



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Amendment and Repeal) Instrument 2020/579

This is the Explanatory Statement for the *ASIC Corporations (Amendment and Repeal) Instrument 2020/579*.

The Explanatory Statement is approved by the Australian Securities and Investments Commission (**ASIC**).

Summary

1. The instrument makes minor amendments to *ASIC Corporations (Disclosure of Fees and Costs) Instrument 2019/1070* (the **principal instrument**) in relation to the fees and costs disclosure requirements for superannuation products and collective investment products, and other consequential amendments to related instruments. Collective investment products are managed investment products and notified foreign passport fund products. The principal instrument wholly substitutes Schedule 10 to the *Corporations Regulations 2001* (**Schedule 10**). References to clauses are to clauses of Schedule 10 unless otherwise stated.
2. The instrument also amends an outdated reference in ASIC Class Order [CO 12/415] and repeals ASIC Class Order [CO 13/1420] and *ASIC Corporations (Urgent Superannuation Advice) Instrument 2017/530*. This amendment and repeal are not in relation to the fees and costs disclosure requirements.

Purpose of the instrument

3. ASIC makes the instrument to make minor amendments to the principal instrument and other related instruments to clarify and confirm the intended operation of aspects of the fees and costs disclosure regime that will apply under the principal instrument.
4. In November 2019, ASIC made the principal instrument to give effect to proposals to enhance comparability and transparency about fees and costs of superannuation products and collective investment products. ASIC considered that those changes would improve and promote better decision-making by consumers and their financial advisers and improve their ability to exert demand-side competitive pressure in the superannuation and collective investment product markets.
5. The making of the principal instrument followed:

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- (a) the review and report by an external expert of the fees and costs disclosure regime, published in July 2018 as ASIC Report 581 *Review of ASIC Regulatory Guide 97 Disclosing fees and costs in PDSs and periodic statements (Report 581)*; and
 - (b) ASIC's consideration of the feedback received on ASIC's proposals in January 2019 to make changes to the fees and costs disclosure regime in Consultation Paper 308 *Review of RG 97 Disclosing fees and costs in PDSs and periodic statements (CP 308)*.
6. The modifications made by the principal instrument were accompanied by the release of a restructured and updated version of ASIC Regulatory Guide 97 *Disclosing fees and costs in PDSs and periodic statements (RG 97)*.
 7. ASIC is making minor amendments required to the principal instrument and consequential amendments within other instruments to give effect to ASIC's intended policy positions. Those amendments are made through the instrument.

Consultation

8. ASIC had conducted formal consultation in relation to policies to be reflected in the principal instrument by seeking submissions in relation to its proposals in CP 308, which was open from 8 January 2019 to 2 April 2019. ASIC also conducted further informal consultation with industry on aspects of some proposals following the CP 308 consultation period.
9. Prior to CP 308 the external expert had also conducted consultation with industry participants and peak bodies during the expert's review of [CO 14/1252] and RG 97. Over the first half of 2018, the expert met with over 120 industry stakeholders in Sydney, Melbourne and Brisbane and via teleconference. ASIC attended each of these industry stakeholder meetings as an observer.
10. Since the release in November 2019 of the revised RG 97 and the principal instrument ASIC has conducted further meetings and informal consultation with industry stakeholders and responded to questions raised by industry which have informed our decision on where amendments are required to give effect to our intended policy positions.

Operation of the instrument

11. The instrument amends aspects of the fees and costs disclosure regime that will apply as a result of the principal instrument. This instrument commences on the day after it is registered on the Federal Register of Legislation.

ASIC Class Order [CO 12/415]

12. ASIC Class Order [CO 12/415] provides flexibility in how in-use notice information is provided to ASIC for employer-sponsored superannuation products in light of the unique nature of those products. The instrument amends

an outdated reference in the definition of “variable choice part” in notional subsection 1015DA(9) as modified by ASIC Class Order [CO 12/415].

ASIC Class Order [CO 13/763]

13. ASIC Class Order [CO 13/763] implements ASIC’s policy in relation to investor-directed portfolio services (**IDPS**). Under that policy, an IDPS operator is required to give an IDPS Guide to a client. The disclosure of fees and costs in an IDPS Guide is modelled on the fees and costs disclosure required in a Product Disclosure Statement (**PDS**) for a managed investment product. The instrument amends notional subsection 912A(5)(e) as modified by ASIC Class Order [CO 13/763] to align it with the updated managed investment product fees and costs summary line items in clause 202A of Schedule 10. Amendments have also been made to introduce transitional arrangements reflecting the PDS transition arrangements in paragraph 7 of the principal instrument.

ASIC Class Order [CO 14/1252]

14. ASIC Class Order [CO 14/1252] makes a number of notional amendments to the enhanced fees and costs disclosure regime in Schedule 10. The instrument makes minor amendments to subclauses 101A(4)(b) and 102(2)(b) of Schedule 10 as modified by ASIC Class Order [CO 14/1252]. This is to apply the correct label of “transactional and operational costs”.
15. The instrument also amends paragraph 6 in ASIC Class Order [CO 14/1252] to reinstate the relief that was previously relied upon by issuers of managed investment products (and which already applies to superannuation products) from the obligation to disclose buy-sell spreads in periodic statements. The relief applies only under [CO 14/1252] until the end of the transitional period or until an issuer elects to apply the principal instrument.

Transition

16. The instrument amends the transition arrangements in relation to PDSs in paragraph 7 of the principal instrument and the complementary provision in paragraph 12 of the ASIC Class Order [CO 14/1252].
17. These amendments are in response to COVID-19 and provide more time and flexibility for the industry to comply with the new requirements. PDSs given on or after 30 September 2022 must comply and issuers have the ability to elect to apply the new requirements from 30 September 2020. An election to apply the new requirements cannot be withdrawn and the election is taken to cover any subsequent PDS for the financial product.
18. The instrument amends the election arrangements that apply to periodic statements, to clarify that the election can only be made by the product issuer, that an election to apply the new requirements cannot be withdrawn and the election is taken to cover any subsequent periodic statements for any subsequent reporting periods.

Transaction costs

19. The instrument amends the definition of “transaction costs” in the notional subclause 103(1) of Schedule 10 inserted by the principal instrument. This amendment confirms that performance fees are not included in the definition of transaction costs and supports the policy of the modifications reflected in the principal instrument that performance fees appear in a new dedicated line item in the fees and costs summaries and examples of annual fees and costs for collective investment products – see clauses 202 and 202A of Schedule 10.

Excluded transactional and operational costs

20. The instrument amends the definition of “excluded transactional and operational costs” in notional subclause 103(2)(c) of Schedule 10 inserted by the principal instrument. This amendment confirms the policy that there is no intention to change the operation of the existing provisions with respect to the identification and calculation of derivatives costs as part of the treatment of indirect costs in clause 101A of Schedule 10.
21. As a result of the amendment to subclause 103(2)(c), a consequential amendment has been made to subclause 101A(4)(b) to remove the reference to “excluded transactional and operational costs”.

Performance fees

22. The instrument omits the reference to “interposed vehicle” from subclause 209(b)(v) of Schedule 10 inserted by the principal instrument. This amendment is in response to industry feedback that this level of information is impractical to provide, could be commercially sensitive and is likely to be of little use or benefit to the consumer.

“Consumer-facing” definitions

23. The instrument amends the principal instrument to correct the cross reference in paragraph 6(2)(l) of the principal instrument from clause 101 (the instructional definitions) to the intended clause 209A of Schedule 10 which are consumer facing definitions that must appear in the superannuation PDS or must be incorporated by reference.

Example of Annual Fees and Costs / Consumer Advisory Warning

24. The instrument makes amendments to clauses 211 and 212 (example of annual fees and costs). This is to include the words “or have deducted from your investment” after the word “charged” in each relevant line item to make it clear that a member can be charged or have deducted from their investment the fees and costs. An amendment has also been made to ensure the term “fees and costs” is used rather than just “fees” in the last row of each example.
25. The instrument makes a minor amendment to clause 221 (consumer advisory warning) in Schedule 10 as inserted by the principal instrument. This is to

correct an inconsistency in the reference to the Moneysmart website between the templates in the principal instrument and RG 97.

Disclosure of material changes and significant events

26. The instrument provides an exemption for an issuer from having to provide a significant event notice under section 1017B of the *Corporations Act 2001* (the *Act*) if it is the principal instrument that directly results in the change or event that requires a notification to be made.
27. This exemption is intended to ensure that issuers who merely update the calculation and presentation of their fees and costs to meet the requirements of the principal instrument for the first time will not need to give a significant event notice to product holders.
28. The exemption does not apply if there is a material increase in the amounts of fees and costs that does not arise from complying with *ASIC Corporations (Disclosure of Fees and Costs) Instrument 2019/1070*.

Repeal of spent instruments

29. ASIC Class Order [CO 13/1420] granted interim relief to superannuation trustees from the requirement to separately report the amount of low income superannuation contributions in a periodic statement. The relief applied to reporting periods that ended on or before 30 June 2015.
30. *ASIC Corporations (Urgent Superannuation Advice) Instrument 2017/530* granted interim relief to financial advisers from the timing requirements relating to the giving of Statements of Advice in the period leading up to 1 July 2017.
31. Both of those instruments are spent and are also repealed by this instrument.

Incorporation by reference

32. The instrument does not incorporate any matters by reference.

Retrospective application

33. The instrument does not apply retrospectively.

Legislative authority

34. Under subsection 1020F(1) of the Act, ASIC may declare that Part 7.9 of the Act applies in relation to a class of financial products as if specified provisions were omitted, modified or varied as specified in the declaration. The provisions of Part 7.9 of the Act include regulations (and Schedules to regulations) made for the purposes of that Part: see subsection 1020F(7). There are no pre-conditions to the exercise of the power.
35. The instrument is made under subsection 1020F(1), having regard to subsection 33(3) of the *Acts Interpretation Act 1901* (as in force on 1 January 2005). Where an Act confers a power to make an instrument the power is to be construed as

including a power exercisable in the like manner and subject to the like conditions (if any) to amend or repeal the instrument.

36. The classes of financial products to which the instrument relates are superannuation products and collective investment products.
37. The instrument is a disallowable legislative instrument.

Unsuitability for primary legislation

38. The requirements that govern the disclosure of fees and costs in PDSs and periodic statements for superannuation products and collective investment products are *not found* in primary legislation such as Part 7.9 of the Act. The existing requirements are not found in the primary legislation because the imposition of complex, detailed requirements is not suitable for primary legislation.
39. The imposition of complex, detailed requirements is more suitable to legislative instruments. The existing unmodified requirements are found in Division 4C of Part 7.9 of the Corporations Regulations, including in Schedules made for the purposes of the regulations. The regulations are legislative instruments. The ASIC instruments, which affect the operation of the regulations and the Schedules, are also legislative instruments.

Statement of Compatibility with Human Rights

40. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the Attachment.

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

ASIC Corporations (Amendment and Repeal) Instrument 2020/579

Overview

1. The instrument has the effect of clarifying the intended operation of aspects of the fees and costs disclosure regime for Product Disclosure Statements and periodic statements that will apply to superannuation products and collective investment products under the *ASIC Corporations (Disclosure of Fees and Costs) Instrument 2019/1070*. The instrument also makes consequential amendments to other related instruments for consistency.
2. The instrument also makes miscellaneous and unrelated minor amendments to other instruments, and repeals two spent instruments.

Assessment of human rights implications

3. This instrument does not engage any of the applicable rights or freedoms.

Conclusion

4. This 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*.