



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 173

Trustee companies: Transfer determinations by ASIC

January 2012

About this paper

This paper sets out our proposals on administering the transfer determination provisions of Ch 5D of the *Corporations Act 2001* (Corporations Act) for trustee companies providing traditional trustee company services (traditional services). Licensed trustee companies may transfer the administration of trust estates to other trustee companies under the Corporations Act.

We seek feedback from trustee companies, their clients and legal advisers, the Public Trustees of the states and territories, and other interested parties, on our proposals.

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 paper was issued on 24 January 2012 and is based on the Corporations Act as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

Regulations about trustee companies are yet to be issued. We will consider the regulations in issuing our final regulatory guidance.

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The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on transfer determinations. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section E, 'Regulatory and financial impact'.

Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 6 March 2012 to:

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What will happen next?

Stage 1	24 January 2012	ASIC consultation paper released
Stage 2	6 March 2012	Comments due on the consultation paper
	April 2012	Drafting of regulatory guide
Stage 3	May/June 2012	Regulatory guide released

A Background to the proposals

Key points

Traditional services provided by licensed trustee companies are regulated by ASIC as a financial service under Ch 7 of the *Corporations Act 2001* (Corporations Act). Trustee companies that provide traditional services must hold an Australian financial services (AFS) licence covering those services.

Part 5D.6 of the Corporations Act sets out the circumstances in which trustee companies can transfer their estate management business to another licensed trustee company. Transfers are divided into two types, voluntary and compulsory.

Under the Corporations Act, in order for ASIC to approve the transfer, we must be satisfied that any transfer is in the best interests of both the clients of the transferring company and those of the receiving company (when viewed as a group).

This paper:

- sets out our proposals on the information that we require from trustee companies with an application for a voluntary transfer determination; and
- sets out our proposals on the information that we require from trustee companies when we make a compulsory transfer determination.

Regulation of trustee companies providing traditional services

- 1 The Council of Australian Governments agreed on 26 March 2008 that the Australian Government would assume responsibility for regulating traditional services provided by trustee companies from the states and territories.
- 2 The *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* (Modernisation Act) was enacted on 6 November 2009. It amends the *Corporations Act 2001* (Corporations Act) to regulate traditional services provided by trustee companies as financial services under Ch 7 of the Corporations Act. The Modernisation Act also inserted Ch 5D into the Corporations Act and consequential amendments were made to the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and Corporations Act. This legislation became operative on 6 May 2010.
- 3 Section 601RAB(1) of the Corporations Act provides that a trustee company is an entity that is prescribed by the regulations as a trustee company. The

Corporations Regulations 2001 (Corporations Regulations) list the names of trustee companies providing traditional services for the purposes of s601RAB(1): see reg 5D.1.01(1) and Sch 8AA of the Corporations Regulations.

4 Traditional services provided by a trustee company are specifically included as a financial service under s766A(1A). This means that a trustee company providing traditional services must obtain an AFS licence and be subject to the conduct, disclosure, compensation and dispute resolution obligations in Ch 7 of the Corporations Act, as modified where necessary under the Corporations Regulations.

5 A trustee company must comply with the general obligations of an AFS licensee, including the obligation to have adequate resources (including financial, technological and human resources) to provide the financial services covered by its licence. A licensed trustee company must also have adequate risk management systems in place and arrangements for managing conflicts of interest.

Note: See Regulatory Guide 104 *Licensing: Meeting the general obligations* (RG 104), Regulatory Guide 181 *Licensing: Managing conflicts of interest* (RG 181) and Regulatory Guide 166 *Licensing: Financial requirements* (RG 166).

6 For trustee companies listed in Sch 8AA of the Corporations Regulations that did not hold an AFS licence at the commencement of the legislation on 6 May 2010, transitional arrangements apply to the operation of Ch 7 of the Corporations Act. These trustee companies are deemed to hold an AFS licence with an authorisation to provide traditional services until the end of the transitional period. We call these entities ‘deemed licensees’. The transitional period currently expires on 29 April 2012, but is expected to be extended by regulation until 31 December 2012.

Note: Class Order [CO 11/407] *Trustee companies—deemed licensees—extension of transitional arrangements* as varied by Class Order [11/1262] *Trustee companies—extension of transitional period* extends the transitional period, set out in reg 5 of the Corporations Amendment Regulations 2010, from 30 April 2011 until 29 April 2012.

7 The trustee company amendments to the Corporations Act do not alter the laws in states and territories that apply generally to trustees, executors, administrators and guardians (including trustee companies when they perform those roles) and the inherent power or jurisdiction of the courts in respect of the supervision of those roles.

8 State and territory legislation and the rules of common law and equity continue to govern the functions and powers of trustee companies.

Trustee companies regulated by APRA

- 9 The Australian Prudential Regulation Authority (APRA) is the prudential regulator of the Australian financial services industry. A licensed trustee company may also be regulated by APRA as a registrable superannuation entity (RSE) licensee under the *Superannuation Industry (Supervision) Act 1993*. APRA establishes and develops prudential standards that RSEs must comply with.
- 10 Entities regulated by APRA are exempt from some of the general obligations attached to an AFS licence, including the obligation to have adequate resources and adequate risk management systems: s912A(1)(d) of the Corporations Act. This is the case even if only part of their business is an activity that APRA regulates. APRA, not ASIC, imposes requirements for resources and risk management systems that apply to dual regulated entities.

ASIC-approved transfers of estate assets and liabilities

- 11 Part 5D.6 of the Corporations Act provides for the transfer of estate assets and liabilities associated with the performance of an estate management function from one trustee company to another licensed trustee company and, in particular circumstances, to a state or territory Public Trustee.
- 12 Transfers are divided into two types, voluntary and compulsory. Voluntary transfers must involve a total transfer of the transferring company's estate assets and liabilities. Compulsory transfers may be a partial transfer of estate assets or liabilities, or a total transfer of them.
- 13 In summary, the transfers involve the following steps:
- (a) with the consent of the Minister, we make a transfer determination if specified conditions in the Corporations Act are satisfied;

Note: The Minister may determine in writing that their consent is not required for the transfer, or a class of transfers that includes the transfer: s601WBD of the Corporations Act.
 - (b) the determination is given to the transferring company and the receiving company;
 - (c) we issue a certificate that has the effect of transferring the estate assets and liabilities to the receiving company; and
 - (d) a copy of the certificate is given by ASIC to the transferring and receiving company. The certificate is published by ASIC.
- 14 When a certificate of transfer comes into force, the receiving company becomes the successor in law of the transferring company for the estate assets and liabilities transferred, to the extent of the transfer. The duties, obligations, immunities, rights and privileges applying to the transferring

company now also apply to the receiving company: s601WBI(1)(c) of the Corporations Act.

- 15 Under s601WDA of the Corporations Act, the transferring company must contact certain persons when a certificate is issued for a voluntary or compulsory transfer determination. A notice must be published in accordance with the Corporations Act and Corporations Regulations.

Note: All reasonable steps must be taken to advise people who have signed and lodged instruments that have yet to come into effect and people who the trustee company knows have appointed it as trustee or in some other capacity: s601WDA of the Corporations Act.

- 16 We may only make a transfer determination:

- (a) if the Minister has consented to the transfer (unless the Minister has determined that their consent is not required);
- (b) for a compulsory transfer determination, if the receiving company is a licensed trustee company or the Public Trustee of a state or territory;
- (c) for a voluntary determination, if the transferring company is a licensed trustee company or one that was previously authorised under state and territory law and the receiving company is a licensed trustee company;
- (d) if we are satisfied the transfer is in the interests of the clients of the transferring company and in the interests of the clients of the receiving company (both when viewed as a group);

Note: This test does not apply to the clients of a receiving company when the transfer is to the public trustee: s601WBA(2)(b)(ii) of the Corporations Act.

- (e) consent from the board of the receiving company has been received; and
- (f) complementary state and territory legislation to facilitate the transfer is in place and has been enacted: see s601WBA of the Corporations Act.

Note: At the time of publication not all states and territories had enacted this legislation.

- 17 When we make a determination we must include a statement of reasons why the determination has been made.

- 18 In this paper we deal separately with the three types of applications for transfer determinations we may receive:

- (a) voluntary transfers between companies within the same corporate group (an intra-group transfer);
- (b) voluntary transfers between unrelated companies (an arm's length transfer); and
- (c) compulsory transfers.

Intra-group voluntary transfer determinations

- 19 Under the former state and territory regulatory regime for trustee companies, many corporate groups operated subsidiaries in the states and territories whose function was to hold the relevant authorisation in that jurisdiction. Following the introduction of the national regulatory framework for trustee companies, it is expected many corporate groups will wish to rationalise their traditional service business within the group and transfer that business to a single AFS licence holder with an authorisation to provide those services. Generally, corporate groups have an AFS licensee and one or more deemed licensees. A group may also have more than one AFS licensee.
- 20 In the Explanatory Memorandum (paragraph 12) to the Corporations and Other Legislation Amendment (Trustee Companies and Other Measures) Bill 2011, which introduced the voluntary transfer provisions, the Australian Government said it:
- ... supports the rationalisation of the industry as an important way of reducing compliance costs. However, no feasible and cost-effective process for transferring large numbers of trusts and estates currently exists. As the TCA has put it, the industry is seeking an administrative rather than a judicial process to ‘allow existing trustee companies to expeditiously, and at minimum cost, rationalise their operations by transferring all estate management functions to one licensed trustee company within the same group’.
- 21 Preliminary industry feedback to date from corporate groups who operate deemed licensees indicate that they all plan to transfer their traditional services business from the deemed licensees to the licensed entity within the group. The transfers will need to be completed before the expiration of the transitional period. These transfers will be intra-group voluntary transfers.
- 22 In addition, where a group has more than one entity holding an AFS licence, they may choose to use the voluntary transfer provisions to reduce the number of licences maintained within the group. These transfers will also be intra-group transfers.
- 23 Section B sets out our proposal for the information we will require when assessing an application for an intra-group transfer determination.

Arm’s length voluntary transfer determinations

- 24 The voluntary transfer provisions may also be used to facilitate the transfer of client estate assets and liabilities from one licensed trustee company to another in a situation where the transfer is between unrelated companies.
- 25 Before the introduction of Ch 5D, the transfer of an estate management business between trustee companies would, generally speaking, be a judicial

one or achieved by the transfer of share ownership in the transferring trustee company. Under Pt 5D.6, the voluntary transfer provisions may be used to transfer an estate management business from one licensed trustee company to another.

- 26 The provisions in Pt 5D.6 are designed to provide for the continuance of the duties and obligations formerly owed to the client by the transferring company following the change of trusteeship to the receiving company.
- 27 Section C sets out our proposal for the information we will require when assessing an application for an arm's length transfer determination.

Compulsory transfer determinations

- 28 The need for a compulsory transfer determination is triggered by the cancellation by ASIC of the AFS licence of the trustee company.
- 29 The circumstances where we may cancel an AFS licence of a body corporate, with or without a hearing, are set out in s915B and 915C of the Corporations Act. If the trustee company, or its related body corporate, is a body regulated by APRA, we will consult with APRA before suspending or cancelling a licence: s915I of the Corporations Act.
- 30 A trustee company requires an AFS licence with an authorisation to provide traditional services to provide estate management services. If we cancel its licence then the company can no longer provide those services. The cancellation of a licence potentially leaves clients, some of whom may be vulnerable persons (such as minors or other persons who lack legal capacity), without a trustee to manage their interests.

Note: See s601WBA of the Corporations Act. These provisions are subject to s915H of the Corporations Act, which provides that when cancelling or suspending a licence, we may allow the licence to continue in a limited way for the purposes of specified provisions of the Corporations Act for specified matters, a specified period, or both.

- 31 In this case, we may make a compulsory transfer determination (of either a partial or total transfer of estate assets and liabilities) to another licensed trustee company with the consent of the board of the receiving company.
- 32 In the circumstances where a licensed trustee company is unavailable or unwilling to accept a transfer of an estate business, we may, with the consent of the relevant Public Trustee, make a compulsory transfer determination to a state or territory Public Trustee.
- 33 This option is contained in the legislation to provide a practical solution, possibly only on a temporary basis, so that clients of trustees that no longer

have an AFS licence are not left without a trustee to manage their affairs.

The Explanatory Memorandum (paragraph 1.19) states:

In circumstances where a private licensed trustee company becomes unviable, the only practical option may be to transfer its business to a State Public Trustee, if only temporarily; for example, because no private licensed trustee company is able or willing to accept the transfer.

- 34 We would consult closely with APRA on a compulsory transfer determination if the entities involved are regulated by APRA.
- 35 Section D sets out our proposal for the information we will require when making a compulsory transfer determination.

B Intra-group voluntary transfer determinations

Key points

We are proposing to require trustee companies applying to ASIC for an intra-group voluntary transfer determination to supply the information set out in Proposal B1.

Licensed receiving trustee companies regulated by APRA will not have to provide information on the resources (including financial, technological and human resources) and risk management systems that may be required following the transfer of the estate business, because these are already monitored by APRA.

Information required for an application

Proposal

- B1** We propose that the transferring company and the receiving company must supply the information set out in Table 1 with an application for an intra-group voluntary transfer determination between two related companies.

Table 1: Information required for an application for an intra-group voluntary transfer determination

Type	Information required
Entity information	<ul style="list-style-type: none"> • The names and Australian Company Numbers (ACNs) of the transferring and receiving companies. • A copy of the consent of the board of the receiving company. • The proposed date of transfer. • A chart of the corporate group showing the group shareholders and the ultimate holding company of both companies. • A diagram of the proposed management and organisational structure of the receiving company after the transfer.
Possible advantages and disadvantages of the transfer	<ul style="list-style-type: none"> • Information on the benefits to the clients of both companies if the transfer takes place (this may include savings on costs). • Information on any possible disadvantages to the clients of both companies should the transfer take place.

Type	Information required
Information on the transfer	<ul style="list-style-type: none"> • An overview of the type (e.g. deceased estates, estates managed under a power of attorney), dollar value and the asset class of the estates being transferred and a statement that this is a total transfer of estate assets and liabilities. • An outline of the internal and external communication strategies planned for the transfer (i.e. what will clients and other external stakeholders be told, along with internal communication to staff). • Copies of any transfer agreement or service level agreements relevant to the transfer. • The particulars of the expected effects of the transfer, if any, on clients subject to the transfer, with regard to: <ul style="list-style-type: none"> – client service and reporting levels; – fee levels; – staffing levels; and – the offices maintained in states and territories, including in regional Australia (as applicable). • The particulars of the expected effects of the transfer, if any, on the risk and compliance program of the receiving company.
AFS licence issues	<ul style="list-style-type: none"> • Information on how the receiving company will deal with client complaints and disputes lodged with the transferring company before the date of transfer. • Advice as to whether the compensation arrangements in relation to the transferred clients will be adequate. • For receiving companies that are not APRA regulated, written assurances from the board that it will have management resources, financial resources in compliance with RG 166, risk management systems and controls, and the staff in place to manage the estate assets and liabilities transferred.

Your feedback

- B1Q1 Do you agree with our approach to the information we require for an intra-group transfer? If not, why not?
- B1Q2 Is there any additional information that we should require when considering an intra-group transfer?
- B1Q3 Is there any alternative information that may satisfy the requirements in our proposal?
- B1Q4 Would this proposal result in practical problems or additional compliance costs? Please give details, including figures and reasons.
- B1Q5 Are there any aspects of traditional services, and the estate management function in particular, that make this proposal impractical?
- B1Q6 Are there any additional issues relating to intra-group voluntary transfers that should be considered in ASIC guidance?

Rationale

- 36 In developing this proposal, we are conscious of the intention of the policy to reduce the ‘red tape’ of the pre-existing state and territory regime. As noted in paragraph 20, the Australian Government supported the rationalisation of estate management operations within the trustee company industry. The voluntary transfer provisions in Pt 5D.6 are designed to provide a cost effective administrative process for this.
- 37 We are also aware of the current business models of the entities operating deemed licensees. We understand that the groups that operate with deemed licensees, or with more than one licensee in the group, currently operate on a ‘shared services’ operating model. This means that key functions in delivering estate management such as custody, estate accounting and reporting, finance, technology and human resources, and risk and compliance are not performed within each state-based entity, but are performed and managed centrally within the group. This suggests to us that intra-group transfers should result in minimal disruption to clients and to the day-to-day operation of the estate management function within the relevant corporate group.
- 38 Bodies regulated by APRA are exempt from the general obligations, attached to an AFS licence, to have adequate resources (including financial, technological and human resources) and risk management systems: s912A(1)(d) and (h) of the Corporations Act. We have recognised this regulatory approach in developing proposals about the capacity and resource requirements in a receiving trustee company for an intra-group transfer. Consequently, we are not proposing to seek board assurances from APRA-regulated trustee companies on these matters.
- 39 We are seeking to strike a balance between being satisfied that the transfer is in the best interest of clients (when viewed as a group), and making the process relatively streamlined and timely for the entities involved.

C Arm's length voluntary transfer determinations

Key points

We are proposing to require trustee companies applying to ASIC for an arm's length voluntary transfer determination to supply the information set out in Proposal C1.

Licensed receiving trustee companies regulated by APRA will not have to provide information on the resources (including financial, technological and human resources) and risk management systems that may be required following the transfer of the estate business, because these are already monitored by APRA.

Information required for an application

Proposal

- c1 We propose that the transferring company and the receiving company must supply the information set out in Table 2 with an application for an arm's length transfer determination between two unrelated companies.

Table 2: Information required for an application for an arm's length transfer determination

Type	Information required
Entity information	<ul style="list-style-type: none"> The names and ACNs of the transferring and receiving companies. A copy of the consent of the board of the receiving company. The proposed date of transfer. Unless the companies are listed, an overview of the share ownership structure of both companies and information about the corporate group to which they belong (as applicable). A diagram of the proposed management and organisational structure of the receiving company after transfer and, where relevant, any changes to the board of the receiving company.
Other regulatory approvals	<ul style="list-style-type: none"> Details of any other regulatory approvals that may be required for the transfer—for example, from the Australian Competition and Consumer Commission (ACCC). Where relevant, a written assurance from the board of the receiving company that it will observe any prudential requirements imposed by, or agreed with, APRA in relation to the transfer.
Possible advantages and disadvantages of the transfer	<ul style="list-style-type: none"> Information on the benefits to the clients of both companies if the transfer takes place. Information on any possible disadvantages to the clients of both companies should the transfer take place.

Type	Information required
Information on the transfer	<ul style="list-style-type: none"> • An overview of the type (e.g. deceased estates, estates managed under a power of attorney), dollar value and the asset class of the estates being transferred and a statement that this is a total transfer of estate assets and liabilities. • An outline of the internal and external communication strategies planned for the transfer (i.e. what clients and other external stakeholders will be told, along with internal communication to staff) and a copy of draft communication(s) to clients the subject of the transfer. • A copy of the transfer agreement between the companies. • An explanation of the due diligence undertaken by both companies, in particular by the receiving company on the capacity to handle the transferring company's clients and assets. • A copy of any report prepared by an independent expert in relation to the transfer. • A copy or outline of the project plan, and information on the timetable for both companies in relation to the transfer, including integration plans of the receiving company. • A description of how the transfer value of the estate assets and liabilities will be arrived at and what procedures will be in place within the receiving company to meet its duty to ascertain the value of the assets and liabilities it receives as trustee. • Particulars of the expected effects of the transfer, if any, on clients subject to the transfer, with regard to: <ul style="list-style-type: none"> – client service and reporting levels; – fee levels; – staffing levels; and – the offices maintained in states and territories, including in regional Australia (as applicable). • The particulars of the expected effects of the transfer, if any, on the risk and compliance program of the receiving company.
AFS licence issues	<ul style="list-style-type: none"> • Information on how the receiving company will deal with client complaints and disputes lodged with the transferring company before the date of transfer. • Particulars of any conflicts of interest (financial or otherwise) that an officer or employee of either company may have about the proposed transfer of estate assets and liabilities, and, if a conflict has been identified, the details of how it will be managed and disclosed to affected parties. • Advice as to whether the compensation arrangements in relation to the transferred clients will be adequate. • For receiving companies that are not APRA regulated, written assurances from the board that it will have management resources, financial resources in compliance with RG 166, risk management systems and controls, and the staff in place to manage the estate assets and liabilities transferred.

Your feedback

- C1Q1 Do you agree with this approach for voluntary transfers between arm's length entities? If not, why not?
- C1Q2 Is there any additional information that we should require when considering an arm's length transfer (e.g. a detailed list of the estate assets and liabilities being transferred)?
- C1Q3 Is there any alternative information that may satisfy the requirements in our proposal?
- C1Q4 Would this proposal result in practical problems or additional compliance costs? Please give details, including figures and reasons.
- C1Q5 Are there any aspects of traditional services, and the estate management function in particular, that make this proposal impractical?
- C1Q6 Are there any additional issues relating to arm's length voluntary transfers that should be considered in ASIC guidance?

Rationale

- 40 We consider that voluntary transfers between arm's length entities will demand a higher level of qualitative information to that for an intra-group transfer determination. In assessing the information supplied and before approving the transfer, we must conclude that the transfer is in the best interests of the clients of the transferring company and the receiving company (when viewed as a group).
- 41 We will use the particulars of each company's due diligence process and their project plans to help assess the general state of readiness and capacity of the receiving company. This is particularly important where the scale of operations of the receiving company is to change significantly. Correspondingly, these particulars may help assess the likely accuracy of the estate and client information supplied to the receiving company by the transferring company.
- 42 Similarly, there will be matters that may not have previously been considered by the companies in the context of a potential transfer to an unrelated receiving company. These may include issues such as other regulatory approvals required, potential conflicts of interests and the transfer date valuations of the estate assets and liabilities. We also consider a greater scrutiny of proposed communication to the affected clients is required to ensure that accurate and timely information is provided to them. In certain circumstances, if it is not in existence, we may request the preparation of an independent expert's report on the transfer.
- 43 Entities regulated by APRA are exempt from the general obligations, attached to an AFS licence, to have adequate resources (including financial,

technological and human resources) and risk management systems: s912A(1)(d) and (h) of the Corporations Act. We have adopted this regulatory approach, and are not proposing to seek board assurances on the capacity and resource requirements from APRA-regulated receiving companies involved in arm's length transfers.

- 44 We may consult with APRA on a voluntary transfer determination that involves entities that are regulated by APRA.

D Compulsory transfer determinations

Key points

We are proposing to require trustee companies involved in a compulsory transfer determination to supply the information set out in Proposal D1.

Licensed receiving trustee companies regulated by APRA will not have to provide information on resources (including financial, technological and human resources) and risk management systems that may be required following the transfer of the estate business, because these are already monitored by APRA.

If the receiving company is a state or territory Public Trustee, there is no requirement that the transfer be in the best interests of the clients of the relevant Public Trustee.

Information required

Proposal

- D1 We propose that a transferring company and a receiving company supply the information set out in Table 3 to ASIC in connection with a compulsory transfer determination:

Table 3: Information required for a compulsory transfer determination

Type	Information required
Entity information	<ul style="list-style-type: none"> The name and ACN of the receiving company. A copy of the consent of the board of the receiving company. The proposed date of transfer. Unless the receiving company is a Public Trustee or listed, an overview of the share ownership of the receiving company and information about the corporate group to which it belongs (as applicable).
Other regulatory approvals	<ul style="list-style-type: none"> Details of any other regulatory approvals that may be required for the transfer—for example, from the ACCC. Where relevant, a written assurance from the board of the receiving company that it will observe any prudential requirements imposed by, or agreed with, APRA in relation to the transfer.

Type	Information required
Information about the transfer	<ul style="list-style-type: none"> • Whether the transfer is partial or total. • In the case of a partial transfer, a detailed list of the estate assets and liabilities being transferred. • An overview of the type (e.g. deceased estates, estates managed under a power of attorney), dollar value and the asset class of the estates being transferred. • A copy of any transfer agreement. • An outline of the internal and external communication strategies planned for the transfer (i.e. what will clients and other external stakeholders be told along, with internal communication to staff) and a copy of draft communication(s) to clients the subject of the transfer. • Unless the receiving company is a Public Trustee, an explanation of the due diligence undertaken by both companies, in particular by the receiving company on the capacity to provide traditional services to the transferring company's clients and assets. • A copy of any report prepared by an independent expert in relation to the transfer. • A copy or outline of the receiving company's integration plan for the management of the transferred clients and their estate assets and liabilities. • Unless the receiving company is the Public Trustee, particulars of the expected effects of the transfer in the receiving company, if any, on clients subject to the transfer, with regard to: <ul style="list-style-type: none"> – client service and reporting levels; – fee levels; – staffing levels; and – the offices maintained in states and territories, including in regional Australia (as applicable). • The particulars of the expected effects of the transfer, if any, on the risk and compliance program of the receiving company.
AFS licence issues	<ul style="list-style-type: none"> • Information on how the receiving company will deal with client complaints and disputes lodged with the transferring company before the date of transfer. • Unless the receiving company is a Public Trustee, advice as to whether the compensation arrangements in relation to the transferred clients will be adequate. • Unless the receiving company is a Public Trustee, particulars of any conflicts of interest (financial or otherwise) that an officer or employee of either company may have about the proposed transfer of estate assets and liabilities, and, if a conflict has been identified, the details of how it will be managed and disclosed to affected parties. • Unless the receiving company is a Public Trustee or regulated by APRA, written assurances from the board that it will have management resources, financial resources in compliance with RG 166, risk management systems and controls, and the staff in place to manage the estate assets and liabilities transferred.

Your feedback

- D1Q1 Do you agree with this approach to the information we require for a compulsory transfer determination? If not, why not?
- D1Q2 Is there any additional information that we should require when considering a compulsory transfer determination (e.g. in the case of a total transfer, a detailed list of the estate assets and liabilities being transferred)?
- D1Q3 Is there any alternative information that may satisfy the requirements in our proposal?
- D1Q4 Would this proposal result in practical problems or additional compliance costs? Please give details, including figures and reasons.
- D1Q5 Are there any aspects of traditional services, and the estate management function in particular, that make this proposal impractical?
- D1Q6 Are there any particular issues or concerns in relation to transfers to a state or territory Public Trustee that should be considered in ASIC guidance?
- D1Q7 Are there any additional issues relating to compulsory transfers that should be considered in ASIC guidance?

Rationale

- 45 Due to the likely circumstances of a trustee company that results in a cancellation of its AFS licence by ASIC, the information available from it to support a compulsory determination application may possibly be limited or incomplete or inaccurate.
- 46 The particular exigencies of the situation may mean that it is important for any transfer of estate business to be completed as quickly as possible so that clients are not left without an effective trustee to manage their affairs. These considerations have influenced the information we are proposing to require, especially from the transferring company.
- 47 Compulsory transfer determinations of estate assets and liabilities may be total or partial. However, if the transfer is partial, it will be very important to have complete and accurate details of the assets and liabilities transferred because there are legal consequences flowing from the certificate issued following the determination. The certificate we prepare will, in the case of a partial transfer, have attached to it a list of the assets and liabilities being transferred.

Note: Div 3 of Pt 5D.6 of the Corporations Act sets out the evidentiary value of a certificate and states that certificates are prima facie evidence of all matters certified. In the case of interests in land, they will be taken as evidence of title at the Registrar of Titles in the states and territories. Similar provisions apply to assets other than land.

- 48 In developing these proposals, we have been aware of the nature of the role of the Office of the Public Trustee and the fact that they are a government-controlled body. Consequently, when we are considering a transfer determination to these entities, we are not proposing to seek information on shareholdings, its due diligence processes, conflicts of interest issues and its operational capacity (including resources and risk management systems).
- 49 In certain circumstances, if it is not in existence, we may request the preparation of an independent expert's report on the transfer.
- 50 Entities regulated by APRA are exempt from the general obligations attached to an AFS licence to have adequate resources (including financial, technological and human resources) and risk management systems: s912A(1)(d) and (h) of the Corporations Act. We have adopted this regulatory approach, and we are not proposing to seek board assurances in relation to capacity and resource requirements from APRA-regulated receiving companies involved in compulsory transfers.
- 51 We will consult with APRA on a compulsory transfer determination that involves entities that are regulated by APRA.

E Regulatory and financial impact

52 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us, we think they will strike an appropriate balance between:

- (a) protecting consumers by ensuring that we are satisfied that in making a transfer determination it is in the best interests of the clients of both the receiving company and the transferring company (when viewed as a group); and
- (b) implementing proposals on the information required that are not unduly burdensome and impractical for industry.

53 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:

- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
- (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
- (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

54 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

55 To ensure that we are in a position to properly complete any required RIS, we ask you to provide us with as much information as you can about our proposals or any alternative approaches, including:

- (a) the likely compliance costs;
- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits.

See 'The consultation process' on p. 4.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries out a financial services business to provide financial services Note: This is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an Australian financial services licence under s913B of the Corporations Act Note: This is a definition contained in s761A of the Corporations Act.
arm's length transfer	A transfer between two companies that are not related bodies corporate by virtue of s50 of the Corporations Act
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Ch 5D (for example)	A chapter of the Corporations Act (in this example, numbered 5D)
client of a trustee company	Has the meaning given by s601RAB(3) of the Corporations Act and reg 7.1.28A of the Corporations Regulations
[CO 07/428] (for example)	An ASIC class order (in this example, numbered 07/428)
compulsory transfer	Has the meaning given in s601WBA 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
deemed licensee	Trustee companies that did not hold an AFS licence as at 6 May 2010
estate assets and liabilities	Has the meaning given in s601WAA of the Corporations Act

Term	Meaning in this document
estate management functions	<p>As defined in s601RAC(2) of the Corporations Act, the following functions:</p> <ul style="list-style-type: none"> • acting as a trustee of any kind, or otherwise administering or managing a trust; • acting as an executor or administrator of a deceased estate; • acting as an agent, attorney or nominee; • acting as a receiver, controller or custodian of property; • otherwise acting as a manager or administrator (including in the capacity as guardian) of the estate of an individual; and • acting in any other capacity prescribed by the regulations for the purpose of this paragraph
Explanatory Memorandum	Explanatory Memorandum to the Corporations and Other Legislation Amendment (Trustee Companies and Other Measures) Bill 2011
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
intra-group transfer	A voluntary transfer of estate assets and liabilities between companies who are members of the same corporate group
Modernisation Act	<i>Corporations Legislation Amendment (Financial Services Modernisation) Act 2009</i>
Pt 5D.6	A part of the Corporations Act (in this example, numbered 5D.6)
receiving trustee company	The company that is receiving the transfer of estate assets and liabilities from the transferring company in a transfer determination
reg 5D.1.01	A regulation of the Corporations Regulations (in this example, numbered 5D.1.01)
RG 104	An ASIC regulatory guide (in this example, numbered 104)
s9	A section of the Corporations Act (in this example, numbered 9), unless otherwise specified
TCA	Trustee Corporations Association of Australia

Term	Meaning in this document
traditional services	<p>Traditional trustee company services as defined in s601RAC(1) of the Corporations Act, which are:</p> <ul style="list-style-type: none"> • performing estate management functions (as defined in s601RAC(2)); • preparing a will, a trust instrument, a power of attorney or an agency arrangement; • applying for probate of a will, applying for grant of letters of administration, or electing to administer a deceased estate; • establishing and operating common funds; and • any other services prescribed by the regulations for the purpose of s601RAC(1)
transferring trustee company	The company that is transferring the estate assets and liabilities to the receiving company in a transfer determination
trustee company	Has the same meaning as in s601RAB of the Corporations Act
voluntary transfer	Has the meaning given in s601WBA of the Corporations Act