
EXPLANATORY STATEMENT for
ASIC Corporations (Ongoing Fees Code) Instrument 2016/1129

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes *ASIC Corporations (Ongoing Fees Code) Instrument 2016/1129* under subsections 962CA(1) and 1101A(1) of the *Corporations Act 2001* (the Corporations Act).

Subsection 962CA(1) of the Corporations Act provides that ASIC may exempt a person, or a class of persons, from section 962K (the opt-in requirement) of the Corporations Act if ASIC is satisfied that the person is, or persons of that class are, bound by a code of conduct approved by ASIC for the purposes of this section.

Subsection 1101A(1) of the Corporations Act provides that ASIC may, on application, approve codes of conduct that relate to any aspect of the activities of (a) financial services licensees, (b) authorised representatives of financial services licensees, or (c) issuers of financial products, being activities in relation to which ASIC has a regulatory responsibility. The approval must be in writing.

1. Background

Ongoing fee arrangements

The Future of Financial Advice (FOFA) reforms introduced a number of new requirements in relation to Australian Financial Services (AFS) licensees and representatives (as defined under s910A of the Corporations Act) who give personal advice to retail clients. One new provision related to ‘ongoing fee arrangements’.

An ongoing fee arrangement exists when an AFS licensee or their representative gives personal advice to a retail client and the retail client enters into an arrangement with the AFS licensee, the terms of which provide for the payment of a fee (however described or structured) during a period of more than 12 months: see s962A of the Corporations Act.

Under s962K of the Corporations Act, a licensee or representative who receives fees under an ongoing fee arrangement must give the client a written renewal notice every two years which requires the client to opt-in to renew that arrangement. If the client does not

respond to the renewal notice or opts-out, then the fee arrangement terminates. This is known as the ‘opt-in requirement’.

It is a condition of the ongoing fee arrangement that the arrangement will terminate if the opt-in requirement has not been complied with. The opt-in requirement only applies in relation to new clients who receive personal advice after 1 July 2013: see s962D(1) of the Corporations Act.

ASIC’s code approval powers

Under s962CA(1) of the Corporations Act, ASIC may exempt a person or class of persons from the opt-in requirement if ASIC is satisfied that they are bound by a code of conduct approved by ASIC for the purpose of the section.

Under s962CA(2) of the Corporations Act, ASIC may approve a code of conduct if:

- a) the code of conduct is approved by ASIC under s1101A of the Corporations Act; and
- b) ASIC is satisfied that the code of conduct obviates the need for persons bound by the code to be bound by the opt-in requirement; and
- c) ASIC is satisfied of any other matters prescribed by the regulations.

There are currently no matters prescribed by the regulations.

Financial Planning Association of Australia Limited

The Financial Planning Association of Australia Limited (FPA) applied to ASIC for approval of its code of conduct pursuant to s962CA of the Corporations Act.

2. Purpose of the instrument

The purpose of *ASIC Corporations (Ongoing Fees Code) Instrument 2016/1129* is to provide ASIC’s approval for the FPA Professional Ongoing Fees Code dated 28 September 2016 and issued by the FPA, as in force at the date of this instrument (Ongoing Fees Code).

ASIC has assessed the Ongoing Fees Code and considers that it meets the requirements of s1101A of the Corporations Act, and ASIC guidance in Regulatory Guide 183 *Approval of financial services sector codes of conduct* (RG 183).

ASIC has determined that the Ongoing Fees Code obviates the need for code members to comply with the opt-in requirement because it achieves substantially the same policy outcomes that s962K of the Corporations Act is intended to achieve – that is, to protect disengaged clients from paying ongoing financial advice fees where they are receiving little or no service.

The effect of the instrument is that a person does not have to comply with s962K of the Corporations Act in relation to an ongoing fee arrangement covered by the Ongoing Fee Code.

As ASIC is approving the Ongoing Fees Code under a legislative provision (s1101A of the Corporations Act), and exempting persons from the operation of s962K of the Corporations Act in exercise of its powers under the Corporations Act, an instrument is necessary.

3. Operation of the instrument

Paragraph 2 of the *ASIC Corporations (Ongoing Fees Code) Instrument 2016/1129* provides that the instrument commences on 1 July 2017. This date has been set to accommodate the FPA's plans for an orderly sign up to the Ongoing Fees Code as part of their broader membership renewal process.

Paragraph 5 of the *ASIC Corporations (Ongoing Fees Code) Instrument 2016/1129* approves the Ongoing Fees Code for the purpose of s1101A of the Corporations Act and s962CA(2) of the Corporations Act.

Paragraph 6(1) of the *ASIC Corporations (Ongoing Fees Code) Instrument 2016/1129* exempts a person who receives fees under an ongoing fee arrangement from giving the client a written renewal notice every two years which requires the client to opt-in to renew that agreement.

The exemption in paragraph 6(1) of the *ASIC Corporations (Ongoing Fees Code) Instrument 2016/1129* is only available where the person is a member of the FPA in either the CFP® Professional or Financial Planner AFP® category and is party to the FPA Ongoing Fees Code Participating Member Registration Agreement with the FPA in the form given by the FPA to ASIC on 30 September 2016.

Note 1 makes it clear that a person who relies on the exemption in paragraph 6(1) of the *ASIC Corporations (Ongoing Fees Code) Instrument 2016/1129* must still give a fee disclosure statement every year in accordance with s962G of the Corporations Act.

4. Documents incorporated by reference

The *ASIC Corporations (Ongoing Fees Code) Instrument 2016/1129* incorporates by reference:

- a) the Ongoing Fees Code; and
- b) the FPA Professional Ongoing Fees Code Participating Member Registration Agreement with the FPA in the form given by the FPA to ASIC on 30 September 2016.

These documents are available at <http://fpa.com.au>

5. Consultation

ASIC released Consultation Paper 191 *Future of Financial Advice: Approval of codes of conduct for exemption from opt-in requirement* (CP 191) on 23 October 2012 which consulted publicly on our approach to code approval and relief powers under the FOFA reforms and how RG 183 should be modified to address these issues.

We received 12 responses to CP 191 from licensees, industry associations, a law firm and a joint consumer submission. The feedback from these submissions is set out in ASIC Report 329 *Response to submissions on CP 191 FOFA: Approval of codes of conduct for exemption from opt-in requirement* (REP 329).

We have consulted with the FPA on the terms of *ASIC Corporations (Ongoing Fees Code) Instrument 2016/1129* as this instrument directly concerns them and their members.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Ongoing Fees Code) Instrument 2016/1129

ASIC Corporations (Ongoing Fees Code) Instrument 2016/1129 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 (Ongoing Fees Code) Instrument 2016/1129 approves the FPA Professional Ongoing Fees Code dated 28 September 2016 and issued by the FPA, as in force at the date of this instrument. This legislative instrument exempts a person who receives fees under an ongoing fee arrangement from giving the client a written renewal notice every two years which requires the client to opt-in to renew that agreement, on the conditions set out in the instrument.

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.

Australian Securities and Investments Commission