

EXPLANATORY STATEMENT

ASIC Corporations (Amendment) Instrument 2018/1088

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (*ASIC*) makes *ASIC Corporations (Amendment) Instrument 2018/1088* (the **amending instrument**) under subsection 1020F(1) of the *Corporations Act 2001* (the *Act*).

Subsection 1020F(1) of the Act provides that ASIC may:

- (a) exempt a person or financial product or a class of persons or financial products from all or specified provisions of Part 7.9 of the Act; or
- (b) declare that Part 7.9 of the Act applies in relation to a person or 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.

The amending instrument amends ASIC Class Order [CO 14/1252] (the **class order**).

1. Background

- 1.1 Schedule 10 to the *Corporations Regulations 2001* (the **Regulations**) sets out requirements for the disclosure of fees and costs of superannuation and managed investment products in Product Disclosure Statements (PDSs) and in periodic statements that must be given to product holders.
- 1.2 The *Superannuation Legislation Amendment (MySuper Measures) Regulation 2013* made a number of amendments to the Regulations as part of the Stronger Super reforms from 1 July 2013. 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 PDSs for superannuation products and managed investment products. These Stronger Super amendments also included some minor drafting anomalies that could be interpreted in a way that did not reflect the intention with which they were made.
- 1.3 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 interpretations of ‘indirect costs’ for superannuation products and of ‘management costs’ for managed investment products. For example, some products issuers had formed the view that, contrary to the intention of the Regulations, the Regulations do not require costs associated with investing through interposed vehicles to be included in their products' indirect costs or management costs.

- 1.4 In response to the review, after consultation with industry and relevant stakeholders, on 8 December 2014 ASIC made the class order. The class order revised some of the definitions in Schedule 10, including the indirect cost and management cost definitions, and clarified the costs that must be disclosed, in keeping with the intended effect of Schedule 10 to the Regulations. The class order 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.
- 1.5 Following the release of the class order, ASIC consulted on revisions to ASIC Regulatory Guide 97: *Disclosing fees and costs in PDSs and periodic statements (RG 97)*. In response to this consultation ASIC received feedback from industry indicating that amendments to the class order were required.
- 1.6 ASIC has since made a number of legislative instruments clarifying:
 - (a) the definitions of ‘interposed vehicle’ and ‘indirect cost’;
 - (b) how derivative fees and costs need to be disclosed as part of indirect costs;
 - (c) the requirements for periodic statements.ASIC has also defined borrowing costs, to assist in cost disclosure.
- 1.7 On 1 November 2017, in response from feedback across the industry around challenges with the implementation of the class order and RG 97, ASIC announced that it would work with an external expert to conduct a review (the **Review**) of the fees and costs disclosure regime to ensure that it is best meeting in practice the objective of greater transparency for consumers. The Review was completed in July 2018 and released as ASIC Report 581 *Review of ASIC Regulatory Guide 97: Disclosing fees and costs in PDSs and periodic statements*.

2. Purpose of the instrument

- 2.1 The purpose of the amending instrument is to amend the class order to extend for an additional 12 months the current interim arrangements in place.
- 2.2 Schedule 10 to the Regulations as modified by the class order currently provides for certain disclosure obligations arising in relation to periodic statements for reporting periods ending before 30 June 2019 to operate differently to the disclosure obligations applying for reporting periods ending on or after 30 June 2019.
- 2.3 Schedule 10 as modified by the class order also currently provides for superannuation trustees to deal with property costs in PDSs given before 30 September 2019 by disclosing these in the Additional Explanation of Fees and

Costs rather than including these as part of investment fees (as would occur for PDSs given on or after 30 September 2019). These disclosure obligations were intended to be interim arrangements, in recognition of the need to change internal systems in relation to the production of periodic statements and to allow additional time for discussions with the industry about how to calculate property costs.

- 2.4 Those interim arrangements initially applied in relation to periodic statements for reporting periods ending before 30 June 2018, and in relation to PDSs given before 30 September 2018.
- 2.5 In December 2017, ASIC extended the time period for those interim arrangements for an additional 12 months, to their current 2019 dates by making *ASIC Corporations (Amendment) Instrument 2017/1138*. This extension was made because at that time the Review was underway but not completed. ASIC extended the time period for the interim arrangements so that industry would not be required to incur additional time and expense where there was uncertainty as to whether or what further amendments to disclosure obligations may be made.
- 2.6 ASIC is currently considering the recommendations made in the Review and for this purpose proposes to release a Consultation Paper shortly advising ASIC's response to the Review Recommendations. This would also seek input in relation to proposed changes to Schedule 10 to the Regulations and a new draft version of RG 97.
- 2.7 The amending instrument further extends the time period for these interim arrangements for an additional 12 months so that industry is not required to incur additional time and expense where whether or what further amendments to disclosure obligations is subject to consultation.

3. Operation of the instrument

- 3.1 The amending instrument extends for an additional 12 months a number of time periods for compliance with Schedule 10 to the Regulations as modified by the class order.
- 3.2 Items 4, 5 and 7 extend the time period for compliance in relation to the disclosure of certain costs in periodic statements for superannuation products.
- 3.3 Item 6 extends the time period for compliance in relation to the disclosure of certain costs in periodic statements for both superannuation products and managed investment products.
- 3.4 Item 8 extends the time period for compliance in relation to the disclosure of certain costs in periodic statements for managed investment products.
- 3.5 Items 1, 2, 3 and 9 extend the time period for compliance in relation to requiring property operating costs to be disclosed as part of the investment fee or indirect costs in a PDS for superannuation products.

4. Consultation

- 4.1 ASIC has made the amendments in the amending instrument after consultation with industry bodies – the Association of Superannuation Funds of Australia, Financial Services Council and Australian Institute of Superannuation Trustees - which represent a significant group of superannuation trustees and responsible entities of managed investment schemes.
- 4.2 The Office of Best Practice Regulation has advised that a RIS is not required in order to make the amending instrument.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Amendment) Instrument 2018/1088

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 Class Order [CO 14/1252] (*JCO 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 (**PDSs**) and in periodic statements that must be given to product holders.

ASIC has put in place interim arrangements that defers the application of some of these disclosure obligations.

In November 2017, in response from feedback across the industry around challenges with the implementation of [CO 14/1252] and Regulatory Guide 97: *Disclosing fees and costs in PDSs and periodic statements*, ASIC announced that it would work with an external expert to conduct a review of the fees and costs disclosure regime to ensure that it is best meeting in practice the objective of greater transparency for consumers.

The Review was completed in July 2018 and released as ASIC Report 581 *Review of ASIC Regulatory Guide 97: Disclosing fees and costs in PDSs and periodic statements*. ASIC is currently considering the recommendations made in the Review and proposes to consult with industry in early 2019 in relation to ASIC's response to those recommendations.

This amending instrument extends the time period for the interim arrangements for an additional 12 months so that industry is not required to incur additional expense in circumstances where the issue of what changes may be made to the fees and costs disclosure requirements following the Review is subject to consultation.

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