



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Asset Holding Standards for Responsible Entities) Instrument 2024/16

and

ASIC Corporations (Custody Standards for Providers of Custodial and Depository Services) Instrument 2024/17

This is the Explanatory Statement for *ASIC Corporations (Asset Holding Standards for Responsible Entities) Instrument 2024/16* (the **Responsible Entity Instrument**) and *ASIC Corporations (Custody Standards for Providers of Custodial and Depository Services) Instrument 2024/17* (the **Custodian Instrument**) (together, the **Asset Holding Instruments**).

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

Summary

1. The Responsible Entity Instrument sets out minimum standards that a responsible entity must meet in relation to holding scheme assets or arranging for another person to hold scheme property or scheme assets, to enable the scheme to be operated efficiently, honestly and fairly. The Responsible Entity Instrument also provides limited relief to responsible entities in certain circumstances where it may not be appropriate to separate assets from those of other persons or schemes (relief for omnibus accounts), subject to requirements to ensure that the interests of members are not put at any material risk of being lost by any pooling arrangements.
2. The Responsible Entity Instrument replaces ASIC's previous legislative instrument ASIC Class Order [\[CO 13/1409\]](#), which will be repealed prior to its scheduled sunseting on 1 April 2024 by *ASIC Corporations (Repeal) Instrument 2024/19*.
3. The Custodian Instrument specifies minimum standards that must be complied with by an entity holding financial products or a beneficial interest in financial products in providing a custodial or depository services (**custodial property**), including content requirements that are to be included in a licensee's agreement to hold custodial property with a sub-custodian or a retail client.

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4. The Custodian Instrument replaces ASIC's previous legislative instrument ASIC Class Order [\[CO 13/1410\]](#), which will be repealed prior to its scheduled sunseting on 1 April 2024 by *ASIC Corporations (Repeal) Instrument 2024/19*.

Purpose of the instruments

5. Under subsection 601FC(2) of the Corporations Act, the responsible entity of a registered scheme must hold scheme property on trust.
6. Under subsection 601FB(2), the responsible entity has the power to appoint an agent, or otherwise engage a person, to do anything that the responsible entity is authorised to do in relation to the scheme, including holding scheme property. The agent, or person otherwise engaged, must comply with any directions of the responsible entity in performing the delegated function or exercising the delegated power.
7. Investors' confidence will be better maintained if asset holders, including non-licensees who hold assets under the licence of their client, are required to meet minimum standards to ensure that:
 - a. client assets are not exposed to unnecessary risks because of the way assets are held; and
 - b. efficient operational arrangements exist for holding and dealing with client assets.
8. The Responsible Entity Instrument sets out minimum standards that a responsible entity must meet in relation to the holding of scheme assets or arranging for another person to hold scheme property or scheme assets, to enable the scheme to be operated efficiently, honestly and fairly.
9. The Responsible Entity Instrument also provides limited relief to responsible entities in certain circumstances where it may not be appropriate to separate assets from those of other persons or schemes (relief for omnibus accounts), subject to requirements to ensure that the interests of members are not put at any material risk of being lost by any pooling arrangements.
10. If the responsible entity has delegated the holding of scheme property to a custodian, the Responsible Entity Instrument requires that the responsible entity must do all things necessary to ensure compliance by the custodian with those minimum standards. The Responsible Entity Instrument also specifies the content requirements for the responsible entity's agreement with a custodian.
11. The Custodian Instrument specifies minimum standards that must be complied with by an entity holding financial products or a beneficial interest in financial products in providing a custodial or depository services (***custodial property***) including content requirements that are to be included in a licensee's agreement to hold custodial property with a sub-custodian or a retail client.
12. Regulatory Guide 133 *Funds management and custodial services: Holding assets* ([RG 133](#)) provides guidance for responsible entities, licensed custody

providers, managed discretionary account (MDA) providers and investor directed portfolio service (IDPS) operators on the Australian financial services (AFS) licence obligations that apply to these entities, including the minimum standards for asset holders.

Consultation

13. Before making the Responsible Entity Instrument and the Custodian Instrument, ASIC consulted publicly. One submission was received, which agreed that [CO 13/1409] and [CO 13/1410] have operated effectively.

Operation of the instrument

Responsible Entity Instrument

14. The Responsible Entity Instrument modifies or varies Chapter 5C of the Act in relation to a responsible entity by notionally inserting sections 601FCAA and 601FCAB into the Act.
15. Notional section 601FCAA requires the responsible entity to satisfy, and where it has engaged a custodian, do all things necessary to ensure that the custodian satisfies certain minimum standards in relation to holding scheme property. The responsible entity must also do all things necessary to ensure that any sub-custodian satisfies the minimum standards applying to custodians, subject to an exception in relation to certain overseas assets.
16. The minimum standards require, among other things, that:
 - a. The responsible entity must:
 - i. do all things necessary to ensure that the custodian holds scheme property on trust for it (other than in certain circumstances where the scheme property is located outside of Australia or where the scheme property is held by the responsible entity or a member of the scheme): notional paragraph 601FCAA(1)(a);
 - ii. have reasonable procedures for giving instructions to the custodian that include reasonable controls to ensure that the instructions are properly authorised and carried out: notional paragraph 601FCAA(1)(b);
 - iii. do all things necessary to ensure that a custodian that holds scheme property identifies the property as held on behalf of the responsible entity in relation to the scheme (to the extent this is practicable) and holds the property separately from property in which the responsible entity or custodian has an interest and from the property of any other person or scheme, except where the responsible entity is exempted from holding the property separately under section 601QA of the Act and complies with that exemption: notional paragraph 601FCAA(1)(c).

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- b. The responsible entity must have, or do all things necessary to ensure that the custodian and any sub-custodian has, an organisational structure that supports compliance with the above requirement for scheme property to be held separately and must segregate custodial staff in a way that minimises any potential conflict of interests and have a documented policy to support this: notional paragraphs 601FCAA(2)(a) to (c) and 601FCAA(4).
 - c. The responsible entity must for its own custodial staff ensure and for staff of the custodian and any sub-custodian do all things necessary to ensure that such staff have the necessary capacity and resources to perform core administrative activities: notional subsections 601FCAA(3) and 601FCAA(4)..
 - d. The responsible entity must keep records for 7 years demonstrating how it complies with the above minimum standard obligations: notional subsection 601FCAA(5).
 - e. If the responsible entity changes its custodian, the responsible entity must obtain a report from an unrelated person with relevant knowledge confirming that all property and assets have been identified and transferred as required (unless it reasonably believes that it is not in the best interests of members to obtain the report), and if the report is not obtained, keep for 7 years a written record of its grounds for that belief: notional subsection 601FCAA(6).
 - f. The responsible entity must have an established process to monitor and assess the custodian's performance of its obligations: notional subsection 601FCAA(7).
 - g. The responsible entity must not permit a custodian or sub-custodian to be involved in discretionary decisions concerning a deposit account, unless the responsible entity is satisfied that the custodian or sub-custodian has set out in writing and implements reasonable processes for, determining which account to use, monitoring performance by the account issuer of the issuer's obligations in relation to the account and taking action if the issuer fails to meet its obligations: notional subsection 601FCAA(8).
 - h. The responsible entity must ensure that it keeps, and must ensure that any custodian or sub-custodian keeps, records of scheme property and assets in a way that enables the holding of the property and assets to be conveniently and properly audited: notional paragraph 601FCAA(9).
17. In addition, the responsible entity is conditionally exempted from subparagraph 601FC(1)(i)(ii) to allow the limited use of omnibus account structures under specified conditions.
 18. Notional section 601FCAB of the Act stipulates minimum content requirements for the responsible entity's agreement with a custodian. In particular:

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- a. The responsible entity must ensure that it has a written agreement with the custodian (*custody agreement*) that satisfies these requirements: notional paragraph 601FCAB(1)(a).
 - b. The responsible entity must do all things necessary to ensure that the custodian has a written agreement with each sub-custodian that the custodian engages to hold scheme property that also satisfies the minimum content requirements, subject to certain exceptions: notional paragraph 601FCAB(1)(b).
 - c. Among other things the custody agreement must have provisions specifying rights that the responsible entity has for the ongoing review and monitoring of the custodian and any sub-custodian, specifying how instructions will be given and to the effect that the custodian must not take a security interest over scheme property unless it is permitted under the agreement and does not cover the custodian's unpaid fees: notional paragraphs 601FCAB(2)(d) to (e).
 - d. The responsible entity must ensure that the custody agreement has reasonable liability provisions and if appropriate contains reasonable indemnity provisions in relation to losses caused to the responsible entity as responsible entity of the scheme by the custodian's acts and omissions that relate to that agreement: notional subsection 601FCAB(3).
 - e. The custody agreement must require the custodian to certify to the responsible entity in writing at least every 13 months that the custodian believes on reasonable grounds that it and each sub-custodian have met the terms of the agreement and certain minimum custodial standards that apply in relation to the custodian and sub-custodians under section 601FCAA other than as disclosed in writing to the responsible entity or that the custodian reasonably believes are trivial. The custody agreement must also provide the responsible entity with a right to terminate in certain specified circumstances including in circumstances that involve the responsible entity having reasonable grounds for believing that the custodian or a sub-custodian has not complied with or is unlikely to comply with these minimum standards: notional paragraphs 601FCAB(2)(b) and (j).
 - f. The custody agreement must not contain any provision that would require the custodian to notify the responsible entity of a suspicion of contravention reporting by the custodian to ASIC in relation to the responsible entity's activities: notional subsection 601FCAB(5).
19. A responsible entity that complies with sections 601FCAA and 601FCAB is taken to comply with any conditions of its Australian financial services licence concerning an arrangement with a custodian or that refer to ASIC Policy Statement 133 or ASIC Regulatory Guide 133 as applying on a certain date: notional subsections 601FCAA(12) and 601FCAB(6).

Custodian Instrument

20. Section 766E of the Act provides that a person (the *provider*) provides a ‘custodial or depository service’ to another person (the *client*) if, under an arrangement, a financial product, or a beneficial interest in a financial product, is held by the provider in trust for, or on behalf of, the client or their nominee.
21. The Custodian Instrument modifies or varies Part 7.6 of the Act (other than Divisions 4 and 8) in relation to an AFS licensee by notionally inserting sections 912AAC, 912AAD and 912AAE into the Act.
22. Notional section 912AAC requires the custodian to satisfy certain minimum standards in relation to holding custodial property. The custodian must also do all things necessary to ensure that any sub-custodian engaged directly or indirectly by it to hold custodial property satisfies the minimum standards applying to custodians, subject to an exception in relation to certain overseas assets.
23. The minimum standards require, among other things, that:
 - a. The custodian must do all things necessary to ensure that it holds custodial property on trust for the client and any custodial property held by a sub-custodian is also held on trust. This requirement does not apply to custodial property held under Divisions 2 or 3 of Part 7.8 or to custodial property held outside of Australia under certain circumstances. Further, this requirement does not apply where the custodial property is exempted under certain regulations of the *Corporations Regulations 2001*, or where a person is providing custody services as an authorised representative of the custodian provided that the custodian is liable to the client for the acts and omissions of the representative and revenue received from the client is revenue of the custodian: notional subsections 912AAC(1) to (3).
 - b. The custodian must do all things necessary to ensure that it and any sub-custodian identifies the custodial property as held on behalf of the relevant persons and holds it separately from the property of the custodian and sub-custodian and other persons, subject to limited exceptions. Where custodial property is not so separated from the property of other persons in the circumstances specified in section 912AAC(5), certain record keeping, policy, process and procedural requirements apply: notional subsections 912AAC(5) and (6).
 - c. The custodian must have:
 - i. an organisational structure that supports compliance with the above requirement for property to be held separately and must segregate custodial staff in a way that minimises any potential conflict of interests and have a documented policy to support this; and

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- ii. the necessary capacity and resources to perform core administrative activities.

The custodian must also do all things necessary to ensure that any sub-custodian also complies with the above minimum standard requirements: notional subsections 912AAC(7) to (9).

- d. The custodian must keep for 7 years records demonstrating how it ensures that it complies with the above requirements: notional subsection 912AAC(10).
 - e. If the custodian has engaged a sub-custodian, the custodian must set out in writing and implement a reasonable process to monitor and assess the sub-custodian's performance, and to do all things necessary to ensure that the sub-custodian sets out in writing and implements a reasonable process to monitor and assess the performance of obligations of any person appointed by the sub-custodian to hold custodial property for that sub-custodian: notional subsection 912AAC(11);
 - f. The custodian must do all things necessary to ensure that if it or a sub-custodian is involved in discretionary decisions concerning a deposit account, it has set out in writing and implements reasonable processes for determining which account to use, monitoring performance of the issuer's obligations and taking action as appropriate: notional subsection 912AAC(12).
 - g. The custodian must keep records of custodial property in a way that enables the holding of the custodial property to be conveniently and properly audited by an auditor acting for the client and do all things necessary to ensure that such records are kept in relation to custodial property that is held by a person it directly or indirectly engages: notional subsection 912AAC(13).
24. Notional paragraph 912AAC(5)(b) permits the limited use of omnibus account structures on the conditions set out in notional subsection 912AAC(6).
25. A custodian that complies with these minimum standards is taken to comply with the conditions (if any) of its Australian financial services (AFS licence) that refer to ASIC Policy Statement 133 or ASIC Regulatory Guide 133 as applying on a certain date: notional subsections 912AAC(15) and 912AAD(5).
26. Notional section 912AAD specifies the content requirements for the custodian's agreement with each sub-custodian.
27. These requirements include the following:
- a. The custodian must ensure that it has a written agreement (***custody agreement***) with its sub-custodian that satisfies certain minimum content requirements, subject to limited exceptions for overseas

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- property and for a sub-custodian that it controls: notional subsection 912AAD(1).
- b. Among other things the custody agreement must have provisions specifying rights that the custodian has for the ongoing review and monitoring of the sub-custodian and any sub-subcustodians, specifying how instructions will be given and to the effect that the sub-custodian must not take a security interest over scheme property unless it is permitted under the agreement and does not cover the custodian's unpaid fees: notional subsection 912AAD(2).
 - c. The custodian must ensure that the custody agreement has reasonable liability provisions and if appropriate contains reasonable indemnity provisions in relation to losses caused to the custodian by the sub-custodian's acts and omissions that relate to that agreement: notional subsection 912AAD(3).
 - d. The custody agreement must require the sub-custodian to certify to the custodian in writing at least every 13 months that the sub-custodian believes on reasonable grounds that the sub-custodian and each sub-subcustodian has met the terms of the agreement and certain minimum custodial standards that apply in relation to the sub-custodian and sub-subcustodians under section 912AAC, other than as disclosed in writing to the custodian or that the sub-custodian reasonably believes are trivial. The custody agreement must also provide the custodian with a right to terminate in certain specified circumstances including in circumstances that involve the custodian having reasonable grounds for believing that the sub-custodian or a sub-subcustodian has not complied with or is unlikely to comply with the minimum custodial standards: notional paragraph 912AAD(2)(b).
28. A custodian that complies with notional section 912AAD in relation to an arrangement with a sub-custodian is taken to comply with any condition on its Australian financial services licence concerning the arrangement.
29. Notional section 912AAE specifies content requirements of the custodian's agreement with a retail client. These include provisions:
- a. to the effect that the custodian is liable to the client if there is a loss to the client due to a failure by the custodian or a person it engages to hold custodial property;
 - b. to the effect that the custodian is prohibited from taking or granting a security interests in relation to the assets, subject to certain exceptions; and
 - c. specifying how instructions will be given to the custodian.

Legislative instrument and primary legislation

30. The Asset Holding Instruments contain technical detail which would otherwise introduce unnecessary complexity to the primary legislation. The Asset Holding Instruments operate to fill in a more comprehensive regulatory framework that sits alongside the primary law and applies in a way consistent with the intended policy and the enabling provisions in the primary legislation.
31. Providing relief for a period of 5 years will allow time for any changes resulting from the Government's review of the regulatory framework for managed investment schemes to be considered.

Duration of the instrument

32. The duration of the Asset Holding Instruments is 5 years.

Legislative authority

33. The Custodian Instrument is made under paragraph 926A(2)(c) of the *Corporations Act 2001*.
34. The Responsible Entity Instrument is made under paragraphs 601QA(1)(a) and 601QA(1)(b) of the *Corporations Act 2001*.
35. Both instruments are disallowable legislative instruments.

Statement of Compatibility with Human Rights

36. 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 (Asset Holding Standards for Responsible Entities) Instrument 2024/16 and ***ASIC Corporations (Custody Standards for Providers of Custodial and Depository Services) Instrument 2024/17***

Overview

1. *ASIC Corporations (Asset Holding Standards for Responsible Entities) Instrument 2024/16* sets out minimum standards that a responsible entity must meet in relation to the holding of assets or arranging for another person to hold scheme property or assets of a registered managed investment scheme to ensure the assets holding arrangements enable the scheme to be operated efficiently, honestly and fairly. It also provides limited relief to responsible entities in certain circumstances where it may not be appropriate to separate assets from those of other persons or schemes (relief for omnibus accounts), subject to requirements to ensure that the interests of members are not put at any material risk of being lost by any pooling arrangements.
2. *ASIC Corporations (Custody Standards for Providers of Custodial and Depository Services) Instrument 2024/17* specifies minimum standards that must be complied with by an entity holding financial products or a beneficial interest in financial products in providing a custodial or depository services (custodial property), including content requirements that are to be included in a licensee's agreement to hold custodial property with a sub-custodian or a retail client.

Assessment of human rights implications

3. These instruments do not engage any of the applicable rights or freedoms.

Conclusion

3. These instruments are 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*.