

**EXPLANATORY STATEMENT for**  
**ASIC CORPORATIONS (SUPERANNUATION AND SCHEMES:**  
**UNDERLYING INVESTMENTS) INSTRUMENT 2016/378**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (ASIC) makes ASIC Corporations (Superannuation and Schemes: Underlying Investments) Instrument 2016/378 (the **Instrument**) under subsections 926A(2) and 951B(1) of the *Corporations Act 2001* (the **Act**).

Subsection 926A(2) of the Act includes paragraph 926A(2)(a), which provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.6 of the Act, other than Divisions 4 and 8 of Part 7.6. Part 7.6 of the Act deals with the licensing of providers of financial services in Australia.

Subsection 951B(1) of the Act includes paragraph 951B(1)(a), which provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.7 of the Act. Part 7.7 of the Act sets out requirements for financial services disclosure, including the requirement in section 941A to provide a Financial Services Guide.

This Instrument remakes three ASIC Class Orders with minor and technical changes, combining the terms of the three Class Orders into one legislative instrument. The Class Orders were [CO 02/1073] - *Financial Services Guide — dealing in underlying investments by responsible entities* ([**CO 02/1073**]), [CO 02/1074] - *Financial Services Guide — dealing in underlying investments by superannuation trustees* ([**CO 02/1074**]) and [CO 02/1161] - *Limited relief from requirement for dealing authorisation for public offer superannuation entities* ([**CO 02/1161**]). All three of these Class Orders would have ceased to have effect, or to sunset, on 1 April 2017 under the *Legislation Act 2003*.

ASIC issued ASIC Corporations (Repeal) Instrument 2016/379, which repeals ASIC Class Orders [CO 02/1073], [CO 02/1074] and [CO 02/1161] prior to the sunset date of 1 April 2017 for each Class Order.

## **1. Background**

Under the Act, an entity that carries on a financial services business must hold an Australian financial services (AFS) licence. The concept of providing a financial service include dealing in a financial product: s766A(1)(b) of the Act. A superannuation interest and an interest in a

registered managed investment scheme are both defined as financial products: ss764A(1)(b) and 764A(1)(g).

Dealing is defined in s766C(1). However, there is an exemption under which a person who deals on their own behalf is not required to hold an AFS licence, and is deemed to not deal in a financial product: see s766C(3).

Under the old Corporations Law (former regulation 7.3.13), there was an exemption from the requirement to hold a dealer's licence if a superannuation trustee dealt in securities only in relation to the management and administration of a superannuation scheme. However, for the purpose of the AFS licensing requirements under Part 7.6 of the Act, this exemption was unable to be relied on by superannuation trustees because their dealings are not on their own behalf, but rather on behalf of their beneficiaries.

In 2002, ASIC issued [CO 02/1161] to provide the trustee of a public offer superannuation fund with an exemption from the requirement to hold an AFS licence in relation to any dealing by the trustee in any financial product (other than an interest in the public offer entity) on behalf of the members of the entity in the course of the operation of the fund. AFS licensees also have an obligation to provide a Financial Services Guide (FSG) to retail clients (see s941A of the Act), however s941C (2) and s941C (3) provide exemptions. These exceptions cover operating a registered scheme and dealing by a responsible entity in scheme interests, but do not cover dealing by a responsible entity in the underlying investments or assets of the scheme.

If an FSG is required for dealing in the underlying investments, the exception in s941C(3) would have little practical effect and its intent would not be achieved. In the context of these provisions, ASIC issued [CO 02/1073] to make it clear that a responsible entity of a registered scheme is not required to give an FSG to a member of the registered scheme in relation to any dealing in financial products by the responsible entity in the course of operating the scheme. A corresponding exemption was given by [CO 02/1074] in relation to the requirement for the trustee of a superannuation fund to give a member of the fund an FSG where the trustee deals in financial products in the course of operating the fund.

The three Class Orders were issued to clarify the operation of the AFS licensing and FSG requirements in relation to dealing in underlying investments by the responsible entity of a registered scheme and the trustee of a superannuation fund. The Class Orders address situations where the provisions of the Act impose an obligation to hold an AFS licence and/or to provide an FSG, as the case may be, where such an obligation would be anomalous or unintended.

## **2. Purpose of the instrument**

The Instrument has three purposes:

- (a) to continue the substance of the relief under [CO 02/1073], [CO 02/1074] and [CO 02/1161];
- (b) to refine the terms of the relief to clarify its operation; and
- (c) to combine the terms of the three Class Orders into one legislative instrument.

### **3. Operation of the instrument**

#### **Licensing exemption – Public offer superannuation funds**

Section 5 of the Instrument sets out the exemption to the trustee of a public offer superannuation fund from the requirement to hold an AFS licence where the trustee provides a financial service of dealing in a financial product, other than an interest in the fund, by the trustee in the ordinary course of operating the fund.

The exemption uses the concept of a “public offer entity” in order to apply to what is generally regarded as a public offer superannuation fund. “Public offer entity” is defined in section 4 of the Instrument. This definition adopts the corresponding definition in subsection 10(1) of the *Superannuation Industry (Supervision) Act 1993* (the **SIS Act**). Subsection 10(1) of the SIS Act states that a “public offer entity” means a public offer superannuation fund, or an approved deposit fund that is an excluded approved deposit fund, or a pooled superannuation. Each of the three elements of the definition of “public offer entity” are addressed by corresponding definitions in subsection 10(1) of the SIS Act.

This exemption is in substantively the same terms as set out in [CO 02/1161]. The Instrument no longer uses the expression “on behalf of the members of the entity” because this expression is unnecessary due to the fact that the trustee must be acting in the ordinary course of operating the fund. In addition, the Instrument uses the term “in the capacity of trustee of a public offer entity” to be consistent with the licensing exemptions available for some types of superannuation funds in reg 7.6.01(1)(a) to 7.6.01(1)(d), inclusive, of the *Corporations Regulations 2001*.

The Instrument grants AFS licensing relief under subsection 926A(2) of the Act. This is in contrast to [CO 02/1161], which was made under ASIC’s exemption power in paragraph 911A(2)(l) of the Act.

#### **FSG exemption - Superannuation entities**

Subsection 6(1) of the Instrument provides an exemption to the trustee of a superannuation fund from the requirement to provide an FSG where the trustee deals in a financial product in the ordinary course of the operation of the fund.

The exemption is provided to the trustee of a “superannuation entity”. Section 4 of the Instrument defines “superannuation entity” as having the meaning given by subsection 10(1) of the SIS Act. Subsection 10(1) of the SIS Act provides that a “superannuation entity” means a regulated superannuation fund, or an approved deposit fund or a pooled superannuation trust. The three elements of this definition of “superannuation entity” have their own definitions in subsection 10(1) of the SIS Act.

Subsection 6(1) is in substantively the same terms as [CO 02/1074]. For the same reasons that apply to section 5 of the Instrument, subsection 6(1) no longer uses the expression “on behalf of the members of the entity” and subsection 6(1) applies the concept of “a person in the capacity of the trustee of a superannuation entity”.

## **FSG exemption - Registered schemes**

Under subsection 6(2) of the Instrument, the responsible entity of a registered scheme is exempted from the requirement to provide an FSG to a member of the scheme to the extent that the requirement would apply to the responsible entity dealing in a financial product in the ordinary course of the operation of the scheme.

Subsection 6(2) is in substantively the same terms as [CO 02/1073]. For the same reasons that apply to section 5 and subsection 6(1), subsection 6(2) no longer uses the expression “on behalf of the members of the scheme”.

## **4. Consultation**

The relief given in the Instrument was the subject of public consultation in Consultation Paper 244 - *Remaking ASIC class orders on dealing in underlying investments (CP 244)*. CP 244 was published on 4 December 2015 and is available on ASIC's website. For [CO 02/1073], [CO 02/1074] and [CO 02/1161], we proposed in CP 244 to remake the instruments with minor and technical changes.

We received feedback from CP 244. The submissions received did not raise any fundamental issues or object to the draft of the Instrument that was included with CP 244. We considered that the relief under the three Class Orders should be continued in a single legislative instrument with refinements to clarify the operation of the relief and other minor and technical changes.

## **Statement of Compatibility with Human Rights**

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

### **ASIC CORPORATIONS (SUPERANNUATION AND SCHEMES: UNDERLYING INVESTMENTS) INSTRUMENT 2016/378**

ASIC Corporations (Superannuation and Schemes: Underlying Investments) Instrument 2016/378 (the **Instrument**) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview**

The Instrument provides an exemption from the requirement under Part 7.7 of the *Corporations Act 2001* (the **Act**) for the trustee of a public offer superannuation fund to hold an Australian financial services licence for providing a financial service that consists only of the trustee dealing in a financial product (other than an interest in the public offer fund) in the course of operating the fund.

The Instrument also provides an exemption to the responsible entity of a registered scheme from the requirement under Part 7.7 of the Act to give an FSG to a member of the registered scheme in relation to any dealing in financial products by the responsible entity in the course of operating the scheme. Further, the Instrument provides a corresponding exemption in relation to the requirement for the trustee of a superannuation fund to give a member of the fund an FSG where the trustee deals in financial products in the course of operating the fund.

#### **Human rights implications**

This legislative instrument does not engage any of the applicable rights or freedoms.

#### **Conclusion**

This legislative instrument is compatible with human rights as it does not raise any human rights issues.