatives and individuals.
- 107 We met with industry and consumer representatives, both during and after the formal consultation period. We also met with some individual financial services providers to obtain more detailed feedback on some of our proposals and sought further detailed information about cost savings.
- 108 We have reflected the feedback from submissions in our final recommendations.
- 109 Submissions received were generally supportive of the principle of further facilitating digital disclosure, with consumer representatives tending to qualify support with the need to ensure that proposals are implemented in a way that does not compromise consumer outcomes.
- 110 Submissions detailed a number of benefits expected to result from our proposals—in particular, speed, convenience, reliability and security, and minimising cost and environmental impacts.

- 111 Submissions from consumer groups in particular also acknowledged that moving to an increasingly digital environment is inevitable, and supported ASIC managing this change through good practice guidance.
- 112 The key risk from these proposals, as noted in some submissions, is to investor and financial consumer trust and confidence. While the overarching goal is to remove barriers to making disclosure more efficient and more innovative, there is a possibility that some consumers will be less likely to receive or read, consume and understand disclosure material delivered digitally if they have not specifically requested disclosure in that way.
- 113 Consumer representatives noted that any risks associated with more digital disclosure would be most acute for certain groups of consumers, including older Australians, those who live remotely, those on lower incomes and those with lower literacy.
- 114 On the other hand, some consumers will also be *more* likely to read, consume and understand disclosure material delivered digitally.
- 115 Submissions (including from consumer groups) supported the overarching goal and the principle of facilitating digital disclosure, provided consumers had the opportunity to choose how to receive disclosures, subject to clear understanding of the terms and conditions they agreed at the time of purchasing the financial product or service.
- 116 We considered these risks and our recommended proposals require that, where a provider chooses to use digital delivery as a default, consumers must be given a reasonable opportunity to opt out of this method of delivery.

D Conclusion and recommended option

- 117 Overall, we see that the significant compliance cost savings, as well as the small consumer benefit we expect to arise from these proposals, outweigh the small potential consumer detriment, particularly when our mitigating measures are taken into account.
- 118 On balance, and given the other benefits of this proposal, we think the risk of consumer detriment, which is small, is outweighed by the likely benefits.
- 119 The failure to grant relief and publish updated guidance (particularly after consultation) could result in ASIC being insufficiently progressive and supportive of business, particularly given the strong support for both our proposals and for technology neutral regulation in general, including in the Financial System Inquiry final report.
- 120 As such, our recommended option is Option 1, the combined measures to facilitate digital disclosure.
- 121 Following consultation, we included an additional relief measure in our recommended option to give certainty to a trustee of a superannuation fund that obtains an email address for a member as part of an employer-nominated superannuation arrangement, that the trustee can use that address to deliver disclosure ('employer-provided email addresses').
- 122 Following consultation, we also include in our recommended option further detail in our updated guidance giving more clarity on certain issues, such as employer-provided email addresses and the use of client contact details, and ensuring our expectations about consumer protections are conveyed, particularly during the transition to digital disclosure.

E Implementation and review

- 123 The recommended option will be implemented using two ASIC instruments. The instruments will replace [CO 10/1219].
- 124 The first instrument will provide for the additional delivery method described in Option 1 above, as well as giving relief to make clear that superannuation providers are able to use an electronic address provided by an employer in the course of the employee being joined to an employer-nominated (default) superannuation fund.
- 125 Specifically, the instrument will do this by allowing providers to provide digital disclosure by default if they so choose, as long as consumers can opt out of this and elect to receive disclosure via an alternative format. Providers will need to notify their clients that disclosure will be made via a digital facility, and clients will have the opportunity to opt out.
- 126 This instrument also allows a trustee of an employer-nominated superannuation fund to use an email address for the client provided by the employer to satisfy the trustee's disclosure obligations, as long as the disclosure is accompanied by a statement to the effect that the client can request an alternative form of delivery. This is to address a technical barrier in the law to the use of employer-provided email addresses in certain circumstances, which was identified during our consultation.
- 127 The second instrument removes several technical barriers to the use of more innovative forms of disclosure by exempting digital content from page length requirements for certain PDSs, enabling the provider to send a different PDS where a copy of a PDS is requested, and providing relief from various requirements that specify that certain words must be used 'on the cover of', or 'at or near the front of', a disclosure.
- 128 In addition, ASIC will release updated guidance in Regulatory Guide 221 *Facilitating digital financial services disclosures* (RG 221).
- 129 The new instruments made as part of the implementation of the recommended option will be reviewed as part of the normal sunseting process.
- 130 In addition, given the Financial System Inquiry's recommendations on digital disclosure, we expect ongoing consideration of methods to further facilitate digital disclosure.

F Regulatory Burden and Cost Offset (RBCO) Estimate table

Average annual compliance costs (from business as usual)

Costs (\$m)	Business	Community organisations	Individuals	Total cost
Total by sector	\$-289.9 million	\$0	\$-9.2	\$-299.1 million
