



ASIC

Australian Securities & Investments Commission

ASIC Corporations (Amendment) Instrument 2017/664

I, Anthony Graham, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Date 12 September 2017

Anthony Graham

Contents

Part 1—Preliminary	3
1 Name of legislative instrument	3
2 Commencement	3
3 Authority	3
4 Schedules	3
Schedule 1—Amendments	4
ASIC Class Order [CO 14/1252]	4

Part 1—Preliminary

1 Name of legislative instrument

This is the *ASIC Corporations (Amendment) Instrument 2017/664*.

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 subsection 1020F(1) of the *Corporations Act 2001*.

4 Schedules

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

Schedule 1—Amendments

ASIC Class Order [CO 14/1252]

1 After paragraph 5CA

Insert:

5CB. After subsection 1017D(3) of the Act, insert:

“(3AA) For a managed investment product, the periodic statement in relation to the reporting period mentioned in paragraph 1017D(2)(d) must be given as soon as practicable after the issuer becomes aware that the holder has ceased to hold the product, and, in any event must be given:

- (a) within six months after the end of the reporting period; or
- (b) if the responsible entity of the registered scheme to which the managed investment product relates has published a notice on its website that, in respect of the scheme, it will provide the relevant periodic statement within a specified period ending at least one month and less than six months after the end of the reporting period—within that specified period or, if that specified period ceased before the date (*commencement date*) this subsection commences, by the commencement date.

(3AB) A notice referred to in paragraph (3AA)(b):

- (a) may be published before the commencement date; and
- (b) after the commencement date, may not be revoked and may not be amended to increase the period specified; and
- (c) if published on or before the date that is one month after the commencement date, is taken to have effect in relation to reporting periods ending on or after:
 - (i) 1 July 2017; or
 - (ii) if the notice specifies a later date, that later date.”.

2 After paragraph 5D

Insert:

5E. Omit paragraph 7.9.75(1)(b) of the Regulations.

3 Sub-subparagraph 6(a)(iaa)

- (a) Omit “that is not a derivative financial product under which credit within the meaning of subregulation 7.1.06(3) is provided”, substitute “within the meaning of regulation 7.1.06 relating to the provision of credit within the meaning of subregulation 7.1.06(3)”.
- (b) At the end of the sub-subparagraph, omit “.”, substitute “;”.

4 After sub-subparagraph 6(a)(iia)

Insert:

(iib) after the definition of *performance fee*, insert:

“*property operating costs* means amounts that are paid or payable in relation to the holding of real property or an interest in real property, but do not include any of the following:

- (a) borrowing costs;
- (b) amounts that are paid or payable relating to the acquisition or disposal of real property or an interest in real property;
- (c) an amount that is otherwise charged as any of the following:
 - (i) an administration fee;
 - (ii) a buy-sell spread;
 - (iii) a switching fee;
 - (iv) an exit fee;
 - (v) an activity fee;
 - (vi) an advice fee;
 - (vii) an insurance fee.”;

5 Sub-subparagraph 6(a)(iv)

- (a) Omit “by inserting after the definition of *withdrawal fee*”, substitute “after the definition of *withdrawal fee*, insert”.
- (b) Omit notional paragraph 101A(1)(a), substitute:

- “(a) either:
- (i) a responsible person knows, or reasonably ought to know or, where this is not the case, may reasonably estimate has reduced or will reduce (as applicable) whether directly or indirectly the return on the product or option that is paid from or reduces the amount or value of:
 - (A) the income of or the property attributable to the product or option; or
 - (B) the income of or the property attributable to an interposed vehicle in or through which the property attributable to the product or option is invested; or
 - (ii) satisfies both the following:
 - (A) the amount is paid or payable by or on behalf of a person who may make payments that form part of the return on, or the value of, the product or option whether directly or through an interposed vehicle;
 - (B) payment of the amount is a benefit that increases the returns or value of the product or option or provides a benefit to the issuer in relation to the product or option that is retained by the issuer; and”.
 - (c) In notional paragraph 101A(1)(b), before “is”, insert “for a MySuper product or an investment option offered within a superannuation product other than a MySuper product,”.

6 Sub-subparagraph 6(a)(v) (notional clause 101B)

- (a) In subclause 101B(4), after “.” omit “,”.
- (b) After subclause 101B(4), insert:

“(4A) Subject to subclause (4B), an entity is also an *interposed vehicle* in relation to a product or investment option if:

 - (a) the Product Disclosure Statement for the product or investment option or any other information issued by the responsible person relating to the product or investment option issued by the responsible person that has been given or may be reasonably be expected to be given to retail clients refers to “property”, “real estate” or “land” or similar terms in the description of the product or investment option or as one of the assets (*relevant asset*) in which investment may be made under the product or investment option; and

- (b) real property or an interest in land to which the reference relates is directly or indirectly held by or through the entity.
- (4B) An entity is not an *interposed vehicle* because of subclause (4A) if both the following are satisfied:
- (a) the reference in the Product Disclosure Statement or other information is merely part of a reference to an entity (whether specified or not) that directly or indirectly invests in real property or interests in land or to physical infrastructure referred to in paragraphs (a) to (j) of the definition of *infrastructure entity* in subclause (6);
 - (b) a retail client who has read the Statement or other information could not reasonably believe that the product or investment option or the relevant asset may be intended for persons predominantly intending to benefit from increases in the value of, or returns from holding, real property or an interest in land other than physical infrastructure referred to in paragraphs (a) to (j) of the definition of *infrastructure entity* in subclause (6).
- (4C) Subject to subclause (4D), an entity is also an *interposed vehicle* in relation to a product or investment option if:
- (a) the Product Disclosure Statement for the product or investment option or any other information issued by the responsible person relating to the product or investment option that has been given or may be reasonably expected to be given to retail clients refers to the product or option as being directly or indirectly invested in or through an entity (whether specified or not) other than an infrastructure entity which the responsible person believes has a majority of its assets invested in physical infrastructure referred to in paragraphs (a) to (j) of the definition of *infrastructure entity* in subclause (6); and
 - (b) the reference relates to the entity.
- (4D) An entity is not an *interposed vehicle* because of subclause (4C) if:
- (a) either of the following is satisfied:
 - (i) the entity is admitted to the official list of a prescribed financial market or a financial market operated outside of this jurisdiction that is regulated by a foreign government or an agency of a foreign government;
 - (ii) the issuer of the securities or financial products of the entity has applied, or stated in a regulated disclosure that they will apply, for such admission; and

- (b) the securities or financial products of the entity are, or are to be, held under an investment strategy for the product or investment option that:
 - (i) relates to, or is publicly measured by the responsible person by reference to, a widely used index (*reference index*) of securities or financial products of entities that satisfy subparagraph (a)(i); and
 - (ii) is a strategy of holding directly or indirectly securities or financial products:
 - (A) of entities that satisfy paragraph (a); and
 - (B) that represent at least 80% by value of the net assets attributable to the investment strategy; and
- (c) the value of all the securities or financial products of the entity that are in the same class as the securities or financial products held under the investment strategy does not exceed 30% of the value of the reference index.

Note: If paragraphs (a) to (c) are satisfied in relation to an entity, the entity may still be an *interposed vehicle* because of provisions of clause 101B other than subclause (4C).”.

- (c) In subclause 101B(5), omit “subclauses (1) to (4)”, substitute “subclauses (1) to (4D)”.

7 At the end of sub-subparagraph 6(a)(v)

Insert “”,”.

8 Subparagraph 6(baa)

Repeat the subparagraph, substitute:

(baa) in clause 103:

- (i) before “*Transactional and operational costs* include”, insert “(1)”; and
- (ii) omit “.”, substitute:

“,

- (ea) where an asset is acquired other than through a financial market, any part of the acquisition price of the asset that exceeds the price at which the asset could have been disposed of;

- (eb) where an asset is acquired through a financial market, any part of the acquisition price of the asset that exceeds the bid price in the financial market that would apply without the acquisition having occurred either:
 - (i) immediately following the acquisition; or
 - (ii) if the acquisition was a part of multiple acquisitions reflecting a single and non-recurring instruction to acquire, after the last acquisition made in accordance with the instruction;
- (ec) property operating costs;
- (f) costs incurred in or by an interposed vehicle that would be transactional and operational costs if they had been incurred by the superannuation entity to which the superannuation product or investment option relates or for the registered scheme to which the managed investment products relate;

and for a superannuation product does not include borrowing costs or costs that are indirect costs because of subclause 101A(3).

(1A) Before 30 September 2018, transactional and operational costs do not include property operating costs for a MySuper product or investment option if details of the property operating costs are disclosed in accordance with paragraph 209(ma).”;

9 Subparagraph 6(e)

(a) In notional paragraph 209(m), omit “investor.”, substitute:

“investor;

(ma) before 30 September 2018, details of property operating costs to the extent those costs are not included in the investment fee or indirect costs for the relevant MySuper product or investment option offered by a superannuation entity, including:

- (i) a description of the cost; and
- (ii) the amount, or an estimate if the amount is not known; and

- (iii) how and when the costs are recovered; and
- (iv) a statement that the cost is an additional cost to the investor.”.

(b) At the end of the subparagraph, omit “.”, substitute “;”.

10 Subparagraph 6(ea) (notional clause 209AA)

- (a) Omit “subclause 209(j) and paragraph 209(m)”, substitute “paragraphs 209(j) and (m)”.
- (b) After “borrowing costs” (wherever occurring), insert “and property operating costs”.

11 Sub-subparagraph 6(f)(ib)

- (a) At the end of the notional definition of *investment fee*, insert:

“Note: The costs referred to in paragraph (b) do not include transactional and operational costs referred to in paragraphs (b), (ea) and (eb) of the definition of *transactional and operational costs*.”.

- (b) At the end of the sub-subparagraph, add:

Note: Transitional provisions apply in relation to the notional definition of *investment fee* until 30 September 2018: see paragraph 11.

12 Sub-subparagraph 6(f)(ii)

Omit “by omitting the definition of *switching fees*, and substituting”, substitute “omit the definition of *switching fees*, substitute”.

13 Subparagraph 6(i) (notional subclause 301(1A))

At the end of the notional subclause, insert:

“(1B) For a periodic statement for a MySuper product or an investment option offered by a superannuation entity, for a period ending on or before 29 June 2018, the amount disclosed for other fees under subclause (1) may be calculated excluding the buy-sell spread if it is stated in accordance with subclause (1E) that, “The total fees you paid do not include the buy-sell spread fee, because it is not reasonably practicable for us to include the buy-sell spread fee that you incurred during the period.”.

(1C) For a periodic statement for a MySuper product or an investment option offered by a superannuation entity, for a period ending on or before 29 June 2018, the amount disclosed for other fees under subclause (1) may be calculated excluding property operating costs if it is stated in accordance with subclause (1E) that, “The total fees you paid do not include the property operating costs that you incurred during the period.”.

- (1D) For a periodic statement for a MySuper product or an investment option offered by a superannuation entity, for a period ending after 29 June 2018, and on or before 29 September 2018, the amount disclosed for other fees under subclause (1) may be calculated excluding property operating costs if it is stated in accordance with subclause (1E) that, “The total fees you paid do not include the property operating costs that you incurred during the period. An estimate of the amount of property operating costs incurred by the holder during the period is provided in the periodic statement.”.
- (1E) For the purposes of subclauses (1B) to (1D), a statement is stated in accordance with this subclause if the statement and each other statement made for the purposes of subclauses (1B) to (1D) is included:
- (a) immediately under the amount of total fees you paid in the periodic statement; or
 - (b) if it is not reasonably practicable to include the statements in that position in the periodic statement—a separate document that accompanies the periodic statement and that includes those statements as consecutive statements.”.

14 At the end of subparagraph 6(i)

Omit “.”, substitute:

“;

- (j) after subclause 301(4), insert:

“(5) For a superannuation product that is subject to tax, for any reporting period ending after 29 June 2018, if a reduced fee or cost is disclosed in the statement because of the benefit of any income tax deduction, the indirect costs, or other fees as appropriate, for the product must include the part of the cost that reduced the disclosed fee or costs.

(6) For a managed investment product that is subject to tax, for any reporting period ending after 29 June 2018, if a reduced fee or cost is disclosed in the statement because of the benefit of any income tax deduction, the indirect costs for the product must include the part of the cost that reduced the disclosed fee or cost.”;

- (k) at the end of paragraph 303(1)(b), omit “.”, insert:

“; and

- (c) for any reporting period ending on or before 29 June 2018:

- (i) the approximate total amount of borrowing costs that affected the investment of the member during the period or that amount combined with the amount required to be disclosed in accordance with subclause 302(1); or
 - (ii) details, including the relevant website address, about how to obtain information about borrowing costs for each MySuper product and investment option on the fund's website; and
- (d) for any reporting period ending after 29 June 2018, the approximate total amount of borrowing costs that affected the investment of the member during the period or that amount combined with the amount required to be disclosed in accordance with subclause 302(1).”;
- (l) at the end of paragraph 303(2)(c), omit “.”, insert:
- “; and
- (d) for any reporting period ending after 29 June 2018, the approximate total amount of transactional and operational costs for the managed investment product that affected the investment of the holder during the period or that amount combined with the amount required to be disclosed in accordance with paragraph 302(1)(b) excluding costs that are both:
- (i) referred to in paragraph (b), (ea) or (eb) of the definition of *transactional or operational costs* and that are a necessary part of the acquisition price of an asset;
 - (ii) recovered by a buy-sell spread for the managed investment product where the estimated amount of the buy-sell spread that the holder has paid in the period in dollars is disclosed in the periodic statement.”.

15 After paragraph 9

Insert:

10. Despite paragraph 9, paragraph 5CB applies from the commencement of *ASIC Corporations (Amendment) Instrument 2017/664*.
11. Before 30 September 2018, if a Product Disclosure Statement for a MySuper product or investment option includes separate details of the property operating costs (within the meaning of the notional definition of *property operating costs* inserted by sub-subparagraph 6(a)(iib)) under Additional Explanation of Fees and Costs for the MySuper product or investment option,

sub-subparagraph 6(f)(ib) applies as if the notional definition of *investment fee* were amended by, at the end of subparagraph (iii) of the definition, omitting “fee.” and substituting:

“fee;

but does not include property operating costs.”.