
EXPLANATORY STATEMENT for
ASIC Corporations (Registered Schemes: Differential Fees) Instrument

2017/40

and

ASIC Corporations (Repeal) Instrument 2017/41

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes *ASIC Corporations (Registered Schemes: Differential Fees) Instrument 2017/40* under subsection 601QA(1) of the *Corporations Act 2001* (the Act).

Subsection 601QA(1) of the Act provides that ASIC may exempt a person from a provision of Chapter 5C of the Act or declare that Chapter 5C of the Act applies in relation to a person as if specified provisions were omitted, modified or varied.

ASIC makes *ASIC Corporations (Repeal) Instrument 2017/41* under subsection 601QA(1) 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, 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

Section 601FC(1)(d) of the Act requires the responsible entity of a registered managed investment scheme to treat members who hold interests of the same class equally and members who hold interests of different classes fairly. In ASIC's view, this prohibits a responsible entity from charging fees to a member of one class that differ from those charged to another member of the same class based on:

- (a) characteristics of the member (e.g. the amount they have invested in the scheme); or
- (b) individual negotiation between the member and the responsible entity.

We recognise that these ‘differential’ fee arrangements are a means by which responsible entities attract large investors to a scheme. Such arrangements may deliver cost savings to all investors through the adoption of more efficient scheme structures and economies of scale.

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 03/217] is due to expire on 1 April 2017.

ASIC has reviewed [CO 03/217] and has decided to extend its operation by making the *ASIC Corporations (Registered Schemes: Differential Fees) Instrument 2017/40*. ASIC has formed the view that this class order is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework.

2. Purpose of the instrument

The purpose of *ASIC Corporations (Registered Schemes: Differential Fees) Instrument 2017/40* is to give relief in recognition that:

- (c) differential fee arrangements are a means by which significant investors are attracted to a scheme and may deliver cost savings to all investors through more efficient scheme structures and economies of scale;
- (d) fees that apply to members on a transparent basis, such as banding or tiered fees, enable investors to consider if the fee they will pay is reasonable given the fees others will pay; and
- (e) relief only applies to fee arrangements that are adequately disclosed (both to existing members and in Product Disclosure Statements) and where the fee arrangements do not adversely affect the fees that any other member will incur.

ASIC Corporations (Registered Schemes: Differential Fees) Instrument 2017/40 will continue the relief provided by [CO 03/217] in a new legislative instrument that:

- (a) expands the relief where a member acquires an investment under a switching facility that involved a withdrawal from a managed investment scheme operated by the responsible entity to also cover a switching facility that involves a withdrawal from a managed investment scheme operated by a related body corporate of the responsible entity;
- (b) does not continue previous relief where a member carries out transactions in relation to the scheme by electronic means because ASIC considers that this relief is not legally necessary;
- (c) updates the name of the legislative instrument; and
- (d) reflects current drafting practice and format.

ASIC Corporations (Repeal) Instrument 2017/41 is made to repeal the relief provided by [CO 03/217].

3. Operation of the instrument

Paragraph 5(1) of the *ASIC Corporations (Registered Schemes: Differential Fees) Instrument 2017/40* exempts a responsible entity of a registered scheme from the requirement to comply with paragraph 601FC(1)(d) of the Act to the extent it would otherwise prohibit the responsible entity from administering a differential fee arrangement.

Paragraph 5(2) of the *ASIC Corporations (Registered Schemes: Differential Fees) Instrument 2017/40* provides that the exemption in paragraph 5(1) is available where the differential fee arrangement under which the fees that may be charged, rebated or waived by the responsible entity to members of the scheme differ based on any of the following criteria:

- (a) the total value of, or the number of, interests held by the member, or by certain associated persons of the member, in financial products issued by the responsible entity or a related body corporate of the responsible entity;
- (b) the total period of time during which the member or certain associated persons of the member, held interests in financial products issued by the responsible entity or a related body corporate of the responsible entity;
- (c) the member being an employee of the responsible entity or a related body corporate in circumstances where the number of votes that may be cast on a resolution of the scheme's members by employee members is no more than 5% of the total votes that may be cast by the scheme's members;
- (d) the member having acquired their interests under a switching facility that involved the member first withdrawing from another registered scheme operated by the responsible entity or a related body corporate of the responsible entity; and
- (e) savings to the scheme resulting from the lower cost of servicing a member because of particular characteristics of that member or of their investment, where the amount of the benefit by way of lower fees charged to that member, or the rebate or waiver of fees provided to that member, is no greater than a reasonable estimate of the amount of the saving or expected saving.

Paragraph 5(3) of the *ASIC Corporations (Registered Schemes: Differential Fees) Instrument 2017/40* provides that the exemption in paragraph 5(1) is also available for a differential fee arrangement under which the fees that may be charged, rebated or waived by the responsible entity to a member that is a wholesale client differs from that applying to other members based on individual negotiation between the responsible entity and the member.

Paragraph 6(2) and of the *ASIC Corporations (Registered Schemes: Differential Fees) Instrument 2017/40* provides that the responsible entity must ensure that the differential fee arrangement:

- (a) does not adversely affect the fees paid or to be paid by any member of the scheme who is not entitled to the benefit of the fee arrangements; and
- (b) is applied without discrimination to all members who satisfy the criteria necessary to receive the benefit of the arrangement.

Paragraph 6(1) and of the *ASIC Corporations (Registered Schemes: Differential Fees) Instrument 2017/40* provides the differential fee structures must be disclosed in a clear, concise, effective and timely manner. An important policy objective of the financial services regime is to ensure that consumers can understand and compare the fees that apply to their investment in managed investment schemes.

Under this relief, fee arrangements that involve individual negotiation may only be entered into with persons who are not retail clients as defined in s761G (e.g. ‘sophisticated’ or ‘professional’ investors). The policy basis is that allowing individual negotiation for these investors may advantage other investors through economies of scale.

4. Consultation

As part of its review of [CO 03/217], ASIC released Consultation Paper 258 *Remaking ASIC class order on differential fees: [CO 03/217] (CP 258)*. A draft version of *ASIC Corporations (Registered Schemes: Differential Fees) Instrument 2017/40* was attached to CP 258.

ASIC received two submissions in response to CP 258. Neither submission raised any concerns with ASIC’s proposals to remake [CO 03/217]. Both submissions generally supported extending relief to permit responsible entities to individually negotiate fees with retail clients. Given the limited consultation feedback on this item and the lack of information about the impacts of this change, we decided not extended this relief at this stage by a legislative instrument but are open to further submissions.

Submission comments also focused on whether relief for members that carry out transactions electronically should be retained. We did not consider this relief necessary as members are not being treated differently based on a personal characteristic of the member. All members are treated according to the form of document they receive rather than anything about the member themselves. It would be open to all members equally to transact electronically and therefore all members would be treated equally.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Registered Schemes: Differential Fees) Instrument 2017/40

and

ASIC Corporations (Repeal) Instrument 2017/41.

ASIC Corporations (Registered Schemes: Differential Fees) Instrument 2017/40 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 (Registered Schemes: Differential Fees) Instrument 2017/40 provides exemptions from the requirement for a responsible entity of a registered managed investment scheme to treat members who hold interests of the same class equally subject to the conditions in the instrument. Equal treatment prohibits a responsible entity from charging fees to a member of one class that differ from those charged to another member of the same class based on either characteristics of the member or individual negotiation between the member and the responsible entity.

The Instrument remakes [CO 03/217] as a new legislative instrument. The Repeal Instrument repeals [CO 03/217].

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