

# EXPLANATORY STATEMENT

## ASIC CORPORATIONS (AMENDMENT) INSTRUMENT 2016/1224

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (**ASIC**) makes *ASIC Corporations (Amendment) Instrument 2016/1224* (the **Instrument**) under paragraph 1020F(1)(c) of the *Corporations Act 2001* (the **Act**).

Paragraph 1020F(1)(c) of the Act provides that ASIC may declare that Part 7.9 of the Act applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.

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

Schedule 10 to the *Corporations Regulations 2001* (the **Regulations**) was introduced in 2005 and sets out requirements for the disclosure of fees and costs of superannuation and managed investment products in Product Disclosure Statements and in periodic statements that must be given to members.

Stronger Super reforms introduced from 1 July 2013 included a number of amendments to the Regulations. Some of the amendments caused unintended inconsistencies in terminology between Schedule 10 and Schedules 10D and 10E to the Regulations that apply to short form superannuation Product Disclosure Statements and registered managed investment scheme Product Disclosure Statements, respectively. The Stronger Super reforms also included some minor drafting anomalies that could be interpreted in a way that did not reflect the intention with which they were made.

In 2013/14, ASIC undertook a review of industry fee and cost disclosure practices. A key finding of this review was that some industry participants were adopting various interpretations of Schedule 10 to the Regulations, in particular the interpretation of indirect costs for superannuation products and of management costs for managed investment products. For example, some products issuers had formed the view that the Regulations do not require costs associated with investing through interposed vehicles to be included in their products' indirect costs or management costs. This was despite the stated intention of the Regulations, as set out in the relevant Explanatory Statement, requiring these costs to be disclosed.

In response, after consultation with industry and relevant stakeholders, on 8 December 2014 ASIC made ASIC Class Order 14/1252 [CO 14/1252] which sought to revise some of the definitions, including the indirect cost and management cost definitions, and to clarify the costs that must be disclosed with the intended effect of Schedule 10 to the Regulations. [CO 14/1252] also addressed some provisions that could be interpreted in an anomalous way that were included in the Regulations as part of the Stronger Super reforms.

Following the release of [CO 14/1252], ASIC consulted on revisions to Regulatory Guide 97 *Disclosing fees and costs in PDSs and periodic statements*. In response to this consultation we received feedback from industry indicating that amendments to [CO 14/1252] were required. On 16 November, 2015 ASIC made ASIC Corporations (Amendment and Repeal) Instrument 2015/876, which clarified the definitions of the interposed vehicle and indirect cost concepts, and how derivative fees and costs need to be disclosed as part of indirect costs.

## **2. Purpose of the Instrument**

The purpose of the Instrument is to amend [CO 14/1252] which modifies Schedule 10 to the Regulations to provide industry with a longer transition period to comply with [CO 14/1252], to clarify how borrowing costs should be disclosed for superannuation products and to make minor amendments to give with greater clarity in disclosing fees and costs for superannuation and managed investment products to promote accurate and consistent disclosure in accordance with the policy of the Regulations.

The transition period will now end by 30 September 2017 for issuers that notify ASIC in writing by 31 January 2017 that they intend to take advantage of this extension in relation to a Product Disclosure Statement (**PDS**), and, before 1 March 2017, provide ASIC in writing using the form published by ASIC certain information about the fees and costs in their current PDS and corresponding information about the fees and costs that would be required to be included in this PDS had they complied with the updated fees and costs disclosure requirements.

Issuers that do not want to take of advantage of this extension will generally have to comply with the updated requirements by 1 February 2017. Any issuer that has commenced compliance with [CO 14/1252] will not be required to provide ASIC this information. Issuers will not need to provide the information in respect of any products with no PDS during February 2017 or that are not to be offered from 30 September 2017.

## **3. Operation of the Instrument**

Schedule 1 to the Instrument amends [CO 14/1252], which modifies or varies Part 7.9 of the Act as it applies in relation to managed investment and superannuation products.

Paragraph 1 in Schedule 1 to the Instrument inserts paragraph 5CA into [CO 14/1252]. This inserted paragraph modifies paragraph 1017B(6)(a) of the Act to ensure consistency with the remainder of the section 1017B.

Paragraph 2 in Schedule 1 to the Instrument inserts after paragraph 6(a)(ia) in [CO 14/1252] a provision inserting into Schedule 10 to the Regulations a definition for 'borrowing costs'.

Paragraph 3 in Schedule 1 to the Instrument modifies notional clause 101A of Schedule 10 to the Regulations inserted by [CO 14/1252]. The modification to notional clause 101A clarifies that amounts that, if they had been paid as a cost out of a superannuation entity, would not be an investment fee or administration fee for the superannuation product are not included as an indirect cost of the superannuation product. It also clarifies that amounts that, if they had been paid out of the scheme property of a registered scheme, would not be a management cost of the managed investment product are not included as management costs of the managed investment scheme.

Paragraph 4 in Schedule 1 to the Instrument modifies notional clause 101B of Schedule 10 to the Regulations inserted by [CO 14/1252].

Subparagraph 4(a) of the Instrument omits the reference in paragraph 101B(2)(a) to a security or financial product being traded on a financial market on which the entity to which the financial product relates is listed. This omission clarifies that the exclusion provided in paragraph 101B(2)(a) is not dependent on the securities being listed by modifying the interposed vehicle definition. It removes the requirement for securities that are a means of gaining exposure to property to be listed in order for those securities to be disregarded for the numerator in the asset test part of the interposed vehicle definition.

Subparagraph 4(b) to the Instrument modifies notional subclause 101B(4) to clarify that the determination of whether an entity is an interposed vehicle under the PDS test part of the interposed vehicle definition should also have regard to other information, issued by the responsible person, about the product or option that is likely to be given to retail clients who may acquire the product under the PDS.

Subparagraph 4(c) to the Instrument modifies notional subclause 101B(6) to omit the definition of listed from [CO 14/1252].

Paragraph 5 in Schedule 1 to the Instrument modifies sub-subparagraph 6(b)(iii) in [CO 14/1252] to clarify the application of notional subclause 102(h).

Paragraph 6 in Schedule 1 to the Instrument modifies the definition of ‘transactional and operational costs’ in clause 103 to Schedule 10 of the Regulations. The modifications clarifies that transactional and operational costs includes transactional and operational costs incurred in an interposed vehicle. The modification under paragraph 6 also clarifies that the transitional and operational costs do not include borrowing costs for a superannuation product.

Paragraph 7 in Schedule 1 to the Instrument substitutes subparagraph 6(e) in [CO 14/1252]. The substituted subparagraph 6(e) in [CO 14/1252] modifies paragraph 209(m) in Schedule 10 to the Regulations. This modification sets out how borrowing costs, in relation to a superannuation product must be disclosed in under the “Additional Explanation of Fees and Costs” heading in a PDS.

Paragraph 8 in Schedule 1 to the Instrument modifies subparagraph 6(ea) in [CO 14/1252] that inserts notional clause 209AA to Schedule 10 of the Regulations. The amendment to notional clause 209AA is to apply this clause to borrowing costs for superannuation products.

Paragraph 9 in Schedule 1 to the Instrument modifies the definition of 'administration fee' in sub paragraph 6(f)(ia) of the [CO 14/1252]. The modification omits 'borrowing costs' from the definition.

Paragraph 10 in Schedule 1 to the Instrument inserts sub paragraph (6)(f)(iaa), which substitutes the note under clause 209A to reflect other changes.

Paragraph 11 in Schedule 1 to the Instrument modifies the definition of 'investment fee' in sub-paragraph 6(f)(ib) of the [CO 14/1252]. The modification omits 'borrowing costs' from the definition.

Paragraph 12 in Schedule 1 to the Instrument modifies the definition of 'switching fee' in sub-paragraph 6(f)(ii) of [CO 14/1252] to clarify that only relevant aspects of the definition must be included and provide for reference to the wording in subsection 29V(5) of the Superannuation Industry (Supervision) Act 1993 rather than cross reference to the provision to facilitate retail clients understanding of terms used in the PDS.

Paragraph 13 in Schedule 1 to the Instrument inserts in subparagraph 6(g) of [CO/14/1252] notional subclause 222(3) to Schedule 10 to the Regulations. This notional subclause allows issuers of managed investment products to replace the word 'account' with 'investment' in the Consumer Advisory Warning in subclause 222(2) to Schedule 10 of the Regulations.

Paragraph 14 in Schedule 1 to the Instrument omits and substitutes paragraphs 8 and 8A in [CO 14/1252] other than its heading. Paragraph 8 of [CO/14/1252] outlines the transition period for [CO 14/1252].

The substitute paragraph 8 states that, subject to paragraphs 8A, 8C and 8D, paragraphs 4 to 7 (except paragraphs 5, 5CA and 5D) of [CO 14/1252] apply in relation to a PDS from 30 September 2017 (regardless of when it was given) unless one of a number of circumstances occur. These circumstances include where:

- the responsible person for the Statement has included in the Statement itself or published on a website of the responsible person from which the Statement can be accessed, a notice to the effect that [CO 14/1252] as amended by Corporations (Amendment and Repeal) Instrument 2015/876 applies to the Statement;
- except for a time-sharing scheme, if the responsible person has not notified ASIC in writing before 1 February 2017 that the responsible person intends to provide to ASIC the written information specified in subparagraph 8(b) in relation to the PDS before 1 March 2017 except for superannuation products or investment options or managed investment products that will not be offered from 30 September 2017;
- except for a time-sharing scheme, if the responsible person has not provided to ASIC in writing before 1 March 2017 the information specified in subparagraphs 8(b)(i) and the statement specified in 8(b)(ii); and
- except for a time-sharing scheme, ASIC has asked in writing the responsible person for a PDS to provide information on a superannuation product, investment option or managed investment product for which information was not previously required, if the information is not provided within 6 business days.

Paragraph 8AB sets out for which superannuation products, investment options and managed investment products, information must be provided to ASIC for the purposes of subparagraph 8(a), in order to rely on the extension of relief provided until 30 September 2017.

Paragraph 8A permits a PDS to apply one or more of the modified provisions under subparagraphs 6(bb), (c), (d), (f)(i), (fa), (fb), (g) and (h) and paragraph 7 of [CO 14/1252] during the transitional period for the Statement.

Paragraph 8B provides that where [CO 14/1252] before commencement of ASIC Corporations (Amendment and Repeal) Instrument 2015/876 applied to a PDS before commencement of ASIC Corporations (Amendment) Instrument 2016/1224, it continues to apply during the transitional period until the Statement complies with the modified provisions after that commencement.

Paragraph 8C provides that paragraphs 6(e), (ea) and (f) other than (f)(i) of [CO 14/1252] as in force immediately before the commencement of the ASIC Corporations (Amendment) Instrument 2016/1224 continue to apply to a PDS given before that commencement until 30 September 2017 or, if earlier, when those provisions of [CO 14/1252] as modified by ASIC Corporations (Amendment) Instrument 2016/1224 are complied with. Those provisions also apply to another PDS given after than commencement that relates only to those financial products.

Paragraph 8D provides that where the transitional period in respect of a PDS does not end on or before 1 March 2017 because of the provision of the information and statements specified under paragraph 8(a) and (b), the same transitional period also applies to another Statement given after commencement of ASIC Corporations (Amendment) Instrument 2016/1224 that relates only to the same financial products as would apply to the Statement first given before that commencement.

#### **4. Consultation**

ASIC consulted with various industry associations, compliance consultants, lawyers, a number of superannuation trustees and responsible entities about the clarifications to [CO 14/1252]. The extension to the transition period for compliance with the updated fee and cost disclosure requirements was in response to application from industry associations representing most of the superannuation and managed investment industries seeking the extension on behalf of superannuation trustees and responsible entities. ASIC consulted industry associations and superannuation trustees on the modifications introduced by the Instrument to the disclosure requirements in relation to borrowing costs for superannuation products and sought submissions on the proposals.

ASIC has determined that the Instrument only makes minor modifications to the operation of [CO 14/1252], and that these modifications have a minor and machinery impact and therefore no Regulation Impact Statement is required.

## Statement of Compatibility with Human Rights

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

### ASIC Corporations (Amendment) Instrument 2016/1224

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

*ASIC Corporations (Amendment) Instrument 2016/1224* (the **Instrument**) amends ASIC Class Order [14/1252].

Class Order [CO 14/1252] relates to Schedule 10 to the *Corporations Regulations 2001* (the Regulations). Schedule 10 sets out requirements for the disclosure of fees and costs of superannuation and managed investment products in Product Disclosure Statements and in periodic statements that must be given to members.

The Instrument amends Class Order [CO 14/1252] to provide industry an extension of the transition period to comply with the amendments to Schedule 10 made by [CO 14/1252]. The instrument also makes minor amendments to the [CO 14/1252] to provide industry with greater clarity in disclosing fees and costs for superannuation and managed investment products.

#### 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.