

ASIC CORPORATIONS (AMENDMENT) INSTRUMENT 2016/1006

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (*ASIC*) makes ASIC Corporations (Amendment) Instrument 2016/1006 (the ***amendment instrument***) under paragraph 926A(2)(c) of the *Corporations Act 2001* (the *Act*). This paragraph of the Act provides that ASIC may declare that the provisions in Part 7.6 (other than Divisions 4 and 8) of the Act apply in relation to a person or financial product, or a class of persons or financial products, as if the specified provisions were omitted, modified or varied as specified in the declaration.

The amendment instrument amends ASIC Class Order [14/923] *Record-keeping obligations for Australian financial services licensees when giving personal advice* (the ***principal class order***). The principal class order was made under paragraph 926A(2)(c) of the Act. 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 any instrument, the power is construed as including a power exercisable in the like manner and subject to the like conditions (if any) to amend it.

1. Background

The principal class order modified Division 3 of Part 7.6 of the Act to insert a new notional section 912G that imposes specific record-keeping requirements for Australian Financial Services (AFS) licensees when the licensee or their representative (including an advice provider) gives personal advice to retail clients.

Under section 912G, licensees must ensure that, in relation to the provision of personal advice, certain records are kept that demonstrate compliance with the best interests duty and related obligations under Division 2 of Part 7.7A of the Act. Subsection 912G(3) specifies that records should be kept for a period of at least seven years after the day the personal advice is provided to the client.

Under current arrangements, many authorised representatives are contracted to retain client records on behalf of the advice licensee, and licensees may have access to the records when needed—for example, to ensure the authorised representative is complying with the financial services law. However, our regulatory experience has highlighted difficulties where advice licensees have been unable to review the personal advice given to some clients because the licensee no longer has access to client records to determine whether the advice complies with the law or whether or not the clients suffered a loss. Where a licensee does not have access to its representatives' records in relation to the advice they give to clients, the licensee may

also encounter difficulties with complying with their AFS licensee obligation under paragraph 912A(1)(ca) of the Act to take reasonable steps to ensure that its representatives comply with the financial service laws.

When an authorised representative moves to another advice licensee, the first licensee may lose access to the representative's advice records. If the first licensee receives a complaint about the advice the authorised representative has given to a client or a review and remediation program is later established involving that authorised representative, the first licensee might not have access to the relevant records. This means that many clients would be disadvantaged because the advice licensee does not have access to records to enable them to review the advice given to those clients.

Perceived conflict of interest with the *Tax Agent Services Act 2009 (TASA)*

Section 30-10 of the *Tax Agent Services Act 2009 (TASA)* contains the Code of Professional Conduct (Code) for registered tax agents or BAS agents. Section 30-10(6) of the TASA provides that unless there is a legal duty to do so, tax (financial) advisers must not disclose any information relating to a client's affairs to a third party without the client's permission. The Tax Practitioners Board who administers the TASA consider that in the case of a tax (financial) adviser that is an authorised representative of an AFS licensee, a third party includes the AFS licensee and vice versa. There is currently no direct legal duty on authorised representatives requiring them to disclose information to the AFS licensee. Therefore, the TPB consider that tax (financial) advisers who are also authorised representatives cannot disclose client records to the AFS licensee without the client's consent.

This creates a perceived conflict of interest between, on the one hand, the TPB's interpretation and, on the other hand, the structure of the Corporations Act which generally imposes obligations on licensees and not individual advisers and [CO 14/923]. Under s912A(1)(ca) of the Corporations Act, a licensee must take reasonable steps to ensure that its representatives comply with financial services laws. In order to satisfy this obligation, a licensee must have full knowledge of the activities of its representatives and access to the representatives' records. Having access to its representatives' records in relation to the advice they give to clients is essential for an AFS licensee to be able to properly monitor and supervise its representatives and to compensate clients who suffer loss because of the actions of its representative.

Implications of the *Corporations Amendment (Financial Advice Measures) Act 2016*

Subsection 912G(4) of the Act provides that the record-keeping obligations under the principal class order do not apply to personal advice where the "modified best interests duty" applies to the provision of personal advice, including in the circumstances covered by subsections 961B(3) and (4) of the Act.

The "modified best interests duty" means the circumstances where an adviser is able to satisfy the best interests duty in subsection 961B(1) of the Act if the adviser takes the steps mentioned in paragraphs 961B(2)(a), (b) and (c) (whether or not they take the additional steps mentioned in the other paragraphs of that subsection).

At the time the principal class order was made, the modified best interests duty only covered personal advice given by an agent or employee of an authorised deposit-taking institution (ADI) that was solely in relation to a basic banking product (subsection 961B(3)) and personal advice that was solely in relation to a general insurance product (subsection 961B(4)).

The *Corporations Amendment (Financial Advice Measures) Act 2016 (the Amendment Act)* amended subsections 961B(3) and 961B(4) of the Act to allow the modified best interests duty to apply to a basic banking product and/or general insurance product where the subject matter of the advice also relates to consumer credit insurance. However, the amendment did not extend the modified best interests duty to the provision of consumer credit insurance advice.

The original policy intention of the principal class order was that where the full best interests duty applies, the specific record-keeping obligations under the principal class order would apply, and where the modified best interests duty applies, the specific record-keeping obligations would not apply.

The effect of the amendment to subsections 961B(3) and (4) of the Act on notional subsection 912G(4), as originally inserted by the principal class order, was that if personal advice given by an agent or employee of an ADI related to both a basic banking product and consumer credit insurance, the specific record-keeping obligations under the principal class order would not have applied in relation to advice for both the basic banking product and the consumer credit insurance, even though the advice in relation to the consumer credit insurance is subject to the full best interests duty. The same applies where the personal advice relates to both a general insurance product and consumer credit insurance. This represents a shift in the original policy intention of the principal class order.

2. Purpose of the instrument

The purpose of the amendment instrument is to:

- (a) clarify that licensees must also have access at all times to records in relation to personal advice during the period in which the records are required to be kept;
- (b) place a direct obligation on authorised representatives who are advisers to keep records in relation to personal advice, and give the records to the licensee if the licensee requests the records provided the request is made in connection with the obligations imposed on the licensee under Chapter 7 of the Act, during the period in which the records are required to be kept, and
- (c) restore the original policy intent of the principal class order so that the exemption to the record-keeping obligation in the principal class order only applies where the modified best interests duty applies.

3. Operation of the instrument

The amendment instrument amends the declaration in paragraph 4 of the principal class order to clarify that subsection 912G also applies to former financial services licensees, as well as to authorised representatives (and former authorised representatives).

The amendment instrument omits existing subsections 912G(3) – (5) and substitutes new subsections 912G(3) - (7).

The new subsection 912G(3) clarifies that in addition to ensuring that records are kept for a period of at least seven years after the day the personal advice was provided to the client, an AFS licensee must ensure that the records are accessible by the licensee at all times during that period in a way that enables the licensee to produce the records. The obligation continues to apply even if the AFS licensee ceases to be an AFS licensee during the period that the records are required to be kept and accessible.

The new notional subsection 912G(4) provides that an authorised representative who provides personal advice must:

- (a) give the advice records to the AFS licensee if the licensee requests the records, provided the request is made:
 - (i) in connection with the obligations imposed on the licensee under Chapter 7 of the Act; and
 - (ii) within seven years after the day on which the personal advice was provided to the client; and
- (b) keep records for a period of at least seven years after the day personal advice was provided to the client, unless the records have been given by the authorised representative to the licensee.

The obligation continues to apply even if the authorised representative ceases to be an authorised representative of the AFS licensee during the period that the records are required to be given or kept.

The effect of subsection 912G(5) is that the record-keeping obligations imposed on authorised representatives are in addition to the record-keeping obligations imposed on licensees.

The new subsection 912G(6) provides that the record-keeping obligations in the principal class order do not apply to the provision of personal advice where the modified best interests duty applies.

Subsection 912G(7) specifies that the record-keeping obligations in subsection 912G (other than paragraph 2(d) and subsection (3) as it relates to that paragraph) do not apply in the following circumstances:

- (a) the provision of personal advice for which a Statement of Advice is not required to be given to the client; or

- (b) the provision of personal advice for which a record of the advice is kept in accordance with subsection 946B(3A) of the Act.

4. Consultation

ASIC consulted publicly on the proposal to amend the principal class order to clarify that AFS licensees must have access at all times to records in relation to personal advice during the period in which the records are required to be kept in the form of Consultation Paper 247 *Client review and remediation programs and update to record-keeping requirements (CP 247)*. CP 247 was issued on 16 December 2015 and consultation took place over a 10 week period. ASIC received 10 submissions including from industry associations and AFS licensees relating specifically to this proposal. Details of the non-confidential submission received are available on ASIC's website at www.asic.gov.au.

ASIC continued to engage with respondents to CP 247 and other stakeholders after the close of the consultation period to finalise the amendment instrument, including consulting with the Tax Practitioners Board (TPB), the Association of Financial Advisers (AFA), the Financial Planning Association (FPA), Chartered Accountants Australia and New Zealand (CAANZ) and CPA Australia on our intention to place a direct obligation on authorised representatives who are advisers to keep records in relation to personal advice, and give the records to the licensee if the licensee requests the records.

The amendment to restore the original policy intent of the principal class order so that the exemption to the record-keeping obligation in the principal class order only applies where the modified best interests duty applies is minor and machinery in nature and merely restores the original policy intention of the principal class order. In addition, we note the concerns relating to a shift in the original policy intention of the principal class order arose after the Amendment Act commenced in mid-March 2016, which was after the end of the consultation period. For these reasons, ASIC did not consult on this particular aspect of the amendment to the principal class order.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Amendment) Instrument 2016/1006

This legislative 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

ASIC Class Order [14/923] *Record-keeping obligations for Australian financial services licensees when giving personal advice* (the **principal class order**) modified Division 3 of Part 7.6 of the *Corporations Act 2001* (the **Act**) to insert a new section 912G that imposes record-keeping requirements for Australian Financial Services (AFS) licensees when the licensee or their representative (including an advice provider) gives personal advice to retail clients. Under section 912G, licensees must ensure that, in relation to the provision of personal advice, certain records are kept that demonstrate compliance with the best interests duty and related obligations under Division 2 of Part 7.7A of the Act.

ASIC Corporations (Amendment) Instrument 2016/1006 (the **amendment instrument**):

- (a) clarifies that licensees must also have access at all times to records in relation to personal advice during the period in which the records are required to be kept;
- (b) places a direct obligation on authorised representatives who are advisers to keep records in relation to personal advice, and give the records to the licensee if the licensee requests the records provided the request is made in connection with the obligations imposed on the licensee under Chapter 7 of the Act, during the period in which the records are required to be kept; and
- (c) restores the original policy intent of the principal class order so that the exemption to the record-keeping obligation in the principal class order only applies where the modified best interests duty applies.

Human rights implications

The amendment instrument engages the right to privacy and reputation in Article 17 of the International Covenant on Civil and Political Rights (“Article 17”). Article 17 prohibits unlawful or arbitrary interferences with a person’s privacy, family, home (which the UN Human Rights Committee has interpreted as including a person’s workplace) and correspondence. It provides that persons have the right to the protection of the law against such interference. The UN Human Rights Committee has not defined ‘privacy’. The Commonwealth Attorney-General’s Department has provided guidance that privacy should be understood to comprise freedom from

unwarranted and unreasonable intrusion into activities that society recognises as falling into the individual sphere of autonomy. To avoid being considered arbitrary, any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances.¹

A record of personal advice may contain ‘personal information’ as defined in the *Privacy Act 1988*, being information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

The right in Article 17 is engaged by the amendment instrument by reason that it involves the use and disclosure of personal information.

The amendment instrument is compatible with the rights recognised in Article 17 of the ICCPR by reason that any interference with a person’s privacy resulting from compliance with the amendment instrument will be lawful and not arbitrary. In particular:

- (a) The amendment instrument is made in accordance with ASIC’s power to declare that the provisions in Part 7.6 (other than Divisions 4 and 8) of the Act apply in relation to a class of persons (i.e. financial services licensees and authorised representatives, and former licensees and authorised representatives) as if the specified provisions were omitted, modified or varied as specified in the declaration (see subsection 926A(2)(c) of the Act);
- (b) The amendment instrument will enable AFS licensees to comply with their AFS licensee obligations. Under subsection 912A(1)(ca) of the Act, a licensee must take reasonable steps to ensure that its representatives comply with financial services laws. In order to satisfy this obligation, a licensee must have full knowledge of the activities of its representatives. Having access to its representatives’ records in relation to the advice they give to clients is essential for licensees to be able to properly monitor and supervise its representatives and to compensate clients who suffer loss because of the actions of its representative.
- (c) The amendment instrument will further the objects of Chapter 7 of the Act, including promoting confident and informed decision making by consumers of financial products and services (see subsection 760A(a) of the Act). Consumers will have confidence that authorised representatives will comply with the financial services laws because they will be monitored and supervised by their authorising licensees. Consumers will also have confidence that, because licensees will be able to access advice records, they can be compensated where they suffer loss because of the actions of authorised representatives. Ensuring the ability of licensees to properly monitor and supervise its representatives will also promote fairness, honesty and professionalism by those who provide financial

¹ Australian Government Attorney-General’s Department: *Privacy and Reputation*
<http://www.ag.gov.au/Humanrightsandantidiscrimination/Humanrightsandthepublicsector/Humanrightsguidancesheets/Pages/Privacyandreputation.aspx>

services (see subsection 760A(b) of the Act).

- (d) An authorised representative who is an adviser is under an obligation through the Financial Services Guide (FSG) requirement to tell the client, before providing financial services to them, that the adviser is acting on behalf of the licensee. As such, the client would reasonably expect the adviser to use or disclose the personal information to the authorising licensee if the authorising licensee asks for it for the purposes of assessing whether the advice given on the licensee's behalf complies with the law.
- (e) The obligation on authorised representatives who are advisers to give advice records to the licensee if the licensee requests the records is subject to a number of safeguards, including:
 - (i) It is limited to situations where the licensee seeks access in connection with the obligations imposed on the licensee under Chapter 7 of the Act; and
 - (ii) Licensees are required to maintain the confidentiality of the information contained in the advice records in accordance with the common law principles of confidentiality and Principle 6(2)(b) of the Australian Privacy Principles.

If the amending instrument was considered to limit the right in Article 17 of the ICCPR, ASIC considers that the amending instrument is nevertheless compatible with that right. The right in Article 17 is not absolute. As noted, the right has implied limitations ('unlawful' and 'arbitrary') and may be subject to a permissible limitation where that limitation aims to achieve a legitimate objective, there is a rational connection between the limitation and the objective and the limitation is reasonable, necessary and proportionate. Any limitation imposed on the right by the amending instrument has a clear legal basis, in that it:

- (a) *Aims to achieve a legitimate objective* – The amending instrument will enable licensees to comply with their AFS licensee obligations under s912A(1)(ca) of the Act to monitor and supervise its representatives to ensure that its representatives comply with the financial services laws. It will also further the statutory objects of Chapter 7 of the Act by promoting confident and informed decision making by consumers of financial products and services, and promoting fairness, honesty and professionalism by those who provide financial services.
- (b) *Has a rational connection with the objective* – By ensuring that licensees can have access to client advice records, the amending instrument will allow licensees to comply with their AFS licensee obligations of properly monitoring and supervising its representatives. This will promote confident and informed decision making by consumers of financial products and services, and fairness, honesty and professionalism by those who provide financial services.
- (c) *Is reasonable, necessary and proportionate* – The amending instrument is necessary to achieve the legitimate objectives described above because it gives licensees confidence that they will be able to have access to advice records, and gives consumers confidence that licensees can properly monitor and supervise

their representatives. The amending instrument contains adequate safeguards in that the obligation on authorised representatives to give advice records to the licensee is limited to situations where the licensee seeks access in connection with the obligations imposed on the licensee under Chapter 7 of the Act. Further, licensees are required to maintain the confidentiality of the information contained in the advice records in accordance with the common law principles of confidentiality and the Australian Privacy Principles.