

Attachment 1 to CP 264: Draft instrument



ASIC

Australian Securities & Investments Commission

ASIC Corporations (Nominee and Custody Services) Instrument 2016/XX

I, <insert name>, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Date 2016

[DRAFT ONLY – NOT FOR SIGNATURE]

<insert name>

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Part 1—Preliminary

1 Name of legislative instrument

This is *ASIC Corporations (Nominee and Custody Services) Instrument 2016/XX*.

2 Commencement

This instrument commences on the day after it is registered on the Federal Register of Legislation.

Note: The register may be accessed at www.legislation.gov.au.

3 Authority

This instrument is made under subsections 741(1), 992B(1) and 1020F(1) of the *Corporations Act 2001*.

4 Definitions

In this instrument:

accessible financial product means a financial product that may be held through a nominee and custody service.

accessible securities means securities that may be held through a nominee and custody service.

Act means the *Corporations Act 2001*.

custodial or depository service has the meaning given by section 766E of the Act.

custodian means a person who provides a custodial or depository service in connection with a nominee and custody service.

Note: The custodian may also be the operator of the nominee and custody service.

financial product has the meaning given by Division 3 of Part 7.1 of the Act.

IDPS has the same meaning as in ASIC Class Order [CO 13/763].

IDPS-like scheme has the same meaning as in ASIC Class Order [CO 13/762].

issuer means a person who is capable of issuing or making available or transferring accessible securities.

nominee and custody service means a custody and settlement service (which includes the provision of a custodial or depository service):

- (a) in relation to which the clients of the service have the sole discretion to decide what (but not necessarily when) financial products will be acquired or disposed of, except where:
 - (i) there are any prior written directions, which the client has agreed not to vary, to acquire or dispose of a particular financial product in particular circumstances (other than a circumstance that is affected by a discretion of an operator); or
 - (ii) the client has authorised the operator or another person to give directions on their behalf for the purpose of the other person receiving or securing payment of moneys owing by the client to the person; and
- (b) which is not an IDPS or provided under an IDPS-like scheme.

operator, in relation to a nominee and custody service, means a public company that is a holder of an Australian financial services licence authorising it to provide a custodial or depository service, who contracts with a client for the provision of the nominee and custody service or a function that forms part of the nominee and custody service.

Part 2—Exemptions

5 Operators of nominee and custody services

- (1) An operator of a nominee and custody service does not have to comply with:
 - (a) Part 6D.2 or 6D.3 of the Act for an offer to issue equitable rights or interests in accessible securities arising because of an offer to hold, or arrange for the holding of, the accessible securities through the nominee and custody service; and
 - (b) Division 8 of Part 7.8, or Part 7.9, of the Act in relation to a financial product that is an equitable right or interest in an accessible financial product arising because of a holding, or an offer to hold or arrange for the holding of, the accessible financial product through the nominee and custody service.

Note: This subsection does not apply to the accessible securities or accessible financial products that are held through the nominee and custody service.
- (2) An operator of a nominee and custody service cannot rely on subsection (1) if ASIC has given a notice in writing to the operator stating that it cannot rely on that subsection and has not withdrawn the notice.

6 People involved in the operation of nominee and custody services

- (1) A person (other than an operator) who is involved in the operation or promotion of a nominee and custody service does not have to comply with:
 - (a) Part 6D.2 or 6D.3 of the Act for an offer to issue equitable rights or interests in accessible securities arising because of an offer to hold, or arrange for the holding of, the accessible securities through the nominee and custody service; and
 - (b) Division 8 of Part 7.8, or Part 7.9, of the Act in relation to a financial product that is an equitable right or interest in an accessible financial product arising because of a holding, or an offer to hold or arrange for the holding of, the accessible financial product through the nominee and custody service.

Note: This subsection does not apply to the accessible securities or accessible financial products that are held through the nominee and custody service.
- (2) A person cannot rely on subsection (1) if ASIC has given a notice in writing to the person stating that it cannot rely on that subsection and has not withdrawn the notice.

Part 3—Declarations

7 Offers of securities through nominee and custody services

Chapter 6D of the Act applies to all persons as if that Part were modified or varied by, after section 704, inserting:

“704C Offers through a nominee and custody service

- (1) A person who makes an offer of accessible securities through a nominee and custody service that needs disclosure under this Part must promptly notify the operator or custodian if:
 - (a) a supplementary or replacement document has been lodged in relation to the disclosure document; or
 - (b) the person is prohibited under Division 1 of Part 6D.3 from making offers of securities under the disclosure document; or
 - (c) the disclosure document is withdrawn before the expiry date specified in the disclosure document.
- (2) Nothing in this Part or Part 6D.3 requires a disclosure document for offers of accessible securities through a nominee and custody service to include information about the nominee and custody service or the rights attached to the accessible securities where they differ from the rights that a person would have if they acquired the accessible securities directly.
- (3) A person cannot rely on subsection (2) if ASIC has given a notice in writing to the person stating that it cannot rely on that subsection and has not withdrawn the notice.
- (4) In this section:

accessible securities, custodian, nominee and custody service and operator have the same meanings as in subsection 912AE(10).”.

8 Operators of nominee and custody services

Part 7.6 of the Act (other than Division 4 and 8) applies to all persons as if that Part were modified or varied by, before section 912B, inserting:

“912AE Requirements for the operation of a nominee and custody service

- (1) This section applies to a financial services licensee that provides a nominee and custody service.

Acquisition of accessible investments that are interests in unregistered scheme

- (2) The licensee must not, and must ensure that any custodian acting on its behalf does not, acquire accessible investments for a client as part of a nominee and custody service that are:
- (a) interests in a managed investment scheme that is not a registered scheme; or
 - (b) interests in a scheme that would be a managed investment scheme but for paragraph (e) of the definition of *managed investment scheme* in section 9;

unless the licensee reasonably believes that:

- (c) had the client invested directly in the scheme, the scheme would not have been required to have been registered; and
- (d) had all interests in the scheme held in custodial arrangements been held by the clients (as defined in section 1012IA) of those arrangements, the scheme would not have been required to be registered.

Note: Under section 601ED a managed investment scheme does not generally need to be registered if it has no more than 20 members. If interests held through an IDPS, an IDPS-like scheme or a nominee and custody service had been acquired directly, the scheme may have required registration as it may have had more than 20 members.

Acquisition of accessible securities under direction from client

- (3) The licensee must not, and must ensure that any custodian acting on its behalf does not, acquire accessible securities for a client as part of a nominee and custody service under a direction from the client unless:
- (a) both of the following are satisfied:
 - (i) the licensee reasonably believes that the client has been given a disclosure document for the accessible securities that would have been required had the accessible securities been offered to the client directly at the time of the acquisition of the accessible securities;

- (ii) the licensee has no reason to believe that the disclosure document is defective as if it were prepared at that time; or
- (b) the licensee reasonably believes that the accessible securities could lawfully have been offered and issued or sold, as the case may be, to the client directly without the client being required to be given a disclosure document other than because of subsection 708(1).

Acquisition of accessible financial products under direction from client

- (4) The licensee must not, and must ensure that any custodian acting on its behalf does not, acquire accessible financial products for a client as part of a nominee and custody service under a direction from the client unless:
 - (a) subsection (5), (6) or (7) are satisfied; and
 - (b) from 1 July 2017—subsection (8) is satisfied.
- (5) This subsection is satisfied if:
 - (a) the licensee reasonably believes that the client has been given a copy of the Product Disclosure Statement for the accessible financial product that would have been required had the financial product been offered to the client directly at the time of the acquisition of the financial product; and
 - (b) the licensee has no reason to believe that the Product Disclosure Statement is defective as if it were prepared at the time of the acquisition.
- (6) This subsection is satisfied if:
 - (a) the licensee reasonably believes that the accessible financial product could lawfully have been offered and issued or sold, as the case may be, to the client directly without the client being required to be given a Product Disclosure Statement other than because of section 1012E; and
 - (b) the licensee has no reason to believe that a Product Disclosure Statement would have been required to be given to the client if all other holdings of the financial product in custodial arrangements had been issued to the clients (as defined in section 1012IA) of those arrangements.

- (7) This subsection is satisfied if:
- (a) the client already holds an accessible financial product of the same kind through the nominee and custody service; and
 - (b) the licensee has given the client a Product Disclosure Statement for a financial product of the same kind; and
 - (c) the licensee reasonably believes that the client has access to, and knows that they have access to, a Product Disclosure Statement for the financial product; and
 - (d) the Product Disclosure Statement the client has access to is the most current in use or does not differ from the most current in use in a way that is materially adverse for the client; and
 - (e) the licensee has no reason to believe the Product Disclosure Statement the client has access to is defective as if it were prepared at the time of the acquisition.
- (8) This subsection is satisfied if the licensee reasonably believes that the issuer or seller of the financial products has a dispute resolution system that:
- (a) covers complaints against the issuer or seller by each client of the operator who:
 - (i) holds through the nominee and custody service an accessible financial product issued or sold by the issuer or seller; and
 - (ii) if the issuer or seller had issued or sold the accessible financial product the subject of the direction to the client directly—would have acquired the product as a retail client;where the complaints are made in connection with an accessible financial product issued or sold by the issuer or seller that is held through the nominee and custody service; and
 - (b) complies with subsection 912A(2) as if the issuer or seller were a financial services licensee and the issue or sale was a financial service covered by the issuer's or seller's Australian financial services licence provided to the acquirer as a retail client.

Facilitating dispute resolution

- (9) If a client notifies the licensee that it has a complaint in relation to an accessible investment, the licensee must take reasonable steps to facilitate resolution of the dispute between the client and the issuer of the accessible investment, including informing the client whether the issuer has a dispute resolution system that is available to the client.

Interpretation

- (10) In this section:

accessible financial product means a financial product that may be held through a nominee and custody service.

accessible investments means assets or property that may be held through a nominee and custody service, including accessible securities and accessible financial products.

accessible securities means securities that may be held through a nominee and custody service.

custodial or depository service has the meaning given by section 766E of the Act.

custodian means a person who provides a custodial or depository service in connection with a nominee and custody service.

Note: The custodian may also be the operator of the nominee and custody service.

defective:

- (a) in relation to a Product Disclosure Statement—has the same meaning as in section 1021B; and
- (b) in relation to a disclosure document—means a disclosure document in relation to which a person offering securities under the disclosure document must not issue securities or must deal under subsection 724(2) of the Act with any applications for securities made under the disclosure document that have not resulted in an issue or transfer of the securities.

IDPS has the same meaning as in ASIC Class Order [CO 13/763].

IDPS-like scheme has the same meaning as in ASIC Class Order [CO 13/762].

issuer means a person who is capable of issuing or making available or transferring accessible securities.

nominee and custody service means a custody and settlement service (which includes the provision of a custodial or depository service):

- (a) in relation to which the clients of the service have the sole discretion to decide what (but not necessarily when) financial products will be acquired or disposed of, except where:
 - (i) there are any prior written directions, which the client has agreed not to vary, to acquire or dispose of a particular financial product in particular circumstances (other than a circumstance that is affected by a discretion of an operator); or
 - (ii) the client has authorised the operator or another person to give directions on their behalf for the purpose of the other person receiving or securing payment of moneys owing by the client to the person; and
- (b) which is not an IDPS or provided under an IDPS-like scheme.

operator, in relation to a nominee and custody service, means a public company that is a holder of an Australian financial services licence authorising it to provide a custodial or depository service, who contracts with a client for the provision of the nominee and custody service or a function that forms part of the nominee and custody service.”.

9 Product Disclosure Statements: nominee and custody services

Part 7.9 of the Act applies in relation to all persons as if the provisions of that Part were modified or varied by, after subsection 1012IA(9), inserting:

- “(10) An operator of a nominee and custody service or a custodian does not need to give a client a Product Disclosure Statement for a regulated acquisition that complies with subsection 912AE(5), (6) or (7).

In this subsection, **custodian**, **nominee and custody service** and **operator** have the same meanings as in subsection 912AE(10).”.