



ASIC

Australian Securities & Investments Commission

ASIC Corporations (Amendment) Instrument 2016/1158

I, Grant Moodie, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Date 5 December 2016

Grant Moodie

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Part 1—Preliminary

1 Name of legislative instrument

This is the *ASIC Corporations (Amendment) Instrument 2016/1158*.

2 Commencement

This instrument commences on the day after it is registered on the Federal Register of Legislation.

Note: The register may be accessed at www.legislation.gov.au.

3 Authority

This instrument is made under subsections 341(1), 601QA(1), 741(1), 926A(2), 992B(1) and 1020F(1) of the *Corporations Act 2001*.

4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended as set out in the applicable items in the Schedule.

Schedule 1—Amendments

ASIC Class Order [CO 13/762]

1 Subparagraph 4(a)

Omit, substitute:

- (a) Parts 6D.2 or 6D.3 of the Act for an offer to issue equitable rights or interests in accessible securities arising because of an offer to hold, or arrange for the holding of, the accessible securities through the scheme; and

2 Paragraph 5

Omit, substitute:

5. A responsible entity of an IDPS-like scheme and each other person involved in the preparation of a Product Disclosure Statement for an interest in the scheme cannot rely on paragraph 4 if ASIC has given a notice in writing to the responsible entity or the person stating that the responsible entity or the person may not rely on that paragraph and has not withdrawn the notice.

3 Subparagraph 6(b) (notional subsection 1012IA(10))

Omit “subsection 1013DAB(8).”, substitute “subsection 1013DAB(8B), (8C), (8D), (8E) or (8F).”

4 Subparagraph 6(c) (notional section 1013DAB)

- (a) insert the following heading to subsection (1):

Product Disclosure Statement – additional content

- (b) insert the following heading to subsection (4):

Application form – warning

- (c) insert the following heading to subsection (5):

Members requests for information

- (d) omit subsection (7), substitute:

Acquisition of accessible investments that are interests in unregistered scheme

- (7) The responsible entity of an IDPS-like scheme must not, and must ensure that any custodian does not, acquire accessible investments as part of the scheme that are:

- (a) interests in a managed investment scheme that is not a registered scheme; or
- (b) interests in a scheme that would be a managed investment scheme but for paragraph (e) of the definition of *managed investment scheme* in section 9;

unless the responsible entity reasonably believes that:

- (c) had the particular member invested directly in the scheme, the scheme would not have been required to have been registered; and
- (d) had all interests in the scheme held in custodial arrangements been held by the clients of those arrangements, the scheme would not have been required to be registered.

Note: Under section 601ED, a managed investment scheme does not generally need to be registered if it has no more than 20 members. If interests held through custodial arrangements such as IDPSs, IDPS-like schemes and nominee and custody services had been acquired directly, the scheme may have required registration as it may have had more than 20 members.

- (e) omit subsection (8), substitute:

Acquisitions under direction from client

- (8) The responsible entity of an IDPS-like scheme must not, and must ensure that any custodian acting on its behalf does not, acquire accessible securities or accessible financial products under a direction of a member as part of the scheme unless:
 - (a) in relation to acquisitions of accessible securities—subsection (8A) or (8E) are satisfied; and
 - (b) in relation to acquisitions of accessible financial products:
 - (i) subsection (8B), (8C), (8D), (8E) or (8F) are satisfied; and
 - (ii) for acquisitions after 31 December 2017—subsection (8G) is satisfied.

(8A) This subsection is satisfied if:

- (a) both of the following are satisfied:
 - (i) the responsible entity reasonably believes that the member has been given a copy of the disclosure document for the accessible securities that would have been required had the accessible securities been offered to the member directly at the time of the acquisition of the accessible securities;

- (ii) the responsible entity has no reason to believe that the disclosure document is defective as if it were prepared at that time; or
 - (b) the responsible entity reasonably believes that the accessible securities could lawfully have been offered and issued or sold, as the case may be, to the member directly without the member being required to be given a disclosure document other than because of subsection 708(1).
- (8B) This subsection is satisfied if:
 - (a) the responsible entity reasonably believes that the member has been given a copy of the Product Disclosure Statement for the accessible financial product that would have been required had the financial product been offered to the member directly at the time of the acquisition of the financial product; and
 - (b) the responsible entity has no reason to believe the Product Disclosure Statement is defective as if it were prepared at the time of the acquisition.
- (8C) This subsection is satisfied if:
 - (a) the responsible entity reasonably believes that the accessible financial product could lawfully have been offered and issued or sold, as the case may be, to the member directly without the member being given a Product Disclosure Statement other than because of section 1012E; and
 - (b) the responsible entity has no reason to believe that a Product Disclosure Statement would have been required to be given to the member if all other holdings of the financial product in custodial arrangements had been issued to the clients (as defined in section 1012IA) of those arrangements.

Note: Under section 601ED, a managed investment scheme does not generally need to be registered if it has no more than 20 members. If interests held through custodial arrangements such as IDPSs, IDPS-like schemes and nominee and custody services had been acquired directly, the scheme may have required registration as it may have had more than 20 members.

- (8D) This subsection is satisfied if:
 - (a) the member already holds an accessible financial product of the same kind through the scheme; and
 - (b) the responsible entity has given the member a Product Disclosure Statement for a financial product of the same kind; and
 - (c) the responsible entity reasonably believes that the member has access to, and knows that they have access to, a Product Disclosure Statement for the financial product; and

- (d) the Product Disclosure Statement the member has access to is the most current in use or does not differ from the most current in use in a way that is materially adverse for the member; and
 - (e) the responsible entity has no reason to believe the Product Disclosure Statement the member has access to is defective as if it were prepared at the time of the acquisition.
- (8E) This subsection is satisfied if the acquisition is made under a distribution reinvestment plan in relation to a member and the member already has an existing holding of an accessible financial product of the same kind or accessible securities in the same class through the scheme.
- (8F) This subsection is satisfied if the acquisition is made under a regular saving acquisition in relation to a member and:
- (a) the member already has an existing holding of an accessible financial product of the same kind through the scheme; and
 - (b) the responsible entity has complied with its agreement with the member in relation to the regular savings plan to give any missing documents.
- (8G) This subsection is satisfied if the responsible entity reasonably believes that the issuer or seller of the accessible financial products has a dispute resolution system that satisfies either subsection 912A(2) or 1017G(2) and which covers complaints against the issuer or seller by each member of the IDPS-like scheme who:
- (a) holds through the IDPS-like scheme an accessible financial product issued or sold by the issuer or seller; and
 - (b) if the issuer or seller had issued or sold the accessible financial product the subject of the direction to the member directly—would have acquired the product as a retail client;
- where the complaints are made in connection with an accessible financial product issued or sold by the issuer or seller that is held through the IDPS-like scheme.
- (f) insert the following heading to subsection (9):
- Quarterly report or electronic access on a substantially continual basis*
- (g) insert the following heading to subsection (13):
- Annual investor statement*
- (h) insert the following heading to subsection (14):

Audit report

- (i) insert the following heading to subsection (15):

Giving of documents

- (j) insert the following heading to subsection (17):

Policies

- (k) insert the following heading to subsection (18):

Facilitating dispute resolution

- (l) insert the following heading to subsection (19):

Interpretation

- (m) in subsection (19):

- (i) omit the definition of **accessible financial products**, substitute:

accessible financial products means financial products (other than securities) that may be held through an IDPS-like scheme.

- (ii) omit the definition of **defective**, substitute:

defective:

- (a) in relation to a Product Disclosure Statement—has the same meaning as in section 1021B; and
- (b) in relation to a disclosure document—means a disclosure document in relation to which a person offering securities under the disclosure document must not issue securities or must deal under subsection 724(2) with any applications for securities made under the disclosure document that have not resulted in an issue or transfer of the securities.

- (iii) omit the definition of **disclosure document**;

- (iv) in the definition of **financial assets**, omit “*Legislative Instruments Act 2003*”, substitute “*Legislation Act 2003*”;

- (v) in the definition of **IDPS-like scheme**, after “registered managed investment scheme”, insert “under which or”;

- (vi) omit the definition of **NCS**, substitute:

nominee and custody services has the same meaning as in *ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156*.

5 Paragraph 8 (including the heading)

Omit

6 Paragraph 9

Insert the following heading:

Declaration – withdrawals**7 Paragraph 10 (including the heading)**

Omit, substitute:

Declaration – offers of securities through an IDPS-like scheme

10. Chapter 6D of the Act applies to all persons as if Part 6D.2 were modified or varied by, after section 704, inserting:

“704B Offers through an IDPS-like scheme

- (1) A person who makes an offer of accessible securities through an IDPS-like scheme that needs disclosure under this Part must promptly notify the responsible entity if:
 - (a) a supplementary or replacement document has been lodged in relation to the disclosure document; or
 - (b) the person is prohibited under Division 1 of Part 6D.3 from making offers of securities under the disclosure document; or
 - (c) the disclosure document is withdrawn before the expiry date specified in the disclosure document.
- (2) Nothing in this Part or Part 6D.3 requires a disclosure document for offers of accessible securities through an IDPS-like scheme to include information about the scheme or the rights attached to the accessible securities where they differ from the rights that a person would have if they acquired the accessible securities directly.
- (3) A person cannot rely on subsection (2) if ASIC has given a notice in writing to the person stating that it cannot rely on that subsection and has not withdrawn that notice.
- (4) In this section:

accessible securities and *IDPS-like scheme* have the same meanings as in subsection 1013DAB(19).”.

Declaration – Simple managed investment schemes

10A. Part 7.9 of the Act applies in relation to a responsible entity of a simple managed investment scheme as if regulation 7.9.11S of the

Corporations Regulations 2001 were modified or varied by, in subregulation (4), omitting “managed investment scheme that has a constitution” and substituting “managed investment scheme where, or has a constitution”.

8 Paragraphs 12 to 18 (including the heading)

Omit

9 Paragraph 19

(a) omit the definition of *accessible financial products*, substitute:

accessible financial products means financial products (other than securities) that may be held through an IDPS-like scheme.

(b) omit the definition of *application date*;

(c) omit the definition of *existing IDPS-like scheme*;

(d) in the definition of *IDPS-like scheme*, after “registered managed investment scheme”, insert “under which or”;

(e) omit the definition of *issuer*;

(f) insert the following definition in alphabetical order:

simple managed investment scheme has the meaning given by subregulation 1.0.02(1) of the *Corporations Regulations 2001*.

ASIC Class Order [CO 13/763]

10 Subparagraphs 4(b) and (c)

Omit, substitute:

- (b) Parts 6D.2 or 6D.3 of the Act for an offer to issue equitable rights or interests in accessible securities arising because of an offer to hold, or arrange for the holding of, the accessible securities through the IDPS; and
- (c) Division 8 of Part 7.8 or Part 7.9 of the Act in relation to a financial product that is an equitable right or interest in an accessible financial product arising because of a holding, or an offer to hold or arrange for the holding of, the accessible financial product through the IDPS.

11 Paragraph 5

Omit, substitute:

5. An operator of an IDPS cannot rely on paragraph 4 if ASIC has given a notice in writing to the operator stating that the operator may not rely on that paragraph and has not withdrawn the notice.

12 Paragraph 6 (notional subsection 912AD(15))

Omit, substitute:

- (15) At the beginning of a Supplementary IDPS Guide, there must be:
- (a) a statement that it is a Supplementary IDPS Guide; and
 - (b) an identification of the IDPS Guide that it supplements; and
 - (c) a statement that it is to be read together with that IDPS Guide and any other specified Supplementary IDPS Guides.

13 Paragraph 6 (notional subsection 912AD(22A))

Omit

14 Paragraph 6 (notional sections 912AD(25) and (26))

Omit, substitute:

Acquisition of accessible investments that are interests in unregistered scheme

- (25) The licensee must not, and must ensure that any custodian acting on its behalf does not, acquire accessible investments for a client as part of the IDPS that are:

- (a) interests in a managed investment scheme that is not a registered scheme; or
- (b) interests in a scheme that would be a managed investment scheme but for paragraph (e) of the definition of ***managed investment scheme*** in section 9;

unless the licensee reasonably believes that:

- (c) had the client invested directly in the scheme, the scheme would not have been required to have been registered; and
- (d) had all interests in the scheme held in custodial arrangements been held by the clients (as defined in section 1012IA) of those arrangements, the scheme would not have been required to be registered.

Note: Under section 601ED, a managed investment scheme does not generally need to be registered if it has no more than 20 members. If interests held through custodial arrangements such as IDPSs, IDPS-like schemes and nominee and custody services had been acquired directly, the scheme may have required registration as it may have had more than 20 members.

Acquisitions under direction from client

- (26) The licensee must not, and must ensure that any custodian acting on its behalf does not, acquire accessible securities for a client under a direction of a client as part of the IDPS unless:
- (a) in relation to acquisitions of accessible securities— subsection (26A) or (26E) are satisfied; and
 - (b) in relation to acquisitions of accessible financial products:
 - (i) subsection (26B), (26C), (26D), (26E) or (26F) are satisfied; and
 - (ii) for acquisitions after 31 December 2017— subsection (26G) is satisfied.
- (26A) This subsection is satisfied if:
- (a) both of the following are satisfied:
 - (i) the licensee reasonably believes that the client has been given a copy of the disclosure document for the accessible securities that would have been required had the accessible securities been offered to the client directly at the time of the acquisition of the accessible securities;
 - (ii) the licensee has no reason to believe that the disclosure document is defective as if it were prepared at that time; or
 - (b) the licensee reasonably believes that the accessible securities could lawfully have been offered and issued or sold, as the case may be, to the client directly without the client being required to be given a disclosure document other than because of subsection 708(1).
- (26B) This subsection is satisfied if:
- (a) the licensee reasonably believes that the client has been given a copy of the Product Disclosure Statement for the accessible financial product that would have been required had the financial product been offered to the client directly at the time of the acquisition of the financial product; and
 - (b) the licensee has no reason to believe that the Product Disclosure Statement is defective as if it were prepared at the time of the acquisition.
- (26C) This subsection is satisfied if:
- (a) the licensee reasonably believes that the accessible financial product could lawfully have been offered and issued or sold,

as the case may be, to the client directly without the client being given a Product Disclosure Statement other than because of section 1012E; and

- (b) the licensee has no reason to believe that a Product Disclosure Statement would have been required to be given to the client if all other holdings of the financial product in custodial arrangements had been issued to the clients (as defined in section 1012IA) of those arrangements.

Note: Under section 601ED, a managed investment scheme does not generally need to be registered if it has no more than 20 members. If interests held through custodial arrangements such as IDPSs, IDPS-like schemes and nominee and custody services had been acquired directly, the scheme may have required registration as it may have had more than 20 members.

(26D) This subsection is satisfied if:

- (a) the client already holds an accessible financial product of the same kind through the IDPS; and
- (b) the licensee has given the client a Product Disclosure Statement for a financial product of the same kind; and
- (c) the licensee reasonably believes that the client has access to, and knows that they have access to, a Product Disclosure Statement for the financial product; and
- (d) the Product Disclosure Statement the client has access to is the most current in use or does not differ from the most current in use in a way that is materially adverse for the client; and
- (e) the licensee has no reason to believe the Product Disclosure Statement the client has access to is defective as if it were prepared at the time of the acquisition.

(26E) This subsection is satisfied if the acquisition is made under a distribution reinvestment plan in relation to a client and the client already has an existing holding of an accessible financial product of the same kind or accessible securities in the same class through the IDPS.

(26F) This subsection is satisfied if the acquisition is made under a regular saving acquisition in relation to a client and:

- (a) the client already has an existing holding of an accessible financial product of the same kind through the IDPS; and
- (b) the licensee has complied with its agreement with the client in relation to the regular savings plan to give any missing documents.

(26G) This subsection is satisfied if the licensee reasonably believes that the issuer or seller of the accessible financial products has a dispute resolution system that satisfies either subsection 912A(2) or 1017G(2) and which covers complaints against the issuer or seller by each client of the IDPS who:

- (a) holds through the IDPS an accessible financial product issued or sold by the issuer or seller; and
- (b) if the issuer or seller had issued or sold the accessible financial product the subject of the direction to the client directly—would have acquired the product as a retail client;

where the complaints are made in connection with an accessible financial product issued or sold by the issuer or seller that is held through the IDPS.

15 Paragraph 6 (notional paragraph 912AD(40D)(b))

Omit, substitute:

- (b) the licensee reviews the policy at least every 13 months, prepares a written record of the outcome of the review and keeps that record for 7 years; and

16 Paragraph 6 (notional subsection 912AD(40M))

Omit

17 Paragraph 6 (notional subsection 912AD(42))

- (a) omit the definition of *accessible financial products*, substitute:

accessible financial products means financial products (other than securities) that may be held through an IDPS.

- (b) omit the definition of *defective*, substitute:

defective:

- (a) in relation to a Product Disclosure Statement—has the same meaning as in section 1021B; and
- (b) in relation to a disclosure document—means a disclosure document in relation to which a person offering securities under the disclosure document must not issue securities or must deal under subsection 724(2) with any applications for securities made under the disclosure document that have not resulted in an issue or transfer of the securities.
- (c) omit the definition of *disclosure document*;
- (d) in the definition of *financial assets*, omit “*Legislative Instruments Act 2003*”, substitute “*Legislation Act 2003*”;

- (e) in the definition of **IDPS**:
- (i) after “means” insert “a scheme under which”;
 - (ii) omit “following features:”, substitute “following features is provided.”;
 - (iii) omit “other clients.”, substitute “other clients;”;
 - (iv) after paragraph (d), on a new line, insert:
“but does not include a scheme under which material terms of any rights that may be acquired on behalf of a client are negotiated, or substantially determined.”
- (f) omit the definition of **NCS**, substitute:
- nominee and custody services* has the same meaning as in *ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156*.

18 Paragraph 6 (notional section 912AD(44))

Omit “(40A) to (40M)”, substitute “(40A) to (40L)”

19 Paragraph 6 (notional section 912ADA)

Omit

20 Paragraph 9 (including the heading)

Omit, substitute:

Declaration – offers of securities through an IDPS

9. Chapter 6D of the Act applies to all persons as if Part 6D.2 were modified or varied by, after section 704, inserting:

“704A Offers through an IDPS

- (1) A person who makes an offer of accessible securities through an IDPS that needs disclosure under this Part must promptly notify an operator or custodian in relation to the IDPS if:
 - (a) a supplementary or replacement document has been lodged in relation to the disclosure document; or
 - (b) the person is prohibited under Division 1 of Part 6D.3 from making offers of securities under the disclosure document; or
 - (c) the disclosure document is withdrawn before the expiry date specified in the disclosure document.
- (2) Nothing in this Part or Part 6D.3 requires a disclosure document for offers of accessible securities through an IDPS to include

information about the IDPS or the rights attached to the accessible securities where they differ from the rights that a person would have if they acquired the accessible securities directly.

- (3) A person cannot rely on subsection (2) if ASIC has given a notice in writing to the person stating that it cannot rely on that subsection and has not withdrawn that notice.
- (4) In this section:
- accessible securities, custodian, IDPS and operator* have the same meanings as in subsection 912AD(42).”.

21 Paragraph 10 (heading)

Omit, substitute:

Exemption – Persons involved in the operation of an IDPS

22 Paragraph 11

Omit, substitute:

11. A person (other than an operator) who is involved in the operation or promotion of an IDPS does not have to comply with:
- (a) Parts 6D.2 and 6D.3 of the Act for an offer securities to issue equitable rights or interests in accessible securities arising because of an offer to hold, or arrange for the holding of, the accessible securities through the IDPS; and
- (b) Division 8 of Part 7.8 or Part 7.9 of the Act in relation to a financial product that is an equitable right or interest in an accessible financial product arising because of a holding, or an offer to hold or arrange for the holding of, the accessible financial product through the IDPS.

Note: This paragraph does not apply to the accessible securities or accessible financial products that are held through the IDPS.

23 Paragraph 12

Omit

24 Paragraph 13

Omit, substitute:

13. A person cannot rely on paragraphs 10 or 11 if ASIC has given a notice in writing to the person which states that the person cannot rely on the paragraphs and has not withdrawn the notice.

25 Paragraphs 14 to 20 (including the heading)

Omit

26 Paragraph 21

(a) omit the definition of *accessible financial products*, substitute:

accessible financial products means financial products (other than securities) that may be held through an IDPS.

(b) omit the definition of *application date*;

(c) omit the definition of *existing IDPS*;

(d) in the definition of *IDPS*:

(i) after “means” insert “a scheme under which”;

(ii) omit “following features:”, substitute “following features is provided:”;

(iii) omit “other clients.”, substitute “other clients;”;

(iv) after paragraph (d), on a new line, insert:

“but does not include a scheme under which material terms of any rights that may be acquired on behalf of a client are negotiated, or substantially determined.”

(e) omit the definition of *issuer*.