

Explanatory Statement

***ASIC Corporations (Investor Directed Portfolio Services) Instrument 2023/669***

This is the Explanatory Statement for *ASIC Corporations (Investor Directed Portfolio Services) Instrument 2023/669* (the **Instrument**).

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

**Summary**

1. *ASIC Corporations (Investor Directed Portfolio Services) Instrument 2023/669* maintains the relief previously given under ASIC Class Order [CO 13/763] - *Investor directed portfolio services* (**[**[**CO 13/763**](https://www.legislation.gov.au/Details/F2021C01035)**]**). It establishes the regulatory framework for investor directed portfolio services (**IDPSs**). IDPS operators are provided with relief because, unlike most responsible entities, operators do not make investment decisions and therefore have more limited functions.

2. [CO 13/763] was due to sunset on 1 October 2023. Following consultation, ASIC considered that [CO 13/763] was operating effectively and efficiently to achieve its objectives and continued to form a necessary and useful part of the legislative framework.

3. As a result, [CO 13/763] has been remade in a new legislative instrument, with minor drafting changes to reflect ASIC’s current style and format and approach, removing redundant provisions and updating definitions, while preserving the current effect of the Instrument. We have made minor changes also in response to submissions as outlined further below in paragraph 11. In light of there being no significant changes, this Explanatory Statement should be read in conjunction with the [Explanatory Statement for [CO 13/763].](https://www.legislation.gov.au/Details/F2013L01273/Explanatory%20Statement/Text)

4. ASIC makes the Instrument under subsections 601QA(1), 655A(1), 673(1), 741(1), 926A(2), 951B(1), 992B(1) and 1020F(1) of the *Corporations Act 2001* (the **Act**).

**Purpose of the Instrument**

5. The purpose of the Instrument is to establish the regulatory framework for IDPSs. The instrument recognises that, unlike responsible entities of managed investment schemes, IDPS operators do not make investment decisions—as the decisions are ‘investor directed’, IDPSs have more limited functions. It also exempts IDPSs from the requirement to be a registered managed investment scheme.

6. Since 2002 the platforms sector has changed and grown significantly, and continues to develop, expand and present new challenges. Given this, in 2012-2013 ASIC recognised a need to review and update the regulation of IDPS and IDPS-like schemes.

7. The review of ASIC’s regulation of platforms followed a consultation paper published in March 2012, setting out proposals and supporting rationale for reviewing the regulatory approach to platforms: CP176 Review of ASIC policy on platforms: Update to RG 148 ([CP 176](https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-176-review-of-asic-policy-on-platforms-update-to-rg-148/)).

8. On 28 June 2013, ASIC released RG 148 *Platforms that are managed investment schemes* ([RG 148](https://asic.gov.au/about-asic/news-centre/find-a-media-release/2013-releases/13-153mr-new-asic-guidance-for-platforms-a-boost-for-investors#!page=1&type=media%20releases&search=platforms)) to explain our objectives when regulating platforms, set out the requirements for operating a platform and the disclosure obligations of operators of IDPS and responsible entities of IDPS-like schemes and to provide guidance to people who provide financial product advice on platforms.

9. On 1 July 2013 ASIC made [CO 13/763], which replaced ASIC Class Order 02-294 *Investor directed portfolio services* ([[CO 02-294](https://www.legislation.gov.au/Details/F2012C00292)]). The purpose of [CO 13/763] was to update our regulation of IDPSs to address complexities existing in current regulatory settings and emerging issues, treat platform operators similarly where there is no regulatory basis for different treatment, and promote confident and informed investors, including by ensuring that they receive adequate disclosure and advice about IDPSs and investments available through them.

**Consultation**

10. On 28 March 2023, ASIC released Consultation Paper 369 *Remaking ASIC class orders on platforms: [CO 13/762] and [CO 13/763]* (**CP 369**) proposing to continue the relief given by [CO 13/763], without any significant changes. ASIC considers[CO 13/763] was operating effectively and efficiently, and continued to form a necessary and useful part of the legislative framework.

11. The consultation period closed on 28 April 2023. ASIC received two submissions in response to CP 369. ASIC has taken these into account and made minor changes to include an additional option for information to be accessible in a secure, digital format and will provide additional guidance in RG 148. A change has also been made to clarify that the handling of client monies requirements in section 1017E of the Act applies.

12. Notwithstanding ASIC’s general consultation on the re-issue and update of the legislative instrument, ASIC considers thatthe Instrument is of a minor or machinery nature and does not substantially alter existing arrangements.

13. ASIC has self-certified that it is not required to prepare an Impact Analysis for the Instrument. This is because, following a formal consultation process with affected stakeholders, ASIC has assessed that [CO 13/763] is operating effectively and efficiently.

**Operation of the Instrument**

14. Section 5 of the Instrument exempts IDPS operators from managed investment, fundraising, hawking, cooling off provisions and most of the financial product disclosure provisions in the Act. The relief for IDPS operators does not extend to section 1017E of the Act when dealing with money received from an IDPS a client.

15. Sections 6 and 7 of the Instrument exempt other persons involved in the operation of an IDPS from managed investment, fundraising, hawking, cooling off provisions and most of the financial product disclosure provisions in the Act.

16. Section 8 of the Instrument declares that Part 7.6 of the Act (other than Divisions 4 and 8) apply in relation to an operator of an IDPS by inserting notional section 912AD into the Act. The notional provision applies to IDPS operators. The requirements broadly relate to:

(a) Disclosure

An IDPS operator must provide an IDPS Guide that meets the content requirements in the Instrument, comply with quarterly reporting obligations, provide an annual investor statement and audit report and if requested, a copy of all communications that are required by law to be given to a holder of financial products and securities.

Before an operator or a custodian acting on its behalf acquires accessible investments (accessible securities and financial products) for a client, they need to ensure that the client has been given an IDPS Guide and the relevant PDS, except in certain circumstances provided in the Instrument.

(b) Duties

An IDPS operator must continue to perform its obligations honestly, with due care and diligence.

An IDPS operator must meet minimum standards applying to the licensee, such as procedures for giving instructions to custodians or custodial staff and standards on the holding of IDPS property.

(c) Compensation

An IDPS operator must compensate clients in relation to the functions that the operator has contracted to perform for acts and omissions of any of its agents engaged to perform those functions or functions connected with the performance of those functions as if they were the acts or omissions of the licensee.

(d) Investments held on trust

An IDPS operator must hold all investments within the IDPS (not including assets held by a client) on trust for clients of the IDPS.

(e) Insurance

An IDPS operator must maintain professional indemnity insurance and insurance against fraud by officers of the IDPS.

(f) Engagement of services

An IDPS operator that appoints another person to perform the transactional functions of the IDPS or engages a custodian must enter into a written agreement with the person or custodian regarding these outsourced functions, which must include the provisions specified in the Instrument.

(g) Licensing

An IDPS operator must be a public company that holds an AFS licence specifically authorising it to operate an IDPS.

(h) Policies

An IDPS operator must have in place a voting policy that includes information about the IDPS operator’s voting practices on company and scheme resolutions, available to investors free of charge on request.

An IDPS operator must have in place a policy for investors who do not opt in to receiving financial product advice, available to investors free of charge on request.

(i) Dispute resolution

An IDPS operator must take reasonable steps to facilitate resolution of disputes between investors and product issuers of accessible financial products, including informing members whether issuers have internal dispute resolution systems that are available to the investors.

(j) Breach

IDPS operators must comply with the requirements in the Instrument or will be in breach of AFS licensee obligations to comply with the relevant financial services laws. IDPS operators must report breaches under the Act.

(k) Internal control procedures

IDPS operators must comply with internal control procedures and have these audited.

17. Section 9 of the Instrument declares that Part 7.7 of the Act applies in relation to an operator of an IDPS by inserting notional sections 952BA and 953BA into the Act. The sections relate to the apportionment of liability for a defective Financial Services Guide.

18. Section 10 of the Instrument declares that Part 7.9 of the Act applies in relation to an operator of an IDPS as if the provisions of that Part were modified or varied by inserting subsection 1012IA(9). Subsection 1012IA(9) provides an exemption from the obligation in section 1012IA for the IDPS operator (or its custodian) to provide a Product Disclosure Statement if the conditions in the Instrument are met.

19. Section 11 of the Instrumentdeclares that Chapter 6D of the Act applies to all persons as if Part 6D.2 were modified or varied by inserting section 704A. The section adds a requirement in subsection (1) for persons offering accessible securities through an IDPS requiring disclosure to notify the IDPS operator or custodian of specific items set out in paragraphs (a) to (c)*,* unless an exception applies.

20. The Instrument will commence on 1 October 2023.

**Incorporation by reference**

21. The class order incorporates by reference the following documents:

(a) *ASIC Corporations (Investor Directed Portfolio Services Provided Through a Registered Managed Investment Scheme) Instrument 2023/668* – which modifies the Act as it applies to a responsible entity of an investor directed portfolio service provided through a registered managed investment scheme and to a person who is offering or issuing accessible securities through an IDPS-like scheme. This document is registered on the Federal Register of Legislative instruments.

(b) *ASIC Corporations (Nominee and Custody Services) 2016/1156 ­* regarding the definition of nominee and custody services.

**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:

(a) the modifications made by the Instrument are highly specific amendments designed to ensure the application of primary legislation is consistent with the intended policy and the enabling provisions in the primary legislation;

(b) the Instrument preserves the effect of [CO 13/763] that was otherwise due to sunset on 1 October 2023; and

(c) following consultation, ASIC considered that [CO 13/763] was operating effectively and efficiently to achieve its objectives and continued to form a necessary and useful part of the legislative framework.

**Duration of the instrument**

24. ASIC considers that five years is the appropriate duration for the Instrument.

**Legislative authority**

25. The sources of power to make the Instrument are subsections 601QA(1), 655A(1), 673(1), 741(1), 926A(2), 951B(1), 992B(1) and 1020F(1) of the Act*.*

26. The Instrument is a disallowable legislative instrument.

**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*.

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Overview

1. *ASIC Corporations (Investor Directed Portfolio Services) Instrument 2023/669* maintains the relief previously given under ASIC Class Order [CO 13/763] - *Investor directed portfolio services* ([[CO 13/763](https://www.legislation.gov.au/Details/F2021C01035)]) and establishes the regulatory framework for investor directed portfolio services*.*

Assessment of human rights implications

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

Conclusion

3. 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*.