

# Attachment 4 to CP 296: Draft regulatory guide



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 133

# Funds management and custodial services: Holding assets

October 2017

### About this guide

This guide is for:

- responsible entities of registered managed investment schemes (registered schemes);
- corporate directors and depositaries of corporate collective investment vehicles (CCIVs);
- licensed providers of custodial services (licensed custody providers);
- managed discretionary account (MDA) providers that are responsible to clients for assets held under an MDA; and
- investor directed portfolio service (IDPS) operators that are responsible to clients for assets held under an IDPS.

It explains the Australian financial services (AFS) licence obligations that apply to these entities in relation to holding assets and sets out minimum standards for asset holders.

Note: This draft guide is based on the exposure draft of the Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2017 and Corporations Amendment (Asia Region Funds Passport) Bill 2017, released 25 August 2017.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This draft guide was issued in October 2017 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 133 *Managed investments and custodial or depository services: Holding assets*, issued November 2013
- Superseded Policy Statement 133 *Managed investments: Scheme property arrangements*, issued August 1998, reissued October 1998 and June 1999, rebadged as a regulatory guide 5 July 2007

### Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

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## A Overview

### Key points

This guide explains:

- the obligations that apply to responsible entities of registered managed investment schemes (registered schemes), corporate directors and depositaries of corporate collective investment vehicles (CCIVs), licensed custody providers, managed discretionary account (MDA) providers and investor directed portfolio service (IDPS) operators, in relation to holding assets;
- the minimum standards and related requirements for asset holders;
- what responsible entities, corporate directors, depositaries, licensed custody providers, MDA providers and IDPS operators must do if they engage another asset holder;
- the requirements for documented compliance measures;
- the additional requirements that apply to primary production schemes that include rights for the use of land; and
- the limited class order relief we have given responsible entities of registered schemes and corporate directors and depositaries of CCIVs from the obligation to separate assets to allow the use of omnibus accounts, and the requirements that apply when other Australian financial services (AFS) licensees use omnibus accounts.

### Purpose of this guide

- RG 133.1 This guide sets out minimum standards for asset holders to ensure that they meet their obligations under their AFS licence or delegation.
- RG 133.2 We consider that clients' 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.
- RG 133.3 The minimum standards will help to ensure that clients maintain confidence in the provision of the relevant services and to promote a fair and efficient market for the provision of asset-holding services.

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## Who this guide applies to

- RG 133.4 This guide is for:
- (a) responsible entities of registered schemes;
  - (b) corporate directors of CCIVs, where they are legally responsible for the asset holding function;
  - (c) depositaries of CCIVs, where they are legally responsible for the asset holding function;
  - (d) licensed custody providers (including those delegated by corporate directors of wholesale CCIVs and depositaries of CCIVs) and, where relevant, entities that provide custodial services incidentally;
  - (e) MDA providers that are responsible to clients for assets held under an MDA;
  - (f) IDPS operators that are responsible to clients for assets held under an IDPS; and
  - (g) other asset holders who hold assets under the licence of their client.

Note 1: For the purposes of this guide, we do not consider as asset holders persons who must be, or are customarily, used to clear, settle or hold assets to participate in particular kinds of transactions on financial markets, such as certain securities depositaries and clearing systems.

Note 2: This guide applies to registered schemes that are also registered as Australian passport funds for the purposes of the Asia Region Funds Passport. Under the draft legislation, only registered schemes are eligible to be Australian passport funds. If the legislation is changed to also allow retail CCIVs to be Australian passport funds, we will amend our guidance accordingly.

## Services that form part of a custodial service

- RG 133.5 The minimum standards and related requirements apply to all asset holders, regardless of whether the services are provided as a main business of the provider or as an incidental provider. In some cases, the nature and scale of the services provided may affect what is required to meet the minimum standards.

Note: See [Regulatory Guide 166](#) *Licensing: Financial requirements* (RG 166) for an explanation of ‘incidental providers’.

- RG 133.6 We consider that services performed as a result of holding financial products, or a beneficial interest in financial products, in providing a custodial service are a part of holding the assets and so form part of the custodial services. On this basis, the following services form part of the custodial services when provided in that way:
- (a) *Securities lending*—this is a market transaction involving the transfer of securities from the owner (the lender) to another party (the borrower). The borrower must return the securities or equivalent securities to the lender on demand or at the end of the loan term.

- (b) *Exercising rights as a holder*—this involves exercising the rights and obligations associated with assets held that are interests or securities, other than dealing in the assets. For example, this applies to:
  - (i) the exercise of voting rights arising from a reorganisation or restructure;
  - (ii) electing to participate in dividend or distribution reinvestment plans; and
  - (iii) electing to accept offers made on the basis of holding the assets, such as certain placements and rights issues.
- (c) *Tax reclamations*—this involves reclaiming recoverable portions of tax withheld by foreign taxation authorities from interest or dividend payments on investments held.
- (d) *Reconciliations*—this involves reconciling the asset holder’s own records of its holdings against the records of various third parties, such as fund managers, banks and other custodians.
- (e) *Record keeping and reporting*—this involves maintaining statements of holdings and completed transaction reports, and keeping records of valuations provided to the asset holder.

RG 133.7 This list is not exhaustive. Other services may be provided from time to time that may be considered to form part of the provision of a custodial service.

RG 133.8 Other services that may be provided by licensed custody providers include:

- (a) fund accounting;
- (b) unit pricing and determining asset values and net asset values;
- (c) compliance monitoring and reporting;
- (d) maintaining and operating a basic deposit product; and
- (e) performance measurement and monitoring.

Note: [Information Sheet 141](#) *Dealing and providing a custodial or depository service as a secondary service* (INFO 141) may also be relevant in determining whether a person is providing a custodial service and subject to this guide.

## Summary of our guidance

RG 133.9 Table 1 summarises the sections of this guide and who each section applies to.

RG 133.10 The minimum standards and related requirements in relation to asset-holding set out in this guide apply to entities in their capacity as asset holders or when engaging an asset holder: see Sections B and C.

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**Table 1: Summary of our guidance**

Section of this guide	Applies to
<b>Section B: Minimum standards and related requirements for asset holders</b>	<p>The following entities who hold assets:</p> <ul style="list-style-type: none"> <li>• responsible entities of registered schemes;</li> <li>• corporate directors of CCIVs, where they are legally responsible for the asset holding function;</li> <li>• depositaries of CCIVs, where they are legally responsible for the asset holding function;</li> <li>• licensed custody providers;</li> <li>• MDA providers;</li> <li>• IDPS operators; and</li> <li>• other asset holders holding assets under the licence of their client</li> </ul>
<b>Section C: Requirements when engaging another asset holder</b>	<p>The following entities who engage asset holders:</p> <ul style="list-style-type: none"> <li>• responsible entities of registered schemes; <ul style="list-style-type: none"> <li>Note: Under the Australian Passport Rules, the operator of a registered scheme that is registered as an Australian passport fund for the purposes of the Asia Region Funds Passport is required to appoint an independent asset holder.</li> </ul> </li> <li>• corporate directors of CCIVs, where they are legally responsible for the asset holding function;</li> <li>• depositaries of CCIVs, where they are legally responsible for the asset holding function;</li> <li>• licensed custody providers;</li> <li>• MDA providers;</li> <li>• IDPS operators; and</li> <li>• other asset holders holding assets under the licence of their client</li> </ul>
<b>Section D: Compliance controls for licensed custody providers</b>	<p>Licensed custody providers</p> <p>Note: Guidance on the documented compliance measures applicable to registered schemes and CCIVs is in draft updated Regulatory Guide 132 <i>Funds management: Compliance and oversight</i>, which is available on our website at <a href="http://www.asic.gov.au/cp">www.asic.gov.au/cp</a> under CP 296.</p>
<b>Section E: Protection of rights for land used in registered schemes</b>	<p>Responsible entities of registered schemes whose members require the use of particular land on which the scheme will occur</p>
<b>Section F: Relief from the obligation to separate assets</b>	<p>Responsible entities, corporate directors, depositaries, licensed custody providers, MDA providers and IDPS operators, in relation to holding assets</p>

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## B Minimum standards and related requirements for asset holders

### Key points

An asset holder must meet minimum standards and related requirements if it holds, directly or indirectly, the assets of a registered scheme, CCIV, MDA or IDPS.

If a responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator engages another asset holder it must also ensure that the asset holder, including an asset holder who holds assets under its AFS licence, meets these minimum standards (see Section C).

To meet the minimum standards, asset holders must:

- have an adequate organisational structure (see RG 133.39–RG 133.44);
- have adequate staffing capabilities (see RG 133.45–RG 133.48);
- have adequate capacity and resources to perform core administrative activities (see RG 133.49–RG 133.52); and
- hold assets on trust for the client, which includes the obligation to separate assets (see RG 133.53–RG 133.57).

An asset holder must keep records for seven years demonstrating compliance with the minimum standards for organisational structure, staffing capabilities, and capacity and resources (see RG 133.58).

We expect an asset holder that is an AFS licensee to conduct checks on its clients before providing the service and then, as appropriate, to ensure that it meets its obligations (see RG 133.59–RG 133.62).

## Specific obligations for registered schemes and CCIVs

### Registered schemes

- RG 133.11 Subsection 601FC(2) of the Corporations Act provides that the responsible entity of a registered scheme holds scheme property on trust for members.
- RG 133.12 Under s601FB(2) of the Corporations Act, 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.
- RG 133.13 The agent, or person otherwise engaged, needs to comply with any written directions of the responsible entity in performing the delegated function or exercising the delegated power.

RG 133.14 A responsible entity or another person engaged by it to hold assets of a registered scheme does not need to hold an AFS licence authorising it to provide a custodial service for this purpose. This is because holding those assets is not regulated as a custodial service under s766E(3)(b) of the Corporations Act. Holding assets is a part of the operation of the registered scheme by the responsible entity.

### **CCIVs**

RG 133.15 A retail CCIV, unless exempt, must have a depositary and a wholesale CCIV may appoint a depositary: see draft s1163 and 1163A of the Corporations Act.

RG 133.16 Where a depositary is appointed, the depositary must hold the assets of the CCIV on trust for the CCIV: see draft s1164(1) of the Corporations Act.

Note: Where a depositary is appointed to a wholesale CCIV, all of the requirements that apply in respect of the appointment of the depositary must be complied with.

RG 133.17 Under draft s1163(2), the depositary must:

- (a) be either a public company or registered foreign company;
- (b) hold an AFS licence authorising it to act as a depositary; and
- (c) meet the requirement to be independent of the corporate director.

RG 133.18 The depositary has duties and powers including to:

- (a) hold assets of the CCIV on trust;
- (b) deal on instructions from the corporate director;
- (c) supervise aspects of the operation of the CCIV for which it acts as depositary;
- (d) provide the corporate director with reasonable assistance: see draft s1164–1164C of the Corporations Act.

RG 133.19 The depositary may delegate, in writing, all or part of its asset-holding function: see s1164(3).

### **Wholesale CCIVs**

RG 133.20 The corporate director is the operator of a CCIV, and performs the functions conferred on it by the CCIV's constitution and the Corporations Act.

Note: See draft updated Regulatory Guide 132 *Funds management: Compliance and oversight*.

RG 133.21 For wholesale CCIVs, we consider that the corporate director may:

- (a) hold the assets of the CCIV under a licence to do so;
- (b) appoint a depositary;
- (c) engage a licensed custody provider; or

- (d) engage a custodian to hold the assets under the corporate director's licence.

## Obligations applying to all asset holders who are licensed to hold assets

RG 133.22 An asset holder who is licensed to hold assets must:

- (a) do all things necessary to ensure that it carries on the financial services for which it is licensed efficiently, honestly and fairly;

Note: An MDA provider must be a licensed custody provider unless another custody provider directly contracts with all retail clients to be the asset holder: see [Regulatory Guide 179](#) *Managed discretionary accounts* (RG 179).

- (b) demonstrate that it meets the minimum standards and related requirements as set out in this section, including when it applies for a licence to hold assets; and

Note: These minimum standards apply while the assets are held.

- (c) meet any other obligations that apply to its licence.

Note: See [Regulatory Guide 104](#) *Licensing: Meeting the general obligations* (RG 104) and [Regulatory Guide 105](#) *Licensing: Organisational competence* (RG 105).

## Obligations applying to all AFS licensees who engage asset holders

RG 133.23 If an AFS licensee engages another asset holder, including an asset holder who holds assets under the AFS licensee's licence, it must do all things necessary to ensure that the asset holder meets the minimum standards and related requirements. For more detailed guidance on the obligations that apply generally to AFS licensees that engage another asset holder, see Section C.

### Engaging non-licensees

RG 133.24 The asset holder may or may not be an AFS licensee itself. If the asset holder is providing a financial service to clients on the AFS licensee's behalf, it will generally need to be either an authorised representative of the AFS licensee, exempted from holding an AFS licence, or acting on behalf of another AFS licensee: see s911B(1) of the Corporations Act.

RG 133.25 The asset holder may also be providing a financial service to the AFS licensee. The client who is provided with a custodial service is the person on whose behalf the financial products are held, or for whom the financial products are held on trust. Depending on the terms of the arrangement, a person who contracts with a provider of a custodial service may be the client

of that service or merely a person who is arranging for the service to be provided to another person. If the AFS licensee is the client, provided that the requirements in reg 7.6.01(1)(k) of the Corporations Regulations 2001 (Corporations Regulations) are satisfied, the asset holder may not need an AFS licence to hold the client assets that are financial products or beneficial interests in financial products.

RG 133.26 The exemption under reg 7.6.01(1)(k) may be relevant to sub-custodians and applies if:

- (a) the asset holder holds the financial products on trust for, or on behalf of, a licensed custody provider; and
- (b) the licensed custody provider in turn holds the beneficial interest on trust for, or on behalf of, the client of the licensed custody provider.

RG 133.27 The exemption under reg 7.6.01(1)(k) takes into account the responsibility of an AFS licensee who holds the beneficial interest in the financial products, which may be a financial service provided to the person for whom the beneficial interest is held, to ensure that the holder of the financial products meets appropriate standards. The minimum standards for asset holders also reflect this responsibility by applying to AFS licensees that directly or indirectly engage other entities as asset holders of client assets. Ensuring that asset holders meet the minimum standards helps AFS licensees meet their broader licensee obligations and safeguards clients' interests.

## Meeting the minimum standards and related requirements

RG 133.28 All asset holders must meet the minimum standards and related requirements as set out in this section.

RG 133.29 An asset holder's arrangements for meeting the minimum standards may vary depending on the particular assets being held. We have not prescribed specific arrangements for different asset holders.

RG 133.30 We expect that an asset holder will seek independent verification of the robustness of its controls applying to the asset holding, as appropriate for the nature of the assets.

RG 133.31 A responsible entity, corporate director, depository, licensed custody provider, MDA provider or IDPS operator must establish adequate procedures for giving instructions to the asset holder or, if it is the asset holder, its custody staff. It must ensure that the associated risks are managed appropriately and reasonable controls are in place to ensure the instructions are followed. It should have regard to relevant industry best practice for providing instructions, including data, when establishing its procedures for interacting with the asset holder.

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RG 133.32 A responsible entity, corporate director or depository must set out in writing and implement a reasonable process for determining if it should hold assets or scheme property or, if it will engage another person as asset holder, which asset holder and on what terms. The process must apply a reasonable written policy approved by the directors of the responsible entity, corporate director or depository. The written policy must address the potential conflicts of interest and other considerations relevant to the best interests of members.

RG 133.33 All asset holders must:

- (a) have an adequate organisational structure: see RG 133.39–RG 133.44;
- (b) have adequate staffing capabilities: see RG 133.45–RG 133.48;
- (c) have adequate capacity and resources to perform core administrative activities: see RG 133.49–RG 133.52; and
- (d) hold assets on trust for the client, which includes the obligation to separate assets: see RG 133.53–RG 133.57.

RG 133.34 These minimum standards and related requirements apply when:

- (a) the responsible entity, corporate director, depository, licensed custody provider, MDA provider or IDPS operator or other asset holder holding assets under the licence of its client is the asset holder;
- (b) the responsible entity, corporate director, depository, licensed custody provider, MDA provider or IDPS operator engages another asset holder: see Section C; or

Note: If an asset holder engages another asset holder, it must ensure that asset holder meets the minimum standards.

- (c) the custodial services are provided as a main business of the provider or merely incidentally: see RG 133.5–RG 133.8.

RG 133.35 In some cases, the nature and scale of the services provided may affect what is required to meet the minimum standards.

RG 133.36 The minimum standards are set by modification of the Corporations Act under:

- (a) [Class Order \[CO 13/1409\]](#) *Holding assets: Standards for responsible entities*;
- (b) [Class Order \[CO 13/1410\]](#) *Holding assets: Standards for providers of custodial or depository services*;
- (c) [ASIC Corporations \(Managed Discretionary Account Services\) Instrument 2016/968](#); and
- (d) [Class Order \[CO 13/763\]](#) *Investor directed portfolio services*.

Note: The application of the minimum standards by legislative instrument replaces the licence conditions in [Pro Forma 209 Australian financial services licence conditions](#) (PF 209). PF 209 has been amended accordingly.

- RG 133.37 A responsible entity, a corporate director, a depositary, a licensed custody provider, an MDA provider that engages an asset holder to hold client portfolio assets of the MDA and an IDPS operator that engages an asset holder to hold assets held under the IDPS must keep records for seven years demonstrating compliance with the minimum standards for organisational structure, staffing capabilities, and capacity and resources: see RG 133.58.
- RG 133.38 We expect asset holders that are AFS licensees to conduct checks on their clients before providing the service and then, as appropriate, to ensure that the asset holder will meet its AFS licensee obligations: see RG 133.59–RG 133.62.

## Organisational structure

- RG 133.39 The asset holder must have an organisational structure that supports the separation of the assets held from its own assets, and those of any other client or managed investment scheme or sub-fund (of a CCIV), except to the extent permitted for omnibus accounts: see Section F. We consider that the use of nominee companies is a means of separating client assets.
- RG 133.40 The asset holder must ensure that custodial staff and their managers are segregated from staff performing other functions in a way that minimises the potential for a conflict of interest arising between:
- (a) the duties of custodial staff; and
  - (b) the duties and interests of persons who make investment decisions, trading decisions or other discretionary decisions resulting in the transfer or disposal of client assets, other than discretionary decisions in relation to certain at-call deposit accounts with regulated deposit takers and foreign exchange transactions.
- RG 133.41 This is particularly important where the asset holder is the responsible entity, corporate director, depositary, MDA provider or IDPS operator performing transactional functions, or a related body corporate.
- RG 133.42 Custodial staff and other staff involved in these discretionary decisions must be located sufficiently separately to reduce, as far as is reasonably practicable, the risk of inappropriate influence on decisions relating to holding client assets.
- RG 133.43 In addition, the asset holder must have a documented policy designed to ensure that custodial staff are not influenced to act other than in accordance with their duties because of a conflict of interest. The policy must be approved by the asset holder's directors or governing body, a senior manager authorised by the directors or governing body to give approval or, for an AFS licensee that is a foreign company, its senior officer in Australia. The

asset holder must undertake reasonable checks to ascertain and document whether there has been any attempt to inappropriately influence custodial staff, and must take reasonable action if this occurs.

Note: Where the asset holder is an AFS licensee, it also has a general obligation to adequately manage conflicts of interest: see [Regulatory Guide 181](#) *Licensing: Managing conflicts of interest* (RG 181).

- RG 133.44 The reporting lines must be independent of potentially conflicting activities up to the point of reporting to the level of managing director or senior officer in Australia. The asset holder must have arrangements that ensure custodial staff who are not involved in potentially conflicting activities can report directly, or through other custodial staff:
- (a) to the board of directors or governing body of the client;
  - (b) for a registered scheme with a compliance committee, to the committee;  
or
  - (c) for non-Australian clients, to the most senior officer of the client in Australia, or the relevant foreign jurisdiction in which the assets are held.

## Staffing capabilities

- RG 133.45 Custodial staff must have the knowledge and skills necessary to perform their functions properly. The asset holder must provide adequate ongoing training and educational programs so that staff knowledge remains at a level necessary for performing their assigned responsibilities. The training must cover the asset holder's legal obligations, to the extent relevant to enable the staff members to perform their particular responsibilities.
- RG 133.46 Responsible entities, corporate directors, depositaries, licensed custody providers, MDA providers and IDPS operators have obligations to conduct 'know your staff' risk-based due diligence inquiries under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act).
- RG 133.47 In addition to these inquiries, we would expect that, where appropriate, résumé, police (where available) and reference checks would be carried out and appropriate oversight applied to address the risk of fraud and any other risks in relation to the asset holding (including exercising rights as holder) that might arise from the engagement of an employee.
- RG 133.48 We expect an asset holder to assess the risks associated with the various employee functions that are established within its organisation, and design measures which it considers are appropriate to the nature of the risks faced by it in relation to potential fraud (e.g. mandatory absence periods, dual approval processes, staff rotation and 'maker/checker' processes).

## Capacity and resources

- RG 133.49 An asset holder's staff must have the necessary time and authority to perform their duties associated with holding client assets. This will vary depending on the nature of the assets.
- RG 133.50 The asset holder must make resources available to custodial staff, including in specialist areas, to the extent necessary for them to adequately perform their duties.
- RG 133.51 This capacity is likely to include custodial staff having available:
- (a) computer systems that are reasonably up to date and secure from any actual or potential threats, including from fraud;
  - (b) systems capable of handling record keeping and transaction processing appropriate to the volume of transactions, and capable of reliably identifying assets for each client, particularly when omnibus accounts are used;
  - (c) systems capable of handling client instructions for assets held (e.g. exercising voting rights or other rights conferred on the asset holder on client instructions);
  - (d) procedures for accurately recording all client assets held, all movements of those assets and evidence of authorisation for such movements, including who gave authorisation, how and when, and all income and other related administrative activities;
  - (e) access to information sources which may be relevant to being aware of action that may be taken in exercising rights as an asset holder and pricing information;
  - (f) memberships at central securities depositories, where relevant to client assets;
  - (g) access to, and if necessary membership of, any relevant settlement and clearance systems;
  - (h) where appropriate, access to relevant and appropriate domestic or global sub-custodial networks;
  - (i) where physical assets are held, secure physical storage;
  - (j) appropriate business continuity and disaster recovery procedures; and
 

Note: AFS licensees that are bodies regulated by the Australian Prudential Regulation Authority (APRA) are excluded from the requirement to have risk management systems under s912A(1)(h) of the Corporations Act, except for responsible entities that are trustees of regulated superannuation funds in relation to certain matters from 1 July 2015.
  - (k) appropriate systems and procedures for change management.
- RG 133.52 In all circumstances, such systems, processes and procedures should ensure that opportunities for fraud and operational error are reduced as far as reasonably

practicable. As part of having adequate risk management arrangements for AFS licensees to whom that requirement applies, we expect that:

- (a) AFS licensees that are responsible for giving instructions on the use of assets where high-volume transactions are likely to occur will ensure that automated systems are used to authenticate instructions—however, we recognise that there may be exceptional or impractical circumstances where manual systems are used; and
- (b) asset holders will have reasonable capacity to accept and act on instructions through such processes.

## Holding assets on trust

- RG 133.53 Responsible entities, depositaries, licensed custody provider, MDA providers and IDPS operators must do all things necessary to ensure that they, and any other asset holder they engage, hold the relevant assets on trust. This is except for assets held:
- (a) outside of Australia where a trust structure is not recognised under the foreign law and it is reasonable to hold the assets in accordance with the foreign law;
  - (b) outside of Australia where it is not reasonable to hold the assets on trust under the foreign law and the client has documented that they are satisfied that the assets are held in a manner that, given the relevant laws, provides reasonably effective protection in case of insolvency of the asset holder, including the basis on which the asset holder is satisfied;
  - (c) under the requirements in relation to omnibus accounts: see Section F; or
  - (d) if the asset holder is providing a custodial service through its authorised representative, where:
    - (i) the asset holder is liable to the client for the acts and omissions of the authorised representative as if they were the acts or omissions of the asset holder; and
    - (ii) revenue received from the client in relation to the provision of the custodial service is revenue of the asset holder.
- RG 133.54 The conditions in RG 133.53(d) avoid the application of regulatory requirements that could create an incentive for an asset holder to engage an authorised representative to hold the assets on its behalf.
- RG 133.55 The trust may be a bare trust or directed trust held on the basis that the asset holder holding the assets under such a trust will have no active powers and limited duties in relation to the trust assets, except as provided for in the custody agreements.

Note: A depositary of a CCIV has supervisory responsibility, which includes taking reasonable care to ensure that the corporate director conducts certain activities in accordance with the CCIV's constitution and the relevant provisions of the Corporations Act: see draft s1164B.

- RG 133.56 In the case of a deposit-taking facility, the rights under the facility (rather than any money that has been deposited in the account) are the client assets, and it is these rights that should be held on trust. For example, this can be achieved by establishing the account on the basis that the account is recorded in the issuer's records as 'X Ltd as trustee for Y registered scheme'. In this example, X Ltd may be the responsible entity or a custodian. We consider an issuer of a deposit-taking facility cannot hold the facility on trust.
- RG 133.57 Except where permitted for certain omnibus accounts (see Section F), an asset holder must also:
- (a) identify the assets, as far as is reasonably practicable, that are held for a client; and
  - (b) keep the assets of a client held on trust separate from the assets of:
    - (i) the asset holder;
    - (ii) any other person or scheme (in the case of managed investment schemes); and
    - (iii) any other person, CCIV or sub-fund (in the case of CCIVs).

## Keeping compliance records

- RG 133.58 An asset holder must keep for seven years records demonstrating how it has done all things necessary to ensure the minimum standards are met for organisational structure, staffing capabilities, and capacity and resources (as described in RG 133.39–RG 133.52).

## Making client inquiries

- RG 133.59 Businesses regulated under the AML/CTF Act have obligations to conduct certain 'know your client' risk-based due diligence inquiries, to the extent that they are 'designated service providers' under the AML/CTF Act.
- RG 133.60 In addition, we expect asset holders that are AFS licensees to conduct pre-contract inquiries—and subsequent inquiries, when appropriate—in relation to their clients. In conducting these inquiries, we expect the asset holder to take into account the client's circumstances and other circumstances. These inquiries will help ensure that AFS licensees comply with their obligations to provide financial services efficiently, honestly and fairly, and reduce the risk of unexpected differences in capabilities or service requirements, which could lead to potentially avoidable operational risks and other issues. Such

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inquiries may form part of the adequate risk management systems that AFS licensees must have in place under s912A(1)(h) (except for bodies regulated by APRA that are excluded from this requirement).

RG 133.61 These inquiries may also produce information that would form part of the factual background against which the AFS licensee can meet its obligations to report to ASIC in certain circumstances.

RG 133.62 We suggest that asset holders engaged to provide services to another person consider making the following inquiries about their clients:

- (a) when assets are to be held by the asset holder—the identification of these assets from at least the client, clarification of the sources of pricing for assets that are to be applied by the asset holder and reconciliation of holdings against relevant counterparties (such as unit registries) and on transition from a retiring asset holder;
- (b) when acting as a licensed custody provider—verification of the wholesale status of the client unless the licensed custody provider complies on the basis that the client is a retail client;
- (c) review of the scope of the business and breadth of the operation for which custody is provided, including what assets the asset holder may be called on to hold and what transactions it may be called on to undertake;
- (d) understanding the process for provision of instructions to the asset holder, including from a third-party fund manager or investment administrator;
- (e) an assessment of whether the asset holder is able to carry out the mandate of the client (e.g. can the asset holder hold the type of assets involved and provide the reporting required by the client for these assets?); and
- (f) review of public registers concerning a corporate client's status and relevant licences.

## C Requirements when engaging another asset holder

### Key points

Responsible entities, corporate directors, depositaries, licensed custody providers, MDA providers or IDPS operators that arrange for another person to hold client assets must take certain steps to protect clients.

When engaging an asset holder, they must:

- ensure that they have a basis to be confident that the asset holder will meet the minimum standards in Section B, and document how they do this; and
- monitor ongoing compliance with the minimum standards and deal appropriately with any deficiencies that arise (see RG 133.75–RG 133.89).

They must ensure that there is a legally enforceable agreement, which addresses certain issues, with any asset holder they engage (see RG 133.91–RG 133.117) or any master custodian they engage (see RG 133.128–RG 133.132).

If an asset holder is engaged on or after 1 November 2015 by a retail client, the agreement must address certain issues (see RG 133.118–RG 133.127). For retail clients, we expect the engagement of the asset holder to be disclosed and the role of the asset holder to be properly explained (see RG 133.133–RG 133.134).

If a responsible entity or depositary changes the asset holder, it must consider whether it is appropriate to obtain an independent report on the transfer of assets (see RG 133.135).

## Specific obligations for registered schemes and CCIVs

### Registered schemes

RG 133.63 The responsible entity of a registered scheme has power to appoint an asset holder to hold scheme property under s601FB(2) of the Corporations Act.

RG 133.64 A responsible entity that engages an asset holder to hold scheme property is liable to members for the acts and omissions of the asset holder under s601FB(2).

### CCIVs

RG 133.65 If a depositary intends to engage a person to hold the assets of the CCIV for which it is the depositary, the person must not be the corporate director of

the CCIV and must meet the independence requirements applicable to the depositary under draft s1163(2).

- RG 133.66 For the purposes of liability to the CCIV, the depositary is taken to have done (or failed to do) anything that the agent or person has done (or has failed to do) because of the appointment or engagement. This is even if the agent or person was acting fraudulently or outside the scope of the authority or engagement: see draft s1164(4).

### Wholesale CCIVs

- RG 133.67 If the corporate director of a wholesale CCIV does not opt to appoint a depositary under s1163A, we consider that the corporate director may hold the assets if it is licensed to do so or, under draft s1138A(2) of the Corporations Act, it may engage a person other than a depositary to hold the assets of the wholesale CCIV.
- RG 133.68 For the purposes of liability to the CCIV, the corporate director is taken to have done (or failed to do) anything that the agent or person has done (or failed to do) because of the appointment or engagement. This is even if the agent or person was acting fraudulently or outside the scope of the authority or engagement: see draft s1138A(3).

## Obligations applying to all AFS licensees who engage asset holders

- RG 133.69 An AFS licensee may engage another asset holder because:

- (a) it is not permitted to hold assets:
  - (i) under its AFS licence (e.g. because it cannot meet the financial requirements in RG 166); or
  - (ii) under the Australian Passport Rules; or

Note: The Australian Passport Rules will be made by the relevant Minister as a legislative instrument under draft s1211(1) and 1211A of the Corporations Act. Under draft s1211(2), the Australian Passport Rules must be substantially the same as the Passport Rules set out in Annex 3 to the [Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport](#).

- (b) it does not wish to be an asset holder for the relevant assets.

- RG 133.70 If a responsible entity, corporate director or depositary engages another asset holder because it does not meet the financial requirements under [Class Order \[CO 13/760\] Financial requirements for responsible entities and operators of investor directed portfolio services](#) or [Class Order \[CO13/761\] Financial requirements for custodial or depositary service providers](#), it must ensure that all the relevant assets are held by another person. This is apart from any exceptions permitted under [CO 13/760] or [CO 13/761]. For responsible

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entities, corporate directors and depositaries, these exceptions are ‘Tier \$500,000 class assets’ and ‘special custody assets’.

Note: See [CO 13/760] and RG 166 for the definitions of these terms.

- RG 133.71 Except as discussed in Section F for omnibus accounts, a responsible entity, depositary, licensed custody provider, MDA provider or IDPS operator must also ensure that client assets are held on trust and segregated from:
- (a) its own property;
  - (b) in the case of a registered scheme, the property of any other scheme; and
  - (c) in the case of a CCIV, the assets of any other person or sub-fund.
- RG 133.72 If a person applies for an AFS licence as a responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator and plans to engage another asset holder, it will need to demonstrate that it will ensure that any asset holder that holds client assets on its behalf meets the minimum standards in Section B.

## Securities lending by responsible entities or corporate directors

- RG 133.73 A responsible entity or a corporate director may decide to lend the assets of the registered scheme or CCIV under a securities lending program and by way of a custodian or depositary. In determining whether to participate in, and in setting the parameters of, the program, including relevant provisions in a custody agreement, the responsible entity or corporate director must act in the best interests of members. We consider that, in performing this duty, the responsible entity or corporate director should consider whether members will be appropriately compensated through the income generated by the program for any additional risks, including the credit risk associated with borrowers and the operational risks associated with the program.
- RG 133.74 We consider that the responsible entity or corporate director must document:
- (a) the reasons why it would be in the best interests of members to lend the assets; and
  - (b) how any conflicts of interest arising from the securities lending program will be managed (e.g. in the case of CCIVs, when the depositary and custodian are related).

## Ensuring the asset holder meets the minimum standards

- RG 133.75 The minimum standards in Section B apply to all asset holders, regardless of whether the asset holder is engaged by a responsible entity, corporate

director, depositary, licensed custody provider, MDA provider or IDPS operator directly or is a sub-custodian engaged by another person (a master custodian) authorised by the responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator. The minimum standards also apply if there are further links in a chain (e.g. in the case of a sub-sub-custodian).

RG 133.76 A responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator does not routinely need to explain to us how its choice of asset holder or master custodian will meet the minimum standards when it applies for an AFS licence or otherwise. However, when applying for a licence it will need to explain the process it will use. If the responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator plans to engage another person as asset holder directly, or indirectly through a master custodian, it must be able to demonstrate how it will:

- (a) ensure any asset holder that is engaged meets the minimum standards;
- (b) monitor ongoing compliance with the minimum standards and deal with any deficiencies that arise; and
- (c) achieve the outcomes in paragraphs (a) and (b) where the assets are outside Australia, except where exceptions are recognised.

RG 133.77 Where appropriate, the responsible entity, corporate director, licensed custody provider, depositary, MDA provider or IDPS operator may be able to meet the obligations in RG 133.76 in relation to an asset holder that is appointed by a master custodian by seeking appropriate information or assurance from the master custodian.

RG 133.78 To check compliance, we may ask for written evidence at any time about how the responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator is satisfied that a particular person should be appointed or remain as the asset holder.

RG 133.79 A responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator, must ensure that any relevant master custodian has adequate processes. This includes adequate processes for selecting, monitoring and reviewing any other person engaged as asset holder (including if the asset holder is a related party) and taking appropriate action on any deficiency of performance.

RG 133.80 Key processes must be documented. This includes the processes the responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator has followed or will follow for appointing, monitoring and reviewing the activities of the asset holder or master custodian. Where the asset holder who is engaged is a related party, it must have adequate arrangements to manage any conflicts of interest under

s912A(1)(aa) to ensure that it meets all its obligations, including its obligation to ensure that the minimum standards are met.

Note: See also RG 181.

### Selecting an asset holder

- RG 133.81 A responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator must follow a reasonable documented process in selecting an appropriate asset holder or master custodian. We expect it will consider, for example:
- (a) the adequacy of financial, human and technological resources, and risk management systems of the asset holder; and
  - (b) where it engages a master custodian, the basis on which the master custodian will engage any sub-custodian.
- RG 133.82 For a responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator, the engagement must be in accordance with a documented policy approved by the directors. The policy must address any conflict of interest that might arise in relation to the engagement and, in the case of a responsible entity, corporate director or depositary, any other considerations relevant to the best interests of members or shareholders.
- RG 133.83 The appropriateness of the policy must be reviewed at least every 13 months. At our request, a responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator must, at its own expense, arrange for a report on the effectiveness or reasonableness of the policy. The written direction may specify who is to prepare the report and the timing of it.
- RG 133.84 We expect that the risks arising from engaging an asset holder will be addressed in the risk management arrangements (where these arrangements are required under s912A(1)(h)) of a responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator. We also expect responsible entities, corporate directors, depositaries, licensed custody providers, MDA providers or IDPS operators to apply appropriate resources to ensure that any arrangements for holding assets are consistent with their obligations, including ensuring that the minimum standards are met.

### Monitoring ongoing compliance

- RG 133.85 A responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator, must have an established process to monitor and assess the asset holder's performance of the asset holder's obligations. If it delegates decisions to the asset holder about which authorised deposit-taking institution (ADI) or foreign equivalent it uses, or how foreign exchange transactions are entered, it must be satisfied about the

asset holder's written processes for determining which account to use, monitoring performance of the issuer's obligations and taking action in case of a deficiency arising from the failure of the issuer of the account.

- RG 133.86 In addition, if the asset holder is permitted to choose to use its associate, a responsible entity, corporate director, licensed custody provider, MDA provider or IDPS operator, will need to check the adequacy of the process to ensure that the conflict is managed to result in a no less favourable outcome than if there was not an association.

Note: A responsible entity of a registered scheme must also comply with Pt 5C.7 of the Corporations Act. A depository of a CCIV must also comply with the independence requirements in draft s1163C.

- RG 133.87 A responsible entity, corporate director, depository, licensed custody provider, MDA provider or IDPS operator, must ensure that records of the relevant assets are kept in a way that enables the holding of the assets to be audited. It should also ensure that it enforces contractual rights to a written annual acknowledgement by the asset holder that any relevant assets are held in compliance with the minimum standards. This includes that the assets are held on trust when required and separated, subject to the permitted use of omnibus accounts: see Section F. This also applies where a master custodian engages an asset holder.

- RG 133.88 In addition, we expect a responsible entity, corporate director, licensed custody provider, depository, MDA provider or IDPS operator to seek:
- (a) information to satisfy itself that the asset holder's internal processes and controls are adequate and continue to operate effectively, and that they are subject to appropriate independent checking; and
  - (b) periodic information from the asset holder about the effectiveness of such controls, and actions taken or planned to address any concerns.

- RG 133.89 We expect that, where appropriate, a responsible entity, corporate director, depository, licensed custody provider, MDA provider or IDPS operator will obtain a copy of and consider an independent audit of the effectiveness of the controls applying to the asset-holding. This could be an audit based on [Guidance Statement GS 007](#) *Audit implications of the use of service organisations for investment management services*, issued by the Auditing and Assurance Standards Board (AUASB), or another appropriate international equivalent (e.g. Statement on Standards for Attestation Engagements [SSAE No. 16](#) *Reporting on controls at a service organization*). This audit may be performed on the basis of an engagement by the asset holder.

Note: GS 007 is designed to provide detailed and transparent reporting on relevant control frameworks of asset holders and other custodians. It includes guidance on how to apply the AUASB's relevant auditing and assurance standards when preparing audit and assurance reports on the description, design and operating effectiveness of the service organisation's controls over the investment management services.

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## Requirements for the content of custody agreements

### Agreement with an asset holder

- RG 133.90 A responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator must ensure that there is a legally enforceable agreement with any asset holder it engages. There must be an agreement with any master custodian and also between any master custodian and asset holder (sub-custodian) that addresses these issues. The agreement must generally be in writing, unless the criteria in RG 133.130–RG 133.132 are met.
- RG 133.91 The agreement with an asset holder must address the issues in RG 133.92–RG 133.117.

### Rights to review and monitor the asset holder

- RG 133.92 The agreement must provide the responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator with reasonable rights for the ongoing review and monitoring of the asset holder and any sub-custodians, and address the criteria against which their performance will be assessed. We expect that these rights and criteria must be adequate to ensure:
- (a) the responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator can meet its obligations to its clients under the Corporations Act;
  - (b) ASIC's minimum standards for asset holders are met; and
  - (c) the services provided will at least meet the standards generally applying in the relevant markets for the assets held.

### Written certification

- RG 133.93 The agreement must require that the asset holder will certify to the responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator in writing at least every 13 months that, other than in any trivial respect or as previously disclosed to the responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator in writing, it believes on reasonable grounds that since the date of the previous statement in writing or the commencement of the agreement:
- (a) it has met, and has no reason to believe that it will not continue to meet, the minimum standards in the relevant ASIC legislative instrument which reflect the standards for asset holders (whether or not there is any explicit reference to the instrument in the agreement); and
  - (b) it is complying with the agreement.

**Manner in which assets are held**

- RG 133.94 The agreement must require that the asset holder, on request, will:
- (a) formally acknowledge the manner in which it holds assets; and
  - (b) notify any other person where the asset holder is aware that to do so might protect the interest in the assets of the client for whom the assets are so held, unless the responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator directs in writing otherwise.

**Giving of instructions**

- RG 133.95 The agreement must address how instructions will be given to the asset holder.

**Liability**

- RG 133.96 The agreement must contain reasonable liability provisions and contain, if appropriate, reasonable indemnity provisions in relation to losses caused to the responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator by the acts and omissions of the asset holder that relate to the agreement.
- RG 133.97 We expect that a responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator would not compromise the interests of its clients in the presence of liability or indemnity provisions unless it is satisfied that any additional cost would be disproportionate to the benefits to its clients. Clients have a significant interest in promoting compliance by the asset holder and, in the event of non-compliance, receiving compensation for loss by the asset holder. Without implying that it would be sufficient, at a minimum, a responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator, must not agree any broad exclusion of any liability for direct losses that would apply for the failure to take reasonable care under general law and only allow any limited exclusion if reasonable.

**Security interests, mortgages, liens or other encumbrances**

- RG 133.98 The agreement must prohibit the asset holder from taking or granting to its associates a security interest, mortgage, lien or other encumbrance over, or in relation to, the assets held under the agreement unless the responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator reasonably believes for documented reasons that any conflict that may arise as a result of the security interest, mortgage, lien or other encumbrance will not materially increase the risk that the asset holder will fail to meet its obligations.

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RG 133.99 A responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator, must keep the written record of reasons for seven years after the security interest, mortgage, lien or other encumbrance, as relevant, has ceased. For example, an asset holder may have a lien over assets held to secure entitlement to expenses incurred and it may exercise that right in its own interest subject to the terms of, or legal rights under, the lien. The responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator should be satisfied that the asset holder would meet its obligations under the agreement, even if acting contrary to the agreement might maximise the value of the lien.

### **Record keeping and reporting**

RG 133.100 The agreement must address how records of the assets are held and how transactions are recorded including by whom, by what means and when they were authorised. These records must be kept and maintained by the asset holder and made available to the responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator, including:

- (a) the verification procedures for the appropriately frequent reconciliation and checking of the balances of client assets held by the asset holder; and
- (b) the requirements for reporting by the asset holder.

### **Auditing**

RG 133.101 The agreement must require that the asset holder provides all reasonable access and assistance to any auditor engaged to perform an audit.

Note 1: Under draft s1164C the depositary of a CCIV has an obligation to provide the corporate director with:

- (a) reasonable assistance, including any information in the depositary's possession or control that the corporate director reasonably requires for the purposes of fulfilling the corporate director's responsibilities in operating the CCIV; and
- (b) any other assistance the corporate director reasonably needs for the purposes of its responsibilities.

Note 2: Under reg 5C.4.02, an agent of a responsible entity, such as an asset holder, must give the auditor of the registered scheme's compliance plan access to the books of the scheme, and assist in the conduct of the audit. Under reg 5C.5.01, responsible entities and their agents must give the compliance committee access to the books of the scheme and assist the committee in the performance of its functions.

Note 3: We may require an AFS licensee and an agent of a responsible entity to assist us in checking compliance: see s601FF, 912E and reg 5C.2.01. We also have powers to require production of books under the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

**Identity of any agents**

RG 133.102 The agreement must provide that before arranging for assets to be held by another person as agent, the arranging asset holder will provide the responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator, with written notice of the identity of, and contact information for, each agent. This written notice should be provided where reasonably practicable and in any event before the assets are held, except in exceptional circumstances identified in the agreement.

**Termination**

RG 133.103 The agreement must address the circumstances in which the responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator has the right to terminate the agreement if it has reasonable grounds for believing that the asset holder is not complying with, or is unlikely to comply with, the agreement so that to a material extent the asset holder will not comply with the relevant requirements. This should have regard to any remedy provided, or that may be expected to be provided, by the asset holder. The relevant requirements are the requirements that the responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator must ensure the asset holder meets in providing the services under the agreement (reflecting ASIC's minimum standards) and the requirement that records must be kept so as to enable convenient audit.

RG 133.104 The provisions for termination in circumstances where the responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator has reasonable grounds for holding that belief must include, at a minimum, provisions to the effect that it may terminate the agreement:

- (a) without payment, other than in relation to entitlements previously accrued or the reasonable fees, costs and expenses involved in the transfer of the assets to the responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator or another asset holder; and
- (b) without limiting any right to damages the responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator may have under the agreement, including recovering the expenses referred to in paragraph (a) if the asset holder is in breach.

RG 133.105 The agreement must also require that, on termination, the assets will be transferred to the responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator or otherwise be transferred as they lawfully direct within a reasonable period. The agreement must provide for the obligations of the parties at termination, including the

payment of outstanding fees and charges to the asset holder and any costs of the transfer.

### **Breach reporting**

RG 133.106 The agreement must require that material or systemic breaches of the agreement by the responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator or the asset holder will be notified, in writing and within a reasonable timeframe of the asset holder becoming aware of the breach, by the asset holder to:

- (a) the responsible entity, corporate director, depositary, licensed custody provider, MDA provider or IDPS operator;
- (b) if the client is a responsible entity, its board of directors or the compliance committee of each relevant scheme; and
- (c) if the client is a depositary, to the corporate director of the CCIV for which it is acting.

Note: This is in addition to any other statutory breach reporting requirements.

### **Arrangements with other parties**

RG 133.107 The agreement must address the terms on which the asset holder is authorised to directly or indirectly engage another party as asset holder and require provisions of the appointment in a written agreement in accordance with the requirements in this guide. This is subject to the exceptions noted at RG 133.130.

### **Business continuity**

RG 133.108 The agreement must require that the asset holder will establish and maintain business continuity arrangements that are reasonable for the nature, scale and complexity of its business.

### **Confidentiality**

RG 133.109 The agreement must require that the asset holder will keep any information of a confidential nature in confidence, apart from any disclosure to ASIC or as permitted by law or by the client.

### **Suspicious matter reporting for responsible entities and depositaries**

RG 133.110 For a responsible entity of a registered scheme, the agreement must provide that the asset holder will establish and maintain adequate arrangements to ensure that it will report to ASIC within 10 business days if it suspects the responsible entity has breached its obligations to report its own breaches as required by s912D(1B) or, where relevant, s601FC(1)(1).

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- RG 133.111 For a corporate director or depositary of a CCIV, the agreement must ensure that the asset holder will report to ASIC within 10 business days if it becomes aware or reasonably suspects the corporate director or depositary has breached its obligations to report its own breaches as required by s912D(1B) or its obligations to report breaches in relation to the CCIV: see draft s1156(l) and 1164E of the Corporations Act.
- RG 133.112 The required arrangements relate only to what the asset holder does after the suspicion arises, whether from:
- (a) inquiries it undertakes for another purpose (including in relation to other arrangements with the asset holder that reflect obligations applying under the AML/CTF Act);
  - (b) information obtained in the ordinary course of business; or
  - (c) information received from another source.
- RG 000.113 The required arrangements are not the source of any obligation to make inquiries.
- RG 133.114 We would expect the asset holder to use reasonable judgement in determining whether to discuss the suspicion with the client before reporting to ASIC. We accept that, under the required arrangements, if an employee or agent of the asset holder has such a suspicion, the asset holder may give reasonable consideration to determine if there are grounds for the suspicion before reporting to ASIC.
- RG 133.115 The agreement must not contain any provision that would require the asset holder to notify the client of suspicious matter reporting by the asset holder to ASIC in relation to the client's activities. However, except as otherwise restricted by law or where it would be imprudent in light of the risk of tipping off a person engaged in misconduct, it may generally be appropriate to seek clarification from the responsible entity after the matter is considered under the internal governance arrangements of the asset holder.
- RG 133.116 We consider that the requirement for such arrangements may have deterrence benefits for entities that may be considering committing, or not reporting, significant breaches if they know that the asset holder may identify such a breach and report it to ASIC (if the asset holder believes that the entity has not reported it).
- RG 133.117 We also consider that asset holders that provide services under contract and their employees can report suspicious matters to ASIC under the whistleblower protection in Pt 9.4AAA of the Corporations Act, including where the AML/CTF Act may not apply.

Note: See [Information Sheet 52](#) *Guidance for whistleblowers* (INFO 52).

### **Agreement as a retail client**

- RG 133.118 If the asset holder is engaged on or after 1 November 2015 by a retail client, the agreement must address the issues in RG 133.119–RG 133.127, as relevant.

### **Manner in which assets are held**

- RG 133.119 The agreement with the retail client must require that the asset holder will acknowledge to the retail client on request the manner in which it holds the assets.

### **Giving of instructions**

- RG 133.120 The agreement with the retail client must address how instructions will be given to the asset holder.

### **Liability**

- RG 133.121 The agreement with the retail client must state that the asset holder is liable to the client if there is a loss to the client because of a failure by the asset holder, or any sub-custodian engaged by the asset holder, to comply with the duties under the agreement or to observe reasonable standards generally applied by providers of custodial services. This is subject to provision for the asset holder to limit its liability resulting from the failure of a sub-custodian it has appointed if that sub-custodian is insolvent and the asset holder (as master custodian) has taken reasonable care in appointing and monitoring the sub-custodian's compliance.

### **Security interests, mortgages, liens or other encumbrances**

- RG 133.122 The agreement with the retail client must prohibit the asset holder from taking or granting a security interest, mortgage, lien or other encumbrance over, or in relation to, the assets held under the arrangement unless it is:
- (a) for expenses and outlays made within the terms of the agreement other than any of its unpaid fees; or
  - (b) in accordance with the client's written instructions.

### **Record keeping and reporting**

- RG 133.123 The agreement with the retail client must address how records of the assets are held and any transactions recorded, including how, by whom and when they were authorised. These records must be kept and maintained by the asset holder and made available to the client, including:
- (a) the verification procedures for the appropriately frequent reconciliation and checking of the balances of client assets held by the asset holder; and
  - (b) the requirements for reporting by the asset holder.

### **Identity of any agents**

- RG 133.124 Where practicable, the agreement with the retail client must provide that the asset holder will provide the client with written notice of the identity of, and contact information for, each agent:
- (a) before arranging for the assets to be held by another person as agent; and
  - (b) in any event, before the assets are held, except in exceptional circumstances identified in the agreement.

### **Termination**

- RG 133.125 The agreement with the retail client must require that, on termination, the assets will be transferred to the client or otherwise transferred as the client lawfully directs within a reasonable time. The agreement must provide for other obligations of the parties at termination, including the payment of outstanding fees and charges to the asset holder and any costs of the transfer.

### **Business continuity**

- RG 133.126 The agreement with the retail client must state that the asset holder will establish and maintain arrangements to enable it to provide the services under the agreement in any contingency for which it should reasonably plan. Those arrangements must be reasonable for the nature, scale and complexity of the asset holder's business.

### **Confidentiality**

- RG 133.127 The agreement with the retail client must require that the asset holder will keep any information of a confidential nature in confidence, apart from any disclosure to ASIC or as permitted by law or by the client.

### **Agreement with a master custodian**

- RG 133.128 In many cases, a responsible entity, corporate director, depositary, MDA provider or IDPS operator will not directly engage an asset holder, but will engage a master custodian that engages the asset holder (or sub-custodian). As far as possible, the same minimum standards should apply for an asset holder that is a sub-custodian engaged by a master custodian. However, in the case of a responsible entity, corporate director or depositary, the provisions referred to in RG 133.110–RG 133.117 on suspicious matter reporting need not be included if the master custodian holds a beneficial interest in the client assets for the responsible entity, corporate director or depositary.

- RG 133.129 If a responsible entity, corporate director, depository, MDA provider or IDPS operator engages a master custodian that appoints a sub-custodian, it must enter into a written agreement with the master custodian reflecting the terms required in an agreement with an asset holder in RG 133.92–RG 133.109. That agreement must contain an obligation for the master custodian to ensure its agreement with the sub-custodian is in writing and on substantively the same terms as required for an agreement with an asset holder (other than the requirement in RG 133.110–RG 133.117 on suspicious matter reporting).
- RG 133.130 In some cases, it may not be reasonably practicable to engage another person to hold client assets outside Australia who is willing to include such matters in the agreement. In this case, the agreement between the master custodian and the sub-custodian does not need to contain the matters referred to in RG 133.92–RG 133.109 or RG 133.119–RG 133.127, as applicable, to the extent that it is not reasonably practicable to ensure such compliance.
- RG 133.131 However, in that case, the master custodian must provide the responsible entity, corporate director, depository, licensed custody provider, MDA provider or IDPS operator, with documents that demonstrate it is not reasonably practicable to engage another person to hold the assets who is willing to include such matters in the agreement.
- RG 133.132 The requirement for a master custodian to enter into an agreement does not apply if the sub-custodian is controlled by the master custodian and the master custodian is liable to its client for the acts and omissions of the sub-custodian as if they were the acts or omissions of the master custodian.

## Disclosure to retail clients of relationship with asset holder

- RG 133.133 For retail clients, we expect responsible entities, corporate directors, MDA providers and IDPS operators to explain in the Product Disclosure Statement (PDS), Financial Services Guide (FSG) or IDPS Guide the limited role of the asset holder in holding the assets or scheme property, and acting only as a custodian. We also expect responsible entities, corporate directors, MDA providers and IDPS operators to explain the limited role of the asset holder more generally in communications with clients that refer to the asset holder as a custodian. To promote understanding, in communications to retail clients, the role of the asset holder should be explained in a clear, concise and effective manner, including the limited nature of the services undertaken.
- RG 133.134 Where some of the assets or scheme property may not be held on trust by the asset holder, these circumstances may also need to be explained in communications.

## Transfer of assets when asset holder is changed

RG 133.135 If a responsible entity, corporate director or depositary changes the asset holder, it must consider whether it is appropriate to obtain a report from an unrelated person with relevant knowledge, confirming that all assets to be transferred have been identified and transferred as required. Verification of the appropriate identification and transfer of assets may involve checking reconciliations between the outgoing and incoming asset holder or obtaining an audit. If the responsible entity, corporate director or depositary does not consider it is in the best interests of members to obtain the report, it must keep for seven years a record in writing of the grounds for its belief.

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## D Compliance controls for licensed custody providers

### Key points

As an AFS licensee, a licensed custody provider must have documented measures to ensure that it complies with its obligations in relation to client assets.

We use the term compliance ‘controls’ instead of ‘compliance measures’, as this reflects Australian Standard AS ISO 19600:2015 *Compliance management systems—Guidelines*.

Compliance controls may vary depending on the nature and amount of assets and who holds them.

### Compliance controls must cover risks to client assets

RG 133.136 A licensed custody provider must establish and maintain adequate documented controls to demonstrate that it is complying with its AFS licence obligations.

Note: Section D does not apply to CCIVs, registered schemes, MDAs and IDPSs. For guidance about compliance controls addressing risks to client assets applicable to CCIVs, registered schemes, MDAs and IDPSs, see draft updated Regulatory Guide 132 *Funds management: Compliance and oversight*.

### Compliance controls may vary

RG 133.137 We have not prescribed in detail what compliance controls for dealing with client assets should be put in place.

RG 133.138 There will be different risks to clients arising out of the different ways that client assets are held, including whether the licensed custody provider is the asset holder or if it engages another asset holder to hold some or all the assets. We also recognise that what is required in documented compliance controls will depend on the nature and amount of assets held.

RG 133.139 For example, more sophisticated compliance controls, processes and procedures may be required by a stand-alone custody business that provides services for a full range of financial products, compared to a licensed custody provider that holds only a limited range and value of assets.

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**If the licensed custody provider is the asset holder**

- RG 133.140 If the licensed custody provider is the asset holder, we consider its documented compliance controls should include:
- (a) regular checks to ensure that all record keeping for client assets is carried out in a timely and accurate manner; and
  - (b) measures for ensuring that the minimum standards in Section B of this guide are met.

**If another person is the asset holder**

- RG 133.141 If the licensed custody provider engages another person as an asset holder, we expect it to ensure that clients are protected from the possible compliance risks arising from this arrangement.
- RG 133.142 We consider the licensed custody provider's documented compliance controls should set out the controls it will take to minimise these risks. This would include, for example, controls for ensuring that:
- (a) it will allow a person to be the asset holder only if the person meets the minimum standards in Section B;
  - (b) the activities of the asset holder will be actively monitored and appropriate action taken in case of deficiencies; and
  - (c) any agreement entered into with the asset holder will remain compliant and current.

## E Protection of rights for land used in registered schemes

### Key points

We have modified the Corporations Act where an offer of interests in a registered scheme requires the use of particular land on which the scheme will occur.

The purpose of the modification is to protect members by requiring:

- the land to be held by members, a company controlled by members, or on trust for members; and
- the registered scheme to provide measures, including registration of a protective interest in the land, to ensure as far as possible continuing access to the land required for the purposes of the scheme.

The instrument to register the protective interest must be lodged under state or territory land title laws before or immediately after interests in the registered scheme are issued.

### Protecting members' rights

RG 133.143 In many primary production registered schemes, members contract with the responsible entity to set up and maintain the scheme, and harvest or exploit its products in the context that there will be arrangements allowing the use of certain land. This could apply to schemes involved in agriculture, use of animals, harnessing energy from solar or wind energy, or obtaining benefits from sequestering carbon dioxide. The land often remains the property of the responsible entity, or an associate or unrelated landowner, and reverts to it when the scheme ends.

RG 133.144 We consider that it is inconsistent with the obligation of a responsible entity to do all things necessary to ensure that it operates a registered scheme efficiently, honestly and fairly to operate the scheme if the scheme is subject to risks of failure because of inadequate protection of the rights to use the land for the scheme for the expected duration of the scheme. We consider the rights of members requiring protection in relation to the land include the rights sufficient to enable access, cultivation, transmission, exploitation, maintenance, protection, repair, refurbishment, and harvesting or obtaining output from the scheme, where relevant to the scheme.

RG 133.145 To provide adequate protection in relation to land, it is appropriate that members have an interest in the land registered in accordance with the state or territory land title laws, such as by lodging the instruments before or immediately after the interests in the registered scheme are issued. We consider that land should be held in a way that protects members from risks outside the scope of the scheme, such as the insolvency of a landowner.

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RG 133.146 Certain risks arise if members are not protected by an interest in land needed for operation of the scheme that is registered under state or territory laws, and that is paramount and cannot lawfully be adversely affected by any existing or subsequent secured creditor or a transferee, other than one whose title has been conferred by the responsible entity in accordance with its duties.

RG 133.147 Risks to members include the following:

- (a) the holder of the interest in the land may have used, or may use, the land as security without acknowledging the interests of members. If there is a default, the secured creditor may act without regard to the interests of the members;
- (b) a person holding an interest in the land on which the registered scheme relies (landowner)—or a liquidator of a landowner or other person authorised to act on a landowner’s behalf—may restrict access to land not covered by the interest that is reasonably necessary for the operation of the scheme;
- (c) a landowner—or a liquidator of a landowner or other person authorised to act on the landowner’s behalf—may transfer the land (or an interest in the land) to a transferee who may not be under an obligation to recognise the rights of the members regarding the land; and
- (d) it may be practically difficult to continue to operate or to wind up the registered scheme if a landowner has become insolvent.

RG 133.148 Where the interest in the land continues only while the obligations of the interest holder to others with an interest in the land (e.g. a secured creditor or lessor) are being met, failure to meet these obligations may result in the loss of the interest. Retail investors may not expect the registered scheme to be put at risk by such failures. Where the security or lease has been entered into by the responsible entity in accordance with its duties, risk remains and may require disclosure to retail clients.

Note: [Regulatory Guide 232](#) *Agribusiness managed investment schemes: Improving disclosure for retail investors* (RG 232) includes a disclosure principle dealing with a responsible entity’s disclosure obligations in relation to the arrangements entered into to secure rights of access or tenure to the resources and infrastructure required to operate the agribusiness scheme, including any land, licences or leases, and water.

RG 133.149 Registration of an interest does not ensure the land right that the interest might normally confer can be used. There may be other rights to use land such as native title rights. A responsible entity must only offer interests in the registered scheme if following reasonable inquiry it does not believe that there are such rights or that government action or refusal to grant permission will mean the land cannot be used for the scheme as intended.

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## Registration of protective interest

RG 133.150 Where an offer of interests in a registered scheme involves the use of particular land that is reasonably required for the benefits to be produced by the scheme through primary production, certain additional requirements apply.

RG 133.151 We have modified the Corporations Act so that these additional requirements apply to any offer of interests in a registered scheme that is made:

- (a) to retail clients on or after 2 January 2014; and
- (b) with, or includes, an offer of rights attaching to or arising from the land on which the scheme will occur: see [Class Order \[CO 13/1406\]](#) *Land holding for primary production schemes*.

RG 133.152 Under [CO 13/1406], the responsible entity must:

- (a) take reasonable steps to ensure that any regulatory approvals necessary to carry out the primary production activities that the scheme is involved in are obtained and maintained;
- (b) protect the rights of members to have use of the relevant land on which the primary production occurs, as relevant to the scheme and for the expected duration of the scheme through an appropriate registered interest in the land under state or territory land title laws. These rights include the rights sufficient to enable access, cultivation, transmission, exploitation, maintenance, and harvesting or obtaining output from a registered scheme;
- (c) register the interest in such a form and in such a way that it cannot be adversely affected either by the interests of others in the land or, as far as possible, by any future interests. This is unless the interests of others were properly created by the responsible entity in accordance with its duties or were interests of which the responsible entity was not aware after reasonable inquiry. For example, the responsible entity will need to obtain written consents from the entities external to the scheme (e.g. the landowner or secured creditors) to postpone the priority of their interests in the land over the scheme members' interests in the same land, and may need to register the consents in accordance with state or territory land title laws; and
- (d) ensure that, if the registered interest is a lease or an instrument that confers the right to use land which requires regular payments to be made:
  - (i) the constitution of the scheme gives the responsible entity the power to require members to make payments to meet the obligations under the terms of any lease or instrument;

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- (ii) any amounts paid by members are retained in relation to the lease or instrument on trust until the money is used to meet lease or rental payments relating to the land necessary for the continuity of a required registered interest;
- (iii) the terms of the lease or instrument are not less favourable to the scheme than on an arm's length basis and exclude any action by the lessor or a head lessor in connection with the lease or instrument that would adversely affect the interests of members without the responsible entity having at least three months written notice; and
- (iv) on receipt of a notice under paragraph (iii), affected members are promptly notified in writing and advised of members' rights to requisition a meeting.

RG 133.153 The interest must be:

- (a) registered in the name of the members collectively or in the name of a company controlled by scheme members;
- (b) held by each member in relation to that portion of the land on which the primary production business in which the member has an interest is being conducted;
- (c) held by the asset holder or other person entitled to hold scheme property as trustee for members, or in trust for the responsible entity if it holds the beneficial interest in trust for members; or
- (d) held by the responsible entity as trustee for members.

RG 133.154 If the notice of the trust cannot be registered on that register, we expect the responsible entity to lodge a caveat and the trust deed with the land titles registrar where possible and when it would be of assistance in reducing risk.

RG 133.155 [CO 13/1406] does not allow for arrangements that require the use of land outside Australia. However, we will consider case-by-case applications for relief for the use of foreign land by a particular registered scheme. The applicant will need to demonstrate that arrangements will be put in place that are as effective as those that would be required for Australian land.

## F Relief from the obligation to separate assets

### Key points

A responsible entity must ensure that scheme property is clearly identified as scheme property and held separately from its property and the property of any other scheme.

A corporate director must ensure that the assets of each sub-fund of a CCIV are clearly identified and held separately from its property and the assets of any other sub-fund.

We have given limited class order relief to responsible entities, corporate directors and depositaries from this requirement, and make similar exceptions for other asset holders, to allow the use of omnibus accounts.

### Specific obligations for registered schemes and CCIVs

#### Registered schemes

- RG 133.156 Unless an exemption applies, a responsible entity that holds scheme property on trust under s601FC(2) must ensure that property of the registered scheme is:
- (a) clearly identified as scheme property: see s601FC(1)(i)(i); and
  - (b) held separately from the responsible entity's property and the property of any other scheme: see s601FC(1)(i)(ii).

#### CCIVs

- RG 133.157 The corporate director of a CCIV must allocate all the assets of the CCIV to the sub-funds of the CCIV in accordance with draft s1142E of the Corporations Act. Unless an exemption applies, a corporate director or depositary holding the assets of a CCIV must ensure that such assets:
- (a) are clearly identified as assets of the relevant sub-fund: see draft s1142B(1)(a) of the Corporations Act; and
  - (b) held separately from the property of the corporate director and assets of any other sub-fund of the CCIV: see draft s1142B(1)(b).
- RG 133.158 The corporate director or depositary must establish and maintain a separate account with an ADI for each and every sub-fund of the CCIV: see draft s1142B(2).

## Obligations for other AFS licensees who are asset holders

RG 133.159 Similar requirements apply if an AFS licensee holds assets as a licensed custody provider under [CO 13/1410], an MDA provider under ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968 or an IDPS operator under [CO 13/763].

## Relief for omnibus accounts

RG 133.160 In some circumstances, it may not be appropriate to separate assets from those of other persons, sub-funds or schemes. Holding certain classes of assets separately may be inconsistent with market practice where it is likely to substantially add to the cost of holding assets or scheme property. We have given limited relief from s601FC(1)(i) of the Corporations Act to responsible entities and draft s1142B(1) and (2) to corporate directors and depositaries, in certain circumstances. This is subject to requirements to ensure that the interests of members are not put at any additional risk of being lost by any pooling arrangements: see [CO 13/1409].

RG 133.161 Our relief under [CO 13/1409] applies to responsible entities, corporate directors and depositaries, permitting them to use omnibus accounts for:

- (a) Australian or foreign currency;
- (b) a deposit-taking facility with a body carrying on a business of accepting money on deposit, including rights under that facility;
- (c) securities; or
- (d) derivatives.

RG 133.162 This relief applies subject to ASIC's power to exclude reliance by a responsible entity, corporate director or depositary in certain circumstances.

RG 133.163 Provisions regarding the use of pools (e.g. omnibus accounts) also apply to licensed custody providers under [CO 13/1410], MDA providers under ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968 and IDPS operators under [CO 13/763].

RG 133.164 Omnibus accounts are permitted where:

- (a) the assets are held separately from the assets of the AFS licensee engaging the asset holder and the asset holder;
- (b) the AFS licensee responsible for ensuring that the assets are held (e.g. the responsible entity) ensures that the asset holder:
  - (i) maintains adequate records at all times showing the entitlement of clients in the assets not held separately;
  - (ii) performs reconciliation procedures on each business day in relation to the assets not held separately unless, because of the nature of assets of a particular type, it is ordinary and reasonable commercial

practice to reconcile such assets less frequently. We expect that this standard will generally be required daily for financial products traded on a financial market and deposit products;

- (iii) does not restrict its capacity to exercise or cause the exercise of powers in relation to the assets, including any power to direct voting; and
  - (iv) ensures that the omnibus account does not fail to be sufficient after the end of the second business day to meet the entitlements of the client and any other person in relation to the assets not held separately, if necessary, through the asset holder supplementing the assets not held separately with its own assets. The amount paid in by the asset holder would become held for the persons having a beneficial interest in the omnibus account, other than the asset holder. If, because of later repayments, the account goes into surplus, the asset holder can be reimbursed with equivalent assets; and
- (c) the AFS licensee responsible for ensuring that the assets are held:
- (i) documents its policy in relation to not holding assets separately and its reasons why that policy is appropriate. In setting out the reasons why the policy is appropriate, the AFS licensee should have regard to any extent to which it might expose the relevant clients to unreasonable risk or have any reason to believe that applying the policy would not be in accordance with its duties to the relevant clients;
  - (ii) ensures the policy has been reviewed during the previous 13 months and a written record of the outcome of the review recorded; and
  - (iii) keeps a record of the policy and the record of its review for seven years after it has ceased to be the current policy that enables the assets not to be held separately.

RG 133.165 For retail clients of licensed custody providers, the potential use of omnibus accounts must be notified in the asset holder's FSG and expressly agreed to in writing by the retail client.

### **Key reasons for permitting use of omnibus accounts**

RG 133.166 If asset separation requirements applied, omnibus accounts, which are typically used to hold financial assets, would cause the responsible entity, corporate director or depositary to be in breach of the obligation to clearly identify scheme property or assets and hold it separately from other relevant property or assets.

RG 133.167 A responsible entity, corporate director or depositary might reasonably consider that holding assets or scheme property separately would be inappropriate if it increases the costs to members without materially decreasing any risk. A risk could arise from holding assets together to the

extent that the assets of one client could be used to settle the obligations of another client.

RG 133.168 Ensuring efficient and compliant operation by the asset holder may include operating separate omnibus accounts for different types of clients (e.g. buy–hold clients versus broker–dealer clients). Specifically, if there is a non-trivial risk of a shortfall in a client’s account due to the nature of the client or the types of transaction entered into that would not be addressed by the asset holder paying in assets to cover a shortfall, we expect that the asset holder would, as part of its risk management system, segregate the client’s assets to minimise potential losses to other clients or to the asset holder itself.

RG 133.169 If an asset holder has used assets in the omnibus account for the benefit of another person not in accordance with the client’s instructions and a shortfall arises, the asset holder must cover the shortfall after the end of the second business day after the shortfall arises.

## Relief does not extend to non-financial assets

RG 133.170 Our policy on omnibus accounts does not extend to assets other than financial assets within the meaning of PF 209. For example, responsible entities or other persons holding scheme property are not permitted to hold a single piece of other property as trustee for a registered scheme and also another scheme.

RG 133.171 However, we consider that the obligation to hold assets separately arises only to the extent that this can be done. This may not be possible for real property (e.g. where disclosure of trusts in the land titles register may not be permitted) and certain other assets. In this case, we accept that real property can be registered in the name of the asset holder without breaching the requirements to hold the assets separately in (as applicable):

- (a) s601FC(1)(i) for responsible entities of registered schemes;
- (b) draft s1142B(1) for corporate directors and depositaries of CCIVs;
- (c) [CO 13/1410] for licensed custody providers;
- (d) ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968 for MDA providers; or
- (e) [CO 13/763] for IDPS operators.

In the case of a responsible entity, corporate director or depositary, we consider the obligation to separate assets or scheme property extends to doing all that is practicable to achieve separation, given the nature of the property and its ownership. As such, we do not consider it necessary to give any relief from s601FC(1)(i) or draft s1142B(1) in this situation. However, we expect compliance arrangements to particularly address the risks of this asset-holding arrangement.

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## Key terms

Term	Meaning in this document
ADI	An authorised deposit-taking institution—a corporation that is authorised under the <i>Banking Act 1959</i> . ADIs include: <ul style="list-style-type: none"> <li>• banks;</li> <li>• building societies; and</li> <li>• credit unions</li> </ul>
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services  Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act  Note: This is a definition contained in s761A.
AML/CTF Act	<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>
APRA	Australian Prudential Regulation Authority
Asia Region Funds Passport	An agreement between economies in the Asia region that allows passport funds established and regulated in one participating economy to offer interests to investors in another participating economy
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
assets of a sub-fund of a CCIV	The assets of a sub-fund of a CCIV at a particular time are the assets of the CCIV (including money, assets and investments), to the extent the assets: <ul style="list-style-type: none"> <li>• are allocated by the corporate director to the sub-fund in accordance with draft s1142E of the Corporations Act; or</li> <li>• are to be assets of the sub-fund under a restructure, arrangement or court order (but does not include assets that, in accordance with a restructure, arrangement or court order, are no longer to be assets of the sub-fund)</li> </ul> Note: This is a definition contained in draft s1142D.
asset holder	A person who holds scheme property of a registered scheme, assets or property of a sub-fund of a CCIV, client assets of an IDPS, client portfolio assets of an MDA service, or financial products or a beneficial interest in financial products held under a custodial service

Term	Meaning in this document
AUASB	Auditing and Assurance Standards Board
CCIV	A corporate collective investment vehicle—a company that is registered as a corporate collective investment vehicle under the Corporations Act  Note: This is a definition contained in draft s9 of the Corporations Act.
client	A member of a registered scheme or CCIV, a client of an IDPS operator, a client of an MDA provider or a client of a custodial service being a person for whom financial products or a beneficial interest in financial products are held in providing the custodial service (as the case may be)
client assets	Scheme property or other assets of a registered scheme, assets of a sub-fund of a CCIV, the assets held under an IDPS (other than by the client), the client portfolio assets of an MDA service, or financial products or a beneficial interest in financial products held under a custodial service
client portfolio assets	Financial products and other property that are the client's contribution to an MDA service or that are derived directly or indirectly from the client's contributions
[CO 13/1409] (for example)	An ASIC class order (in this example numbered 13/1409)  Note: Legislative instruments made from 2015 are referred to as ASIC instruments.
corporate director	The company named in ASIC's record of the CCIV's registration as the corporate director or temporary corporate director of the CCIV  Note: This is a definition contained in draft s9 of the Corporations Act.
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
custodial service	The service provided under an arrangement between the provider and the client, or between the provider and another person with whom the client has an arrangement (whether or not there are also other parties to any such arrangement), under which 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 another person nominated by the client unless the service is not a custodial service under s766E(3)  Note: This is a definition contained in s766E of the Corporations Act.

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Term	Meaning in this document
custodial staff	<p>Natural persons who have duties relating to:</p> <ul style="list-style-type: none"> <li>• holding assets;</li> <li>• record keeping for assets;</li> <li>• checking authorisations for instructions to transact; or</li> <li>• functions incidental to these powers (but does not include functions that involve the exercise of a material discretion whether under an arrangement with the asset holder or a person engaged by the asset holder other than in relation to an at-call deposit account of a regulated deposit taker or transactions in foreign exchange contracts)</li> </ul>
custodian	A provider of a custodial service as defined in s766E of the Corporations Act or a person that holds scheme property of a registered scheme, assets of a sub-fund of a CCIV, assets held under an IDPS, or client portfolio assets of an MDA service
depository	<p>The company named in ASIC's record of the CCIV's registration as the depository or temporary depository of the CCIV</p> <p>Note: This is a definition contained in draft s9 of the Corporations Act.</p>
financial product	<p>A facility through which, or through the acquisition of which, a person does one or more of the following:</p> <ul style="list-style-type: none"> <li>• makes a financial investment (see s763B);</li> <li>• manages financial risk (see s763C);</li> <li>• makes non-cash payments (see s763D)</li> </ul> <p>Note: This is a definition contained in s763A of the Corporations Act: see also s763B–765A.</p>
FSG	<p>A Financial Services Guide—a document required by s941A or 941B to be given in accordance with Div 2 of Pt 7.7 of the Corporations Act</p> <p>Note: This is a definition contained in s761A.</p>
GS 007	Guidance Standard 007 <i>Audit implications of the use of service organisations for investment management services</i> , issued by the AUASB in October 2011
IDPS	An investor directed portfolio service as defined in <a href="#">Class Order [CO 13/763]</a> <i>Investor directed portfolio services</i> or any instrument that amends or replaces that class order
IDPS Guide	A document provided by an IDPS operator instead of a PDS to help retail clients decide whether they should use the IDPS
IDPS operator	A public company that is a holder of an AFS licence that is authorised to operate an IDPS and who provides an IDPS or a function that forms part of the IDPS

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Term	Meaning in this document
licensed custody provider	A person who holds an AFS licence authorising the licensee to provide a custodial service
licensee obligations	The obligations of an AFS licensee as set out in s912A and 912B of the Corporations Act and the requirement to be of good fame and character as included in s913B of the Corporations Act
master custodian	A person with primary contractual responsibility to the AFS licensee who is authorised by the licensee to engage an asset holder
MDA	A managed discretionary account
MDA provider	A person who holds an AFS licence with authorisations to provide MDA services  Note: A detailed definition is contained in <a href="#">ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968</a> .
MDA service	A managed discretionary account service where: <ul style="list-style-type: none"> <li>• the client gives the MDA provider money or money's worth (client contributions);</li> <li>• the MDA provider has the discretion to invest in financial products using client contributions without prior reference to the client for each transaction; and</li> <li>• the MDA provider manages the client's investments as a discrete portfolio belonging to that client</li> </ul> Note: A detailed definition is contained in <a href="#">ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968</a> .
member	A member of a registered scheme or shareholder of a CCIV
passport fund	A regulated collective investment scheme, or sub-fund of a regulated collective investment scheme, registered as a passport fund in a participating economy
Passport Rules	The requirements in Annex 3 to the <a href="#">Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport</a> , as incorporated into the domestic law of a participating economy  Note: The Australian Passport Rules will be made by the relevant Minister as a legislative instrument under draft s1211 and 1211A of the Corporations Act.
omnibus account	An account in which money, securities or derivatives for more than one beneficial owner are co-mingled by a custodian or a sub-custodian

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Term	Meaning in this document
PDS	<p>A Product Disclosure Statement—a document that must be given to a retail client for the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act</p> <p>Note: See s761A for the exact definition.</p>
PF 209 (for example)	An ASIC pro forma (in this example numbered 209)
Pt 7.9 (for example)	A part of the Corporations Act (in this example numbered 7.9), unless otherwise specified
reg 7.6.04 (for example)	A regulation of the Corporations Regulations (in this example numbered 7.6.04), unless otherwise specified
registered scheme	A managed investment scheme that is registered under s601EB of the Corporations Act
responsible entity	A responsible entity of a registered scheme as defined in s9 of the Corporations Act
RG 104 (for example)	An ASIC regulatory guide (in this example numbered 104)
retail CCIV	<p>A CCIV promoted by a person, or an associate of a person, who was, when the CCIV was promoted, in the business of promoting CCIVs to persons who are, or would be, retail clients or a CCIV that has at least one member that acquired one or more shares in the CCIV:</p> <ul style="list-style-type: none"> <li>• as a retail client; or</li> <li>• under a custodial arrangement and a PDS had to be provided to the shareholder before the acquisition</li> </ul> <p>Note: See draft s1154A of the Corporations Act.</p>
retail client	A client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of the Corporations Regulations
s912A (for example)	A section of the Corporations Act (in this example numbered 912A), unless otherwise specified

Term	Meaning in this document
scheme property	<p>Means:</p> <ul style="list-style-type: none"> <li>(a) contributions of money or money's worth to the scheme;</li> <li>(b) money that forms part of the scheme property under provisions of the Corporations Act or the ASIC Act;</li> <li>(c) money borrowed or raised by the responsible entity for the purposes of the scheme;</li> <li>(d) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraphs (a), (b) or (c); and</li> <li>(e) income and property derived, directly or indirectly, from contributions, money or property referred to in paragraphs (a), (b), (c) or (d)</li> </ul> <p>Note: This is a definition contained in s9 of the Corporations Act.</p>
sub-fund	<p>A part of a CCIV that:</p> <ul style="list-style-type: none"> <li>• is established as a sub-fund in the records of the CCIV by assigning a unique name to the sub-fund and identifying one or more classes of shares in the CCIV that are to be referable to the sub-fund; and</li> <li>• either relates to the entire business of the CCIV (in the case where there is one sub-fund) or relates solely to a particular part of the business of the CCIV (in the case where there are two or more sub-funds)</li> </ul>
wholesale CCIV	A CCIV that is not a retail CCIV

## Related information

### Headnotes

AFS licence, AFS licence conditions, AFS licensee obligations, Asia Region Funds Passport, asset holder, assets, Australian financial services licence, CCIV, client assets, compliance measures, compliance plans, conflicts of interest, corporate collective investment vehicle, corporate director, custodial service, custodian, depositary, IDPS, IDPS operators, investor directed portfolio service, master custodian, licensed custody providers, managed discretionary account, MDA, MDA providers, minimum standards, obligation to separate scheme property, omnibus accounts, organisational structure, passport fund, Passport Rules, primary production schemes, registered interest, registered managed investment schemes, responsible entity, scheme property, staffing

### Legislative instruments and pro formas

[ASIC Corporations \(Managed Discretionary Account Services\) Instrument 2016/968](#)

[\[CO 13/760\]](#) *Financial requirements for responsible entities, corporate directors and operators of investor directed portfolio services*

[\[CO 13/763\]](#) *Investor directed portfolio services*

[\[CO 13/1406\]](#) *Land holding for primary production schemes*

[\[CO 13/1409\]](#) *Holding assets: Standards for responsible entities*

[\[CO 13/1410\]](#) *Holding assets: Standards for providers of custodial services*

[PF 209](#) *Australian financial services licence conditions*

### Regulatory guides

Draft RG 000 *Funds management: Establishing and registering a fund*

Draft updated RG 132 *Funds management: Compliance and oversight*

[RG 104](#) *Licensing: Meeting the general obligations*

[RG 105](#) *Licensing: Organisational competence*

[RG 166](#) *Licensing: Financial requirements*

[RG 179](#) *Managed discretionary accounts*

[RG 181](#) *Licensing: Managing conflicts of interest*

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[RG 232](#) *Agribusiness managed investment schemes: Improving disclosure for retail investors*

## **Legislation**

AML/CTF Act

ASIC Act

Corporations Act, Ch 5C, Pts 9.4AAA, 5C.7, s9, 601FA, 601FB, 601FC, 601FF, 766E, 911B, 912A, 912D, 912E

Corporations Amendment (Asia Region Funds Passport) Bill 2017 (exposure draft), draft Ch 8A, draft s1211, 1211A

Corporations Regulations, regs 5C.2.01, 5C.4.02, 5C.5.01, 7.6.01(1)(k)

Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2017 (exposure draft), draft Ch 7A, draft s1138A, 1142E, 1142B, 1163, 1163A, 1163C, 1164, 1164A, 1164B, 1164C, 1164E

## **Information sheets**

[INFO 52](#) *Guidance for whistleblowers*

[INFO 141](#) *Dealing and providing a custodial or depository service as a secondary service*

## **Consultation papers**

[CP 296](#) *Funds management*

## **Other documents**

[GS 007](#) *Audit implications of the use of service organisations for investment management services*

[SSAE No. 16](#) *Reporting on controls at a service organization*

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