

7 June 2016

Mr David Freyne  
Australian Securities & Investments Commission  
Level 5, 100 Market Street  
SYDNEY NSW 2000

Email: david.freyne@asic.gov.au

Dear David

**Submission on Consultation Paper 258  
Remaking ASIC class order on differential fees: [CO 03/217]**

Thank you for the opportunity to provide feedback on consultation paper 258 released by ASIC on 30 May 2016.

CNM Legal is a commercial law firm specialising in funds management, financial services licensing, corporate capital raising and corporate advisory work.

We act for responsible entities of registered managed investment schemes and so many of our clients have a keen interest in the matters raised in your consultation paper.

Our responses to the questions in your proposal are as follows:

***B1Q1 Are all of the heads of relief in [CO 03/217] regularly relied upon or should ASIC consider allowing the relief to lapse?***

In our experience, most of the heads of relief in CO 03/217 are relied upon and so the relief should not lapse. In particular, the relief to be able to negotiate fees with wholesale clients is widely relied upon.

***B1Q2 Do you agree with proposal B1(a) to extend the switching facility relief to a managed investment scheme operated by a related body corporate of the responsible entity? Please provide reasons for your response.***

Yes. It would be useful to expand the range of schemes to include those operated by responsible entities within the same corporate group.

***B1Q3 Do you agree with proposal B1(b) to remove relief where a member carries out a transaction by electronic means? Please provide reasons for your response and details of any regulatory impact of a policy change in this area.***

We query whether this relief is redundant. Although allowing all members of a class to transact electronically is treating them equally, if the fees that are charged to them are based on whether they exercise that right then it still leads to the outcome that they are treated differently. An RE should have the right to charge investors who want to receive paper copies of materials, for example, by charging lower fees to those who are happy to receive materials electronically.

**B1Q4 Should we review our policy on the restrictions on individual fee negotiation in subsection 5(3) of draft ASIC Corporations (Registered Schemes: Differential Fees) Instrument 2016/XX, and, in particular:**

**(a) Is this relief widely used and considered useful by industry? Please provide any relevant data available to support your response.**

Yes. Most, if not all, of the responsible entities that we work with rely on the relief currently.

**(b) Should all members (including retail clients) be permitted to individually negotiate fees with a responsible entity? Please provide reasons for your response and details of any regulatory impact of a policy change in this area.**

Yes. The relief at paragraph 1(f) of CO 03/217 is limited to savings surrounding the cost of *servicing* a member, and arguably does not take into account the reduction in distribution costs that might occur if the clients invest via a particular source: a dealer group, an independent licensee, a platform, an organisation etc. Distribution costs are generally passed on to members as a scheme cost. If an RE can provide discounted fees to retail clients that invest through a particular distribution channel (regardless of the amount they invest), it can achieve a reduction in costs not only during the life of the scheme but also at the commencement of the scheme through potential reductions in distribution costs. In this respect, the RE should have the ability to negotiate lower fees with retail clients that invest through a particular distribution channel.

**(c) Would an ability for all members to negotiate fees with a responsible entity have a positive or negative impact on the fee structure and overall level of fees that might apply generally to members? Please provide reasons and any data supporting your response.**

Any impact is likely to be neutral. The cost structures of schemes will not change if REs are able to negotiate fees with all clients. Some clients may pay lower fees than others, but these are likely to reflect any reduction in costs saved for the entry into the scheme by those clients and the ongoing servicing of those clients.

We **enclose** a marked-up version of the new instrument with some suggested minor changes to the draft instrument mainly included to ensure the benefits of the current relief are carried across in their entirety.

Sincerely



**Chris Mee**  
Principal  
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Enc:

1. Marked-up version of the draft instrument.

# Attachment to CP 258: Draft instrument



**ASIC**

Australian Securities & Investments Commission

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## **ASIC Corporations (Registered Schemes: Differential Fees) Instrument 2016/XX**

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

Date 2016

<signature>

<insert name>

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## Part 1—Preliminary

### 1 Name of legislative instrument

This instrument is *ASIC Corporations (Registered Schemes: Differential Fees) 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](http://www.legislation.gov.au).

### 3 Authority

This instrument is made under subsection 601QA(1) of the *Corporations Act 2001*.

### 4 Definitions

In this instrument:

*Act* means the *Corporations Act 2001*.

*associated person*, in relation to a member, means:

- (a) a spouse, parent, child, brother or sister of the member; or
- (b) a company which has no member other than the member or a person mentioned in paragraph (a); or
- (c) a regulated superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993* which has no member other than the member or a person mentioned in paragraph (a); or
- (d) a trust which has no beneficiary other than the member or a person mentioned in paragraph (a) or (b); or
- (e) an entity controlled by the member or a person mentioned in paragraph (a) or (b), and includes an entity jointly controlled by the member and a person mentioned in paragraph (a) or (b).

*differential fee arrangement* means an arrangement for the charging, rebating or waiving of fees, including entry, exit and periodic fees, by the responsible entity to members of the scheme on a basis that differs from that applying to other members who hold interests of the same class.

**employee member**, in relation to a scheme, means a member of the scheme who is also an employee of the responsible entity of the scheme or a related body corporate.

**wholesale client** has the meaning given by section 761G of the Act.

## Part 2—Exemption

### 5 Differential fees

- (1) A responsible entity of a registered scheme does not have to comply with paragraph 601FC(1)(d) of the Act to the extent it would otherwise prohibit the responsible entity from administering a differential fee arrangement.

*Characteristics of the member or of their investment*

- (2) This instrument applies to a differential fee arrangement under which the fees that may be charged, rebated or waived by the responsible entity to members of the scheme differ based on any of the following criteria:
- (a) the total value of, or the number of, interests held by the member, or by the member and associated persons, in one or more of the following:
    - (i) the scheme;
    - (ii) other ~~registered-managed investment~~ schemes operated by the responsible entity or a related body corporate of the responsible entity;
    - (iii) other financial products issued by the responsible entity or a related body corporate of the responsible entity;
  - (b) the total period of time during which the member or the member and associated persons has held interests in one or more of the following:
    - (i) the scheme;
    - (ii) other ~~registered-managed investment~~ schemes operated by the responsible entity or a related body corporate of the responsible entity;
    - (iii) other financial products issued by the responsible entity or a related body corporate of the responsible entity;
  - (c) the member being an employee of the responsible entity or a related body corporate in circumstances where the number of votes that may be cast on a resolution of the scheme's members by

employee members is no more than 5% of the total votes that may be cast by the scheme's members;

- (d) the member having acquired their interests under a switching facility that involved the member first withdrawing from another registered-managed investment scheme operated by the responsible entity or a related body corporate of the responsible entity; or
- (e) savings to the scheme resulting, or reasonably expected by the responsible entity to result, from the lower cost of servicing a member of the scheme because of particular characteristics of that member or of their investment, where the amount of the benefit by way of lower fees charged to that member, or the rebate or waiver of fees provided to that member, is no greater than a reasonable estimate of the amount of the saving or expected saving.

*Individual negotiation with wholesale clients*

- (3) This instrument also applies to a differential fee arrangement under which the fees that may be charged, rebated or waived by the responsible entity to a member that is a wholesale client differs from that applying to other members based on individual negotiation between the responsible entity and the member.

## 6 Conditions

- (1) The responsible entity must ensure that:
  - (a) where a differential fee arrangement of a kind referred to in subsection 5(2) is in place or is to be offered—a statement of the basis on which the differential fee will be calculated and which specifies the fees that members will have to bear; and
  - (b) where a differential fee arrangement of a kind referred to in subsection 5(3) is in place or is to be offered—a statement of that fact,

is or has been disclosed in a clear, concise and effective manner:

  - (c) to existing members of the scheme by no later than the date of the first communication by the responsible entity to all members after the date when the differential fee arrangement is first offered; and
  - (d) in any Product Disclosure Statement required by the Act in relation to interests in the scheme that is on issue during the period in which the differential fee arrangement is offered.
- (2) The responsible entity must ensure that any differential fee arrangements do not adversely affect the fees paid or to be paid by any member of the scheme who is not entitled to the benefit of those fee arrangements.

- (3) The responsible entity must ensure that where a differential fee arrangement of a kind referred to subsection 5(2) is in place or is to be offered, the arrangement is applied without discrimination to all members who satisfy the criteria necessary to receive the benefit of the arrangement.