

ASIC Corporations (Managed investment product consideration) Instrument 2015/847

ASIC Corporations (Repeal) Instrument 2015/846

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (*ASIC*) makes the *ASIC Corporations (Managed investment product consideration) Instrument 2015/847* (the *principal instrument*) and the *ASIC Corporations (Repeal) Instrument 2015/846* (the *repealing instrument*) under subsections 601QA(1) and 1020F(1) of the *Corporations Act 2001* (the *Act*).

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

Subsection 1020F(1) 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 were omitted, modified or varied as specified in the declaration.

1. Background

Paragraph 601GA(1)(a) of the Act requires that the constitution of a registered managed investment scheme make adequate provision for the consideration that is to be paid to acquire an interest in the scheme.

Subsection 601GA(4) of the Act requires that, if members are to have a right to withdraw from the scheme, the constitution:

- (a) specify the right;
- (b) if the right can be exercised while the scheme is liquid, set out adequate procedures for making and dealing with withdrawal requests; and
- (c) if the right can be exercised while the scheme is not liquid, provide for the right to be exercised in accordance with Part 5C.6 and set out any other adequate procedures that are to apply to making and dealing with withdrawal requests.

Paragraph 601FC(1)(d) of the Act requires that in exercising its powers and carrying out its duties, the responsible entity of a registered scheme treat members who hold interests of the same class equally and members who hold interests of different classes fairly.

Section 1013D of the Act requires that a Product Disclosure Statement (*PDS*) include certain statements and certain information as a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire the financial product.

On 5 May 2005, ASIC made Class Order [CO 05/26] which modified the application of Chapter 5C in relation to responsible entities of schemes (other than time-sharing schemes) such that if the constitution contained provisions to the effect of the terms of [CO 05/26], then the responsible entity could set the consideration to acquire interests in specified circumstances. The class order was subsequently modified a number of times.

Class Order [CO 05/26] allowed the responsible entity to set the amount of the consideration to acquire interests in a registered scheme in circumstances where:

- (a) the interests are issued as a placement that is not made to the responsible entity or an associate of the responsible entity (except in certain circumstances);
- (b) the interests are issued as part of a pro-rata rights issue or pro-rata options issue;
- (c) the interests are issued under an interest purchase plan;
- (d) the interests are issued under distribution reinvestment plans where the issue is made proportionately to members;
- (e) the consideration paid to acquire the interests is affected by differential fee arrangements;
- (f) the interests are issued in a scheme with no or limited pooling;
- (g) the interests had been forfeited under the constitution to the responsible entity.

Class Order [CO 05/26] provided that the constitution may allow the responsible entity a discretion to influence an aspect of the consideration to acquire an interest or the withdrawal amount, so long as the responsible entity:

- (a) acts reasonably in exercising the discretion;
- (b) either exercises its discretion in accordance with a current documented policy or provides a written explanation explaining how the discretion was exercised and why such exercise was reasonable;
- (c) retains the documents that are relevant to each discretion for seven years;
- (d) provides a copy, upon request and at no charge, of any documents referred to in paragraph (b) to any member of the scheme and a person who has received or should have received a Product Disclosure Statement for an interest in the scheme; and
- (e) informs all members of their right to request a copy of the documents referred to in paragraph (b).

Class Order [CO 05/26] modified the application of Part 7.9 of the Act in relation to responsible entities of registered schemes (other than time-sharing schemes) to require that, where documents were prepared in accordance with subsections 601GAB (6) and (7) and subsections 601GAC (6) and (7) as notionally inserted by [CO 05/26], a PDS prepared after 1

May 2006 include statements to the effect that copies of those documents were available from the responsible entity at no charge.

Class Order [CO 05/26] provided responsible entities of registered schemes (other than time-sharing schemes) with an exemption from the requirement under paragraph 601FC(1)(d) to treat members of the same class equally and members of different classes fairly to the extent that this requirement would prevent the responsible entity from dealing with members in accordance with subsections 601GAA(3), (4), (11) and (12) as notionally inserted by [CO 05/26].

In June 2013, ASIC completed a review of the guidance it provides in Regulatory Guide 134 *Managed investments: Constitutions (RG 134)* to assist responsible entities to prepare and lodge a constitution for a scheme that complies with Chapter 5C as well as a review of [CO 05/26]. As part of that review, ASIC made Class Order [CO 13/655]. Class Order [CO 13/655] amended [CO 05/26], including by removing a number of existing requirements. However, following a public consultation ASIC decided to maintain [CO 05/26]. Responsible entities of schemes that were registered prior to 1 October 2013 can choose to rely on either [CO 05/26] or [CO 13/655]. A responsible entity can only rely on [CO 13/655] if they publish a notice on their website that they will rely on this class order. As at 1 October 2013, there were approximately 4,200 registered schemes that might choose to rely on [CO 05/26].

Given that [CO 05/26] is due to expire in 2015, ASIC has decided to reissue the relief underlying [CO 05/26] in the form of the principal instrument on the grounds that the legal, operational and cost implications of requiring responsible entities of all schemes registered prior to 1 October 2013 to comply with [CO 13/655] would be unduly burdensome. The repealing instrument repeals [CO 05/26].

2. Purpose of the ASIC instruments

The purpose of the principal instrument is to provide certainty and appropriate flexibility to responsible entities of schemes registered prior to 1 October 2013 (other than time-sharing schemes) in relation to the requirement that the constitution make adequate provision for the consideration that is to be paid to acquire an interest in the scheme and the requirement that the constitution specify the right of a member to withdraw from the scheme and set out adequate procedures for making and dealing with withdrawal requests.

The principal instrument provides ancillary relief to avoid unintentional consequences in relation to the statutory duties of a responsible entity as well as to modify the requirements regarding PDS content to cover documents that may be created as a result of reliance on the relief.

The purpose of the repealing instrument is to repeal [CO 05/26] given that the principal instrument replaces [CO 05/26].

3. Operation of the ASIC instruments

Application – principal instrument

The relief provided by the principal instrument only applies to a responsible entity of a managed investment scheme (other than a time-sharing scheme) that became a registered

scheme before 1 October 2013 and in relation to which the responsible entity has not published a notice on its website that it will rely on [CO 13/655]: see section 8 of the principal instrument.

Modifications - principal instrument

Section 5 of the principal instrument modifies Chapter 5C by inserting sections 601GAA, 601GAB and 601GAC into the Act.

Section 601GAA – Constitutional provisions about the amount of consideration for the acquisition of interests

Section 5 of the principal instrument modifies paragraph 601GA(1)(a) of the Act and inserts notional section 601GAA of the Act to provide in certain circumstances exceptions from the requirement that the constitution make adequate provision for the consideration that is to be paid to acquire an interest in the scheme. These circumstances are:

- (a) placements – where:
 - (i) the interests are in a class that are quoted on the financial market operated by ASX Limited or, an approved foreign market and quotation of the interests in that class is not suspended; and
 - (ii) interests are not issued to the responsible entity or an associate except in certain circumstances; and
 - (iii) either:
 - (A) all issues within the previous year does not comprise more than 15% of interests in that class; or
 - (B) members have approved the issue by resolution and the notice of meeting includes details of how the money raised will be used;
- (b) rights issues – where:
 - (i) the interests are offered to members not more than 20 business days before the date of the offer and in proportion to the value of each member's interests; and
 - (ii) the interests are offered in the same class to all members (except certain foreign members) at the same price and at substantially the same time; and
 - (iii) the responsible entity reasonably believes that the amount by which the price of an interest is less than the amount that would otherwise apply under the constitution does not exceed a maximum specified in the constitution; and
 - (iv) interests are only issued to the responsible entity's associates in certain circumstances;
- (c) interest purchase plans – where interests are issued in accordance with Class Order [CO 09/425];
- (d) distribution reinvestment plans – where:

- (i) any distribution of capital or income payable to a member is applied in payment for the issue of interests;
 - (ii) all members (except certain foreign members) can elect to participate and all issues are in the same class, at the same price and issued at substantially the same time; and
 - (iii) the responsible entity reasonably believes that the amount by which the price of an interest is less than the amount that would otherwise apply under the constitution does not exceed a maximum percentage specified in the constitution;
- (e) negotiated fees – where:
 - (i) the responsible entity and a wholesale client agree on an issue price set out in the constitution less a reduction in fees that are payable to the responsible entity for the issue; and
 - (ii) all members have been given a statement that fees may be individually negotiated with wholesale clients; and
 - (iii) each PDS contains a statement that fees may be individually negotiated with wholesale clients; and
 - (iv) the fee reduction does not adversely affect the fees paid by other members who do not have the benefit of a reduction in the fees;
- (f) schemes where there is limited or no pooling – where the only contributions that may be used in common with or pooled with any other assets in the scheme are:
 - (i) money held in a bank account by the responsible entity on trust; or
 - (ii) not proprietary rights and no income in which a member has any interest is to be paid or worked out by dividing up a pool; or
 - (iii) used in common or pooled between joint tenants or tenants in common where none of the tenants is the responsible entity or an associate of the responsible entity and the tenants are known to each other before being offered an interest;
- (g) forfeited interests – where:
 - (i) in accordance with the constitution, interests have been forfeited to the responsible entity on trust for members of the scheme where part of the issue price has not been paid when called; and
 - (ii) on the payment of the outstanding amount, the interest would be in a class of interests quoted on the financial market operated by ASX Limited; and
 - (iii) the sale of the forfeited interests is in accordance with section 254Q of the Act (other than subsections (1), (9), (10) and (13)) as if the interests were shares, the scheme were a company and the responsible entity was each director of the company.
- (h) stapled securities – where:
 - (i) the constitution contains adequate provision for the consideration to acquire the stapled securities; or

- (ii) the constitution contains provisions about the amount of the consideration to acquire the stapled securities that would be permitted by the terms of the provisions notionally inserted by the instrument in relation to the amount of the consideration to acquire interests.

Section 601GAB – Discretions in constitutional provisions that set the amount of the consideration for the acquisition of interests

Section 5 of the principal instrument provides an exception from the requirement in s601GA(1)(a) where the constitution contains a formula or method which complies with subsection 601GAB(2) as notionally inserted by the principal instrument.

Paragraph 601GAB(2)(a) requires that the formula or method, if used to determine the consideration to acquire an interest in a scheme that is not traded on a financial market (other than the AQUA market of ASX Limited) be based on the value of scheme property attributable to a particular class less any liabilities attributable to that class that may be met from scheme property divided by the number of interests on issue in that class.

Paragraph 601GAB(2)(b) requires that the formula or method, if used to determine the consideration to acquire an interest in a scheme that traded on a financial market (other than the AQUA market) be based on the market price of the interests of that class on the market at or around the time of issue.

Subsection 601GAB(1) provides that the formula or method may give the responsible entity a discretion to decide a matter that affects the value of a factor included in the formula, decide a matter that is an aspect of the method or determine the amount of an adjustment for the costs in acquiring or disposing of scheme property, for assets of the scheme that are not scheme property or otherwise. Subsection 601GAB(3) clarifies that any discretion permitted under subsection 601GAB(1) must not be exercised on the basis that it will result in a particular amount being set as the amount of consideration.

Subsection 601GAB(4) requires that, where a constitution contains a provision covered by subsection 601GAB(1), the responsible entity exercise any discretion in accordance with subsections 601GAB(5) to (11). Under subsection 601GAB(5), the responsible entity must act reasonably in exercising a discretion. Subsection 601GAB(6) requires that when a responsible entity is exercising a discretion in relation to determining the:

- (a) value of scheme property, the method for calculating the value must be consistent with ordinary commercial practice for valuing that type of scheme property; and
- (b) market price of interests that are quoted on a financial market, the method for calculating the price must be consistent with the ordinary commercial practice for determining the market price of interests of the same kind.

Subsection 601GAB(7) requires that a responsible entity must prepare and keep documents relating to the exercise of a discretion. In particular, it must prepare documents that set out:

- (a) a description of the formula or method that is applied to work out the consideration to acquire an interest in the scheme;
- (b) the circumstances in which the responsible entity may exercise the discretion;

- (c) the policy that the responsible entity applies in exercising the discretion, and the date on which the policy was formulated;
- (d) what records the responsible entity will keep in relation to the exercise of the discretion;
- (e) if the exercise of the discretion is to be exercised by a nominee, that the discretion will be so exercised and the identity of the nominee;
- (f) in relation to each discretion for which a documented policy exists, an explanation as to why it is reasonable to exercise the discretion in accordance with the policy; and
- (g) if the exercise of the discretion is inconsistent with the ordinary practice of scheme property being valued or the market price of interests being determined, an explanation of why the responsible entity has been unable to do this.

Subsection 601GAB(8) requires that where a responsible entity has exercised a discretion in relation to which there is no documented policy that is current at the time of exercise or involves a departure from documented policy, then the responsible entity must prepare a document outlining:

- (a) the date on which the discretion was exercised;
- (b) if the discretion was exercised by a nominee, a statement to that effect which identifies the nominee;
- (c) how the discretion was exercised;
- (d) an explanation why it was reasonable to exercise the discretion in that manner; and
- (e) if the exercise of the discretion is inconsistent with the ordinary practice of scheme property being valued or the market price of interests being determined, an explanation of why the responsible entity has been unable to do this.

Subsection 601GAB(9) requires that a responsible entity must ensure that the records which it must keep under section 988A of the Act are kept in such a way that will enable the exercise of the discretion to be identified.

Subsection 601GAB(11) requires the responsible entity to prepare and retain certain documentation regarding the exercise of discretions permitted under subsection 601GAB(1).

Section 601GAC – Discretions in constitutional provisions about amounts to be paid on withdrawal

Section 5 of the principal instrument modifies subsection 601GA(4) of the Act and inserts notional section 601GAC of the Act to provide an exception from the requirement that a constitution specify a member's right to withdraw from the scheme and set out adequate procedures for making and dealing with withdrawal requests. The exception, as set out in section 601GAC, applies where the constitution provides a formula or method that will be paid to a member making a withdrawal and which complies with subsection 601GAC(2) but gives the responsible entity certain discretions.

Subsections 601GAC(2) to (11) contain similar requirements for the exercise of the discretion and documentation as subsections 601GAB(2) to (11).

Other modifications

Section 6 of the principal instrument modifies section 1013D to require that, subject to certain provisions of the Act, a PDS, if the financial product is a managed investment product

and the responsible entity of the registered scheme to which the product relates is required to prepare documents in accordance with provisions notionally inserted into the Act by section 5 of the principal instrument, include statements to the effect that copies of those documents are available from the responsible entity at no charge.

Exemption – principal instrument

Section 7 of the principal instrument provides an exemption for responsible entities of registered schemes (other than time-sharing schemes) from the requirement to comply with paragraph 601FC(1)(d) to the extent that complying would prevent the responsible entity from not treating members who hold interests of the same class equally and members who hold interests of different classes fairly where such treatment is contemplated by various provisions notionally inserted into the Act by the principal instrument.

Repeal

The repealing instrument repeals ASIC Class Order [CO 05/26], as it is no longer necessary.

4. Documents incorporated by reference

The principal instrument incorporates by reference Class Order [CO 09/425] which in certain circumstances allows listed companies to offer shares to existing members under a share purchase plan without a prospectus and in certain circumstances allows listed managed investment schemes to issue interests under an interest purchase plan to existing members without a PDS. ASIC Class Order [CO 09/425] is a disallowable legislative instrument and may be obtained from the Federal Register of Legislative Instruments.

The principal instrument also incorporates by reference the ASX Listing Rules as at 1 July 2015. The ASX Listing Rules may be obtained by visiting <http://www.asx.com.au>.

5. Consultation

On 18 September 2012, ASIC released Consultation Paper 188 *Managed Investments: Constitutions – Updates to RG 134 (CP 188)* seeking feedback on proposed changes to RG 134 which were aimed at assisting responsible entities and their advisers understand ASIC's views on the content requirements of constitutions for schemes. One area on which CP188 sought feedback was whether all schemes should comply with a class order replacing [CO 05/26].

ASIC received 10 submissions in response to CP 188. There was strong view in the submissions that ASIC should give existing schemes the choice of whether to comply with [CO 05/26] or a new class order. As a result of this consultation, ASIC has formed the view that the legal, operational and cost implications of requiring responsible entities of all schemes to comply with [CO 13/655] would be unduly burdensome.

ASIC did not conduct consultation on the principal instrument or the repealing instrument on the basis of the consultation that occurred as part of its review of RG 134.

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 of the instruments

The *ASIC Corporations (Managed investment product consideration) Instrument 2015/847* (the **principal instrument**) relates to paragraph 601GA(1)(a) of the *Corporations Act 2001* (the **Act**) and subsection 601GA(4) of the Act. Paragraph 601GA(1)(a) requires that the constitution of a registered managed investment scheme make adequate provision for the consideration that is to be paid to acquire an interest in the scheme. Subsection 601GA(4) requires that if members are to have a right to withdraw from a registered scheme, the right must be specified and adequate procedures must be set out for making and dealing with withdrawal requests.

The principal instrument is a reissue of relief underlying ASIC Class Order [CO 05/26] which modified Chapter 5C of the Act to allow responsible entities of registered managed investment schemes (other than time-sharing schemes) to rely on meeting the requirements in the instrument as an alternative to complying with paragraph 601GA(1)(a) or subsection 601GA(4).

The principal instrument also provides ancillary relief to avoid unintentional consequences in relation to the duties of a responsible entity under the Act as well as to appropriately modify the Product Disclosure Statement content requirements to cover documents that may be created as a result of reliance on the primary relief.

The *ASIC Corporations (Repeal) Instrument 2015/846* repeals ASIC Class Order [CO 05/26], as the relief previously provided by [CO 05/26] is now provided by the principal instrument.

Human rights implications

The instruments do not engage any of the applicable rights or freedoms.

Conclusion

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