**EXPLANATORY STATEMENT for   
ASIC Corporations (Client money - Cash common funds) Instrument 2016/671**

**and**

**ASIC Corporations (Repeal) Instrument 2016/675**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (ASIC) makes the *ASIC Corporations (Client money - Cash common funds)**Instrument 2016/671* under subsection s992B(1) of the *Corporations Act 2001* (the Act).

Subsection 992B(1) of the Act provides that ASIC may exempt a person or a financial product or class of persons or financial products from all or specified provisions of Part 7.8 of the Act; or declare that Part 7.8 of the Act applies in relation to a person or a financial product or class of persons or financial products as if specified provisions were omitted, modified or varied.

The Australian Securities and Investments Commission (ASIC) makes the *ASIC Corporations (Repeal) Instrument 2016/675* under paragraphs 601QA(1)(b) and 992B(1)(c) and subsection 741(1) of the Act.

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

Paragraph 992B(1)(c) of the Act provides that ASIC may declare that Part 7.8 of the Act applies in relation to a person or a financial product or class of persons or financial products as if specified provisions were omitted, modified or varied.

Subsection 741(1) of the Act provides that ASIC may exempt a person from a provision of Chapter 6D; or declare that Chapter 6D applies to a person as if specified provisions were omitted, modified or varied.

Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of the Act), where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

1. **Background**

Subdivision A of Division 2 of Part 7.8 of the Act specifies how Australian financial services licensees (‘licensees’) must deal with money received from or on behalf of a client (‘client money’). The underlying purpose of these rules is to protect clients’ money paid to a licensee in connection with a financial service or the acquisition of a financial product.

Broadly, the Subdivision requires licensees to ensure that client money is paid into an account (referred to as a s981B account) that meets specific requirements. The kinds of account specified are:

* an account with an Australian authorised deposit-taking institution;
* an account with an approved foreign bank; and
* a cash management trust.

‘Cash management trust interest’ is defined in s9 of the Act to mean an interest that is an interest in a registered scheme and that relates to an undertaking of the kind commonly known as a cash management trust.

Another similar arrangement to a cash management trust is a common fund. A common fund is a fund created and operated by a licensed trustee company. Common funds allow for the co-mingling of trust assets that would otherwise have to be held discretely under trust law. A trustee company must hold an Australian financial services licence to operate a common fund. Trustee company common funds may also be managed investment schemes and regulated as registered schemes.

Cash common funds are substantively similar to cash management trusts – both are pooled arrangements used to make comparable investments. The similarities are greatest when the cash common fund is a registered managed investment scheme (like cash management trusts).

ASIC Class Order [CO 04/1063] (‘[CO 04/1063]’) modifies s981B to allow client money to be held by a trustee company in a registered scheme that is a cash common fund.

ASIC Class Order [CO 00/199] (‘[CO 00/199]’) modifies provisions of Ch 5C of the Act in relation to common funds that are operated by licensed trustee companies.

[CO 00/199] provides relief from:

1. the provisions that relate to the retirement of the responsible entity of the registered scheme and the removal of the responsible entity by members (s601FL, 601FM and 601FQ);
2. the limitations in s601GC on changes to the scheme constitution;
3. aspects of the related party transaction provisions in Pt 5C.7; and
4. the rules in Pt 5C.9 that relate to the winding up of registered schemes.

Under the *Legislation Act 2003*, legislative instruments cease automatically, or ‘sunset’, after 10 years, unless action is taken to exempt or preserve the instrument. [CO 04/1063] is due to expire on 1 April 2017 if not remade and [CO 00/199] is due to expire on 1 October 2016.

ASIC has decided to extend the operation of [CO 04/1063] by making the *ASIC Corporations (Client money - Cash common funds)**Instrument 2016/671*. ASIC has formed the view that it continues to be a useful part of the legislative framework.

ASIC has reviewed the operation of [CO 00/199] and has determined that it no longer forms a necessary or useful part of the legislative framework. As a result ASIC proposes to repeal [CO 00/199] prior to its sunsetting so that industry can be certain that ASIC’s intention is for the class order to be repealed.

1. **Purpose of the instrument**

The purpose of the *ASIC* *Corporations (Client money - Cash common funds) Instrument 2016/671* is to modify the Act to allow for client money to be held in a cash common fund. This relief has been granted to provide greater flexibility to licensees in dealing with client money while retaining the consumer protection benefits afforded by s981B of the Act.

*ASIC* *Corporations (Client money - Cash common funds) Instrument 2016/671* will continue the relief provided by [CO 04/1063] in a new legislative instrument that reflects current drafting practice, without any significant changes.

*ASIC Corporations (Repeal) Instrument 2016/675* is made to repeal the relief provided by [CO 00/199] and to repeal [CO 04/1063].

1. **Operation of the instrument**

As discussed in sections 1 and 2, s981B of the Act would ordinarily exclude Australian financial services licensees from holding client money in a cash common fund. ASIC has the power to modify section 981B under section 992B of the Act.

Paragraph 5(1) of the *ASIC* *Corporations (Client money - Cash common funds) Instrument 2016/671* modifies s981B to allow financial services licensees to pay client money into an account with a common fund that is a registered scheme and is commonly known as a cash common fund.

Schedule 1 of ASIC Corporations (Repeal) Instrument 2016/675 repeals [CO 00/199] and [CO 04/1063].

### **Consultation**

ASIC released Consultation Paper 256 *Remaking and repealing class orders on trustee company common funds* (CP 256) as part of its review of [CO 04/1063]. A draft of the proposed *ASIC* *Corporations (Client money - Cash common funds) Instrument 2016/671* was attached to CP 256.

In CP 256 ASIC also proposed to repeal [CO 00/199].

ASIC did not receive any submissions in response to CP 256. Accordingly, ASIC has decided to proceed with the proposals outlined in CP 256.

.

**Statement of Compatibility with Human Rights**

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

**ASIC Corporations (Client money-Cash common funds)****Instrument 2016/671**

**And**

**ASIC Corporations (Repeal) Instrument 2016/675**

*ASIC Corporations (Client money-Cash common funds)* Instrument 2016/671 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**

*ASIC Corporations Instrument (Client money-Cash common funds) 2016/671* provides that financial services licensees may deposit client money under s981B of the *Corporations Act 2001* with a common fund that is a registered scheme and operated by a licensed trustee company and commonly known as a cash common fund.

The Instrument remakes [CO 04/1063] into a new ASIC instrument.

The Repeal Instrument repeals [CO 00/199] and [CO 04/1063].

**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.

**Stephen Yen PSM, Special Counsel**