



**ASIC**  
Australian Securities &  
Investments Commission

## Explanatory Statement

### *ASIC Corporations and Superannuation (Amendment) Instrument 2023/512*

This is the Explanatory Statement for the *ASIC Corporations and Superannuation (Amendment) Instrument 2023/512*.

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

#### Summary

1. The *ASIC Corporations (Consent to Deductions—Ongoing Fee Arrangements) Instrument 2021/124 (Instrument 2021/124)* determines requirements for the written consent that fee recipients must receive from account holders (i.e. their clients) before deducting, arranging to deduct, or accepting the payment of, fees under an ongoing fee arrangement from the account holder's account. This includes a requirement in paragraphs 5(3)(a) and 5(3)(b) that the written consent include the name of the account holder and the name and contact details of the fee recipient.
2. The *ASIC Superannuation (Consent to Pass on Costs of Providing Advice) Instrument 2021/126 (Instrument 2021/126)* determines requirements for the written consent that superannuation trustees must have before passing the cost of providing financial product advice in relation to a member on to the member's superannuation account under a non-ongoing fee arrangement. This includes a requirement in paragraphs 5(3)(a) and 5(3)(c) that the written consent include the name of the member and the name and contact details of the provider of the financial product advice.
3. The *ASIC Corporations and Superannuation (Amendment) Instrument 2023/512 (the Instrument)* modifies the operation of Instrument 2021/124 and Instrument 2021/126 to clarify circumstances when a new written consent is not required.

#### Purpose of the Instrument

4. The purpose of the Instrument is to clarify the operation of paragraphs 5(3)(a) and 5(3)(b) of Instrument 2021/124 and paragraphs 5(3)(a) and 5(3)(c) of Instrument 2021/126. The clarification is in circumstances where there is a change in account holder or member name, or a change in name and/or contact details of a fee recipient under an ongoing fee arrangement, or of a financial

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product advice provider under a non-ongoing fee arrangement. In these circumstances, a new written consent does not need to be obtained from the account holder or member provided that no other information in the written consent has changed.

#### ***Amendments to Instrument 2021/124***

5. Sections 962R and 962S of the *Corporations Act 2001* (the **Corporations Act**) prohibit a fee recipient (defined in section 962C) from deducting, arranging to deduct, or accepting payment of, ongoing fees from an account holder's account under an ongoing fee arrangement unless written consent has been obtained from the account holder. Section 962T of the *Corporations Act* gives ASIC a power to determine the requirements for the giving of consent to deductions for the purpose of sections 962R and 962S. Instrument 2021/124 is the ASIC instrument made for the purpose of section 962T.
6. Paragraph 5(3)(a) of Instrument 2021/124 requires a written consent to contain "the name of the account holder". In certain situations, the name of the account holder may change, which could cause the information in the written consent to be incorrect and therefore breach the requirements in sections 962R and/or 962S. For example, the account holder may legally change their name upon getting married.
7. Paragraph 5(3)(b) of Instrument 2021/124 also requires a written consent to contain "the name and contact details of the fee recipient". In certain situations, the identity of a fee recipient may change under the ongoing fee arrangement which could cause the name and contact details in a written consent to become incorrect, and therefore breach the requirements of sections 962R and/or 962S. These situations commonly involve the sale of a business, or assignment of rights to collect ongoing fees under an ongoing fee arrangement between financial advice practices.
8. The Instrument modifies Instrument 2021/124 to make clear that where the account holder name, or the name and contact details of a fee recipient, changes after the account holder signs (or otherwise agrees in writing to the terms of) the written consent, the change(s) alone will not cause a fee recipient to breach the law. However, if other information that Instrument 2021/124 prescribes changes, such as the amount and frequency of ongoing fee, the consent will become invalid and a new written consent is required.

#### ***Amendments to Instrument 2021/126***

9. Paragraph 99FA(1)(d) of the *Superannuation Industry (Supervision) Act 1993* (the **SIS Act**) prohibits a superannuation trustee from directly or indirectly passing on the cost of providing financial product advice in accordance with a non-ongoing fee arrangement to a fund member unless the cost is paid in accordance with the terms of an arrangement that the member entered and the member has provided written consent and the trustee has the consent or a copy of it. The written consent must comply with any requirements that ASIC has determined under subsection 99FA(2) of the *SIS Act*. Instrument 2021/126 is the ASIC Instrument made for the purpose of subsection 99FA(2).

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10. Paragraph 5(3)(a) of Instrument 2021/126 requires the written consent to contain “the name of the member” which, as is the case with an ongoing fee arrangement, may change after the member has signed (or otherwise agreed in writing to the terms of) the written consent and before the trustee passes on the cost of providing financial advice. If this occurs, the trustee may be in breach of the requirements in section 99FA of the SIS Act as the consent will not comply with the requirements in Instrument 2021/126.
  11. Paragraph 5(3)(c) of Instrument 2021/126 also requires a member’s consent to contain the “name and contact details of the provider of the financial product advice”. As outlined in relation to ongoing fee arrangements above, these details may change after the member has signed (or otherwise agreed in writing to the terms) of the written consent and before the trustee has passed on the costs of providing financial product advice to a member. Having regard to the short-term nature of non-ongoing fee arrangement, however, the situations are less prevalent than for ongoing fee arrangements.
  12. If the name and contact details of the financial product advice provider changes before a trustee passes on the cost of providing financial product advice to a member, this could cause the written consent to not meet the requirements in Instrument 2021/126. As a result, the trustee may breach their obligations under section 99FA of the SIS Act if they passed on the cost.
  13. This Instrument modifies Instrument 2021/126 to make clear that where a member’s name, or the name and contact details of a financial product advice provider, under a non-ongoing fee arrangement change before the advice costs are passed on to the member, this change alone will not cause the trustee to breach the law.
  14. However, if other information that Instrument 2021/126 prescribes, such as the amount of fees to be deducted, how long the consent will last and information about the services the member will be entitled to receive, changes, the consent will become invalid and a new written consent is required.

## **Consultation**

15. ASIC consulted with the Financial Services Council, the Financial Planning Association of Australia, the Association of Financial Advisers, the Association of Superannuation Funds of Australia, the Australian Institute of Superannuation Trustees, CHOICE, Industry Super Australia and Super Consumers Australia. These organisations represent the interests of a large number of financial advisers, financial advice and superannuation consumers and superannuation trustees across Australia.

## **Operation of the instrument**

16. Schedule 1 of the Instrument contains the amendments to Instrument 2021/124 and Instrument 2021/126.
17. Item 1 of Schedule 1 replaces the text of paragraph 5(3)(a) of Instrument 2021/124. This amendment ensures that a written consent will be valid if it

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contains the account holder name at the time that they signed (or otherwise agreed in writing to the terms of) the consent. Item 1 is intended to overcome the technical issue which could otherwise cause the consent to be invalid if an account holder's name later changes under the ongoing fee arrangement. For example, an account holder may change their legal name upon marriage.

18. Item 2 of Schedule 1 replaces the text of paragraph 5(3)(b) of the Instrument 2021/124. Consistent with the amendment of paragraph 5(3)(a), this amendment ensures that a written consent will be valid if it contains the name and contact details of the person who, at the time the consent was signed (or otherwise agreed to in writing), was to be the fee recipient. Item 2 is intended to overcome the technical issue which could otherwise cause a client's consent to become invalid if there is a change in the fee recipient name and contact details under an ongoing fee arrangement.
19. Items 3 and 4 of Schedule 1 make corresponding changes to those made to paragraphs 5(3)(a) and (b) of Instrument 2021/124 to paragraphs 5(3)(a) and (c) of Instrument 2021/126.

#### **Incorporation by reference**

21. The Instrument does not incorporate any matters by reference within the meaning of section 14 of the *Legislation Act 2003*.

#### **Retrospective application**

22. The Instrument does not have retrospective application.

#### **Legislative instrument and primary legislation**

23. The subject matter and policy implemented by the Instrument is more appropriate for a legislative instrument rather than primary legislation because the Instrument utilises powers given by Parliament to ASIC that allow ASIC to determine the requirements for written consents to deduct advice fees to provide a tailored and flexible regulatory environment that is fit for purpose.
24. The Instrument provides administrative relief in circumstances where strict compliance with Instrument 2021/124 and Instrument 2021/126 produces an unintended or unforeseen result. If the matters in the Instrument were to be inserted into the primary legislation, they would insert, into an already complex statutory framework, a set of specific provisions that would apply only to a relatively small group of entities. This would result in additional cost and unnecessary complexity for other users of the primary legislation.

#### **Duration of the instrument**

25. The Instrument does not affect the duration of Instrument 2021/124 and Instrument 2021/126.

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**Legislative authority**

26. The Instrument is made pursuant to section 962T of the Corporations Act and subsection 99FA(2) of the SIS Act.

**Statement of Compatibility with Human Rights**

27. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under s9(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 and Superannuation (Amendment) Instrument 2023/512*

#### Overview

1. The *ASIC Corporations and Superannuation (Amendment) Instrument 2023/512* (the **Instrument**) modifies the operation of the *ASIC Corporations (Consent to Deductions—Ongoing Fee Arrangements) Instrument 2021/124* (**Instrument 2021/124**) and the *ASIC Superannuation (Consent to Pass on Costs of Providing Advice) Instrument 2021/126* (**Instrument 2021/126**).
2. The modifications clarify paragraphs 5(3)(a) and 5(3)(b) of Instrument 2021/124 and paragraphs 5(3)(a) and 5(3)(c) of Instrument 2021/126. They mean that a new written consent is not required where there is a change in account holder or member name, or a change in name and/or contact details of a fee recipient under an ongoing fee arrangement, or of a financial product advice provider under a non-ongoing fee arrangement. If there is any other change in a written consent, a new consent is required.
3. However, if other information that Instrument 2021/124 and Instrument 2021/126 prescribe changes, such as the amount or estimate of fee, the written consent will become invalid and a new consent is required.

#### Assessment of human rights implications

4. The Instrument does not engage any of the applicable rights or freedoms.

#### Conclusion

5. 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*.