



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 136

Funds management: Discretionary powers

July 2018

About this guide

This guide is for operators of registered managed investment schemes (registered schemes) and passport funds, their service providers and advisers.

It explains our approach to exercising our exemption and modification powers to grant individual relief from requirements under the Corporations Act and, where relevant, the Australian Passport Rules for managed investment schemes and Australian passport funds.

It also explains:

- some of the more common situations when we have granted, and when we are likely to grant, relief; and
- when we will consider managed investment schemes as closely related so that they should be aggregated in determining if some exemptions for small schemes apply.

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 guide was issued in July 2018 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Policy Statement 136 *Managed investments: Discretionary powers and closely related schemes*, issued August 1998, reissued September 2000, rebadged as a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 our approach to granting individual relief to managed investment schemes and Australian passport funds.

It also explains:

- some of the more common situations when we have granted, and when we are likely to grant, relief; and
- when we will consider managed investment schemes as closely related so that they should be aggregated in determining if some exemptions for small schemes apply.

Purpose of this guide

RG 136.1 The creation, operation, termination and offer of interests in managed investment schemes is regulated under the *Corporations Act 2001* (Corporations Act). Australian passport funds are also regulated by the Australian Passport Rules. This guide explains our approach to granting individual relief from the requirements under the Corporations Act and the Australian Passport Rules to managed investment schemes and Australian passport funds.

Note 1: Under s1211(2) of the Corporations Act, 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](#) (Memorandum of Cooperation). The Australian Passport Rules will be taken to be substantially the same when they, together with other provisions of the corporations legislation made by the responsible Minister, have substantially the same effect as the Passport Rules set out in Annex 3 to the Memorandum of Cooperation.

Note 2: In this guide, references to sections (s), chapters (Chs) and parts (Pts) are to the Corporations Act, unless otherwise specified.

RG 136.2 We have discretionary powers under the laws we administer to:

- exempt a person or a class of persons from particular provisions; and
- modify the application of particular provisions to a person or class of persons.

Note: The exemption or modification power may relate to all entities, a specified class of entities (which may include operators, custodians and auditors), or a specified class of funds or specified funds.

RG 136.3 Our general approach to relief—that is, how and when we might grant an exemption from, or modification to, the laws we administer—is set out in [Regulatory Guide 51 Applications for relief](#) (RG 51). [RG 51](#) provides general guidance on:

- (a) the types of applications for relief that can be made;
- (b) how to lodge an application for relief and what information we may need from an applicant to consider the application;
- (c) our general approach to relief; and
- (d) the different types of relief that may be available.

RG 136.4 This guide supplements our general policy in [RG 51](#). It is intended to give greater transparency about how we exercise our exemption and modification powers under the Corporations Act and the Australian Passport Rules for managed investment schemes and Australian passport funds. This includes:

- (a) some of the factors we may take into account in applying the principles under [RG 51](#) when assessing applications for individual relief from the provisions in Chs 5C and 8A of the Corporations Act and the Australian Passport Rules (see Section B); and
- (b) the common types of individual relief we have granted to registered managed investment schemes (registered schemes) (see Section C); and

Note: In the future, we intend to update Section C to include other common types of individual relief for managed investment schemes and Australian passport funds.

- (c) when we will consider managed investment schemes as closely related so that they should be aggregated in determining if some registration and product disclosure exemptions for small schemes apply (see Section D).

Our related reports and guidance

RG 136.5 We aim to improve the level of transparency about decisions we make when asked to exercise our discretionary powers to grant relief.

Note: For more information on our recent decisions, see our [Reports on relief applications](#).

RG 136.6 We have also provided separate guidance on our approach to exercising our discretionary powers to grant relief for specific topics that may be relevant to managed investment schemes and Australian passport funds. Table 1 lists some of this guidance and provides a brief explanation of what is covered in each guide.

Table 1: Our related guidance on relief

Guidance	Description
Regulatory Guide 43 <i>Financial reports and audit relief</i> (RG 43)	Provides guidance on the relief available from financial reporting requirements in the Corporations Act
Regulatory Guide 49 <i>Employee incentive schemes</i> (RG 49)	Provides guidance on the relief available from the disclosure, Australian financial services (AFS) licensing, advertising, hawking, managed investment and on-sale provisions in the Corporations Act for an employee incentive scheme

Guidance	Description
Regulatory Guide 76 <i>Related party transactions</i> (RG 76)	Provides guidance on the relief available from certain requirements in the Corporations Act, as well guidance to promote better disclosure and governance for related party transactions
Regulatory Guide 80 <i>Managed investment schemes: Interests not for money</i> (RG 80)	Provides guidance on the relief available from the managed investment, AFS licensing, hawking and disclosure provisions of the Corporations Act for managed investment schemes that do not involve raising money
Regulatory Guide 87 <i>Charitable schemes and school enrolment deposits</i> (RG 87)	Provides guidance on the relief available from the fundraising, managed investment, debenture and AFS licensing provisions of the Corporations Act to charities that wish to raise funds by issuing debentures or interests in a managed investment scheme
Regulatory Guide 91 <i>Horse breeding schemes and horse racing syndicates</i> (RG 91)	Provides guidance on the relief available from the managed investment, AFS licensing and disclosure provisions of the Corporations Act for certain types of horse breeding schemes and horse racing syndicates
Regulatory Guide 138 <i>Foreign passport funds</i> (RG 138)	Provides guidance on our powers and responsibilities as a host regulator under the Asia Region Funds Passport, as well as our requirements for notified foreign passport funds and their operators seeking to enter, or operating in, Australia
Regulatory Guide 140 <i>Strata schemes and management rights schemes</i> (RG 140)	Provides guidance on the relief available from the managed investment, AFS licensing and fundraising provisions of the Corporations Act for promoters and operators of management rights schemes and serviced strata schemes
Regulatory Guide 144 <i>Mortgage investment schemes</i> (RG 144)	Provides guidance on the relief available from certain Ch 5C provisions of the Corporations Act for mortgage investment schemes
Regulatory Guide 148 <i>Platforms that are managed investment schemes and nominee and custody services</i> (RG 148)	Provides guidance on the relief available from the managed investment, fundraising, disclosure and other investor rights requirements in the Corporations Act for operators of investor directed portfolio services (IDPSs) and responsible entities of IDPS-like schemes
Regulatory Guide 160 <i>Time-sharing schemes</i> (RG 160)	Provides guidance on the relief available from the managed investment and AFS licensing provisions of the Corporations Act for certain types of time-sharing schemes
Regulatory Guide 161 <i>Share and interest sale facilities</i> (RG 161)	Provides guidance on the relief available from the managed investment, AFS licensing and disclosure provisions in the Corporations Act for sale facilities and related purchase facilities
Regulatory Guide 174 <i>Relief for externally administered companies and registered schemes being wound up</i> (RG 174)	Provides guidance on the relief available from the financial reporting provisions of the Corporations Act for registered schemes being wound up
Regulatory Guide 195 <i>Group purchasing bodies for insurance and risk products</i> (RG 195)	Provides guidance on the relief available from the managed investment and AFS licensing provisions of the Corporations Act for group purchasing bodies

B Our approach to individual relief

Key points

This section explains how our general approach under [RG 51](#) applies to granting individual relief from requirements under the Corporations Act and the Australian Passport Rules for managed investment schemes and Australian passport funds.

[RG 51](#) remains our primary guidance on our approach to individual relief applications.

This section also explains some of the factors we may take into account in applying the principles under [RG 51](#) when assessing applications for individual relief from the provisions in Chs 5C and 8A of the Corporations Act and the Australian Passport Rules.

Our powers to grant relief

- RG 136.7 We have powers under the Corporations Act to exempt a person or a class of persons from particular provisions and to modify the application of particular provisions to a person or class of persons.
- RG 136.8 Some of these powers of exemption or modification apply in relation to provisions that specifically affect managed investment schemes and Australian passport funds only. These discretionary powers are to grant relief under:
- (a) s601QA from the provisions of Ch 5C (managed investment schemes);
 - (b) s1217 from the provisions of Ch 8A (Australian passport funds); and
 - (c) s1217A from the provisions of the Australian Passport Rules (Australian passport funds).
- RG 136.9 There are other exemption or modification powers under the Corporations Act that also apply. These include the discretionary exemption or modification powers in relation to:
- (a) the AFS licensing provisions (see s926A);
 - (b) the financial services disclosure provisions (see s951B);
 - (c) the conduct requirements relating to financial products and services (see s992B); and
 - (d) the financial product disclosure provisions (see s1020F).
- RG 136.10 If we grant an exemption or modification, the kind of relief granted, the extent of relief and the situations when relief applies will depend on what is appropriate in the circumstances.

Our general approach to relief under RG 51

- RG 136.11 [RG 51](#) provides guidance on the types of applications for relief that can be made, how to lodge applications, our general approach to applications and the types of relief available.
- RG 136.12 Under the general approach set out in [RG 51](#), we will consider and determine all applications for relief on the basis of the facts, circumstances and merits of each individual application.

Our approach to relief for managed investment schemes and Australian passport funds

- RG 136.13 When applying the general principles under [RG 51](#) in the context of assessing applications for individual relief from the provisions in Chs 5C and 8A, we may take into account:
- (a) the result of a cost and benefit analysis and the impact of the sought relief on affected persons (see RG 136.14–RG 136.16);
 - (b) the impact of the sought relief on the regulatory objectives of the managed investment regime and the Asia Region Funds Passport regime (see RG 136.17–RG 136.21);
 - (c) the relevance of any precedents (see RG 136.22);
 - (d) the relevance of the nature, scale and complexity of the managed investment scheme or Australian passport fund seeking relief, and its operator (see RG 136.23); and
 - (e) the adequacy of any alternative regulation (see RG 136.24–RG 136.26).

Note: This list is not exhaustive. Relevant considerations will always depend on the applicable facts, circumstances and merits of each individual application. The weight given to any particular item or any other relevant consideration will also depend on the circumstances.

Cost and benefit analysis and impact on affected persons

- RG 136.14 When we undertake a cost and benefit analysis, we identify the persons whose interests may be affected (whether adversely or otherwise) if the sought relief is granted.
- RG 136.15 We then assess the likely impact of the sought relief on these affected persons. This involves evaluating the financial impact and ensuring we take into account all the relevant positive and negative consequences of granting relief.
- RG 136.16 We may consider:
- (a) whether the persons who will be given the relief and others will receive any benefits from the exercise of our relief powers, and to what extent;

- (b) whether strict compliance with the Corporations Act and the Australian Passport Rules will be impossible or disproportionately burdensome. This also involves identifying the persons bearing the costs; and
- (c) whether the likelihood and extent of detriment to potential clients (including retail clients) resulting from the sought relief is minimal. In part, this will involve considering whether people acquiring, holding or otherwise transacting interests in a managed investment scheme or an Australian passport fund will still have the protection intended by Parliament if the sought relief is granted.

Impact on regulatory objectives

- RG 136.17 When we consider the impact on regulatory objectives, we may consider whether the sought relief promotes or is consistent with:
- (a) the general policy objectives of the Corporations Act; and
 - (b) the specific policy objectives underlying the relevant provision(s) of the Corporations Act, and, where applicable, the Australian Passport Rules.
- RG 136.18 We will give appropriate weight to the value of promoting international harmonisation, where relevant.

Corporations Act

- RG 136.19 Generally, the Corporations Act is intended to harmonise and raise standards of conduct.

Managed investment schemes

- RG 136.20 Specific regulatory objectives for managed investment schemes include:
- (a) promoting commercial stability and efficiency in capital raising and capital formation; and
 - (b) providing an appropriate level of regulation that adequately and effectively protects the interests of investors.

Australian passport funds

- RG 136.21 Specific regulatory objectives for Australian passport funds include:
- (a) facilitating cross-border offerings of passport funds by supporting regulatory consistency across participating economies;
 - (b) providing adequate regulatory standards for the management and distribution of passport funds that promote investor protection, and fair, efficient and transparent markets;
 - (c) providing Australian investors with a greater diversity of investment opportunities through the availability of interests in notified foreign passport funds; and

- (d) facilitating Australian fund managers seeking to offer their products and services in other participating economies.

Relevance of any precedents

RG 136.22 We may consider whether the sought relief involves the same or similar terms as any relief we have granted in comparable situations. We do so to promote consistency and predictability in our decision making when exercising our statutory exemption and modification powers to grant relief.

Note: See Section C for more information on common forms of relief we have granted.

Nature, scale and complexity of the applicant and fund

RG 136.23 We may also assess whether the relief sought is appropriate and necessary by considering the nature, scale and complexity of the applicant's business operations. This includes the scope of the relief and any applicable conditions. At a minimum, we are likely to take into account:

- (a) the number of managed investment schemes and the size of their funds under management;
- (b) whether the fund is a managed investment scheme and whether it is also registered as an Australian passport fund;
- (c) the investment strategies and business activities of the managed investment scheme, including the extent to which the fund will use leverage;
- (d) whether the managed investment scheme is, or will be, listed or traded on a financial market;
- (e) the types of investments and investment locations;
- (f) the distribution model and investor base;
- (g) the activities, including the applicant's investment approach;
- (h) the extent to which the applicant delegates material operational activities, and the level of oversight it has over its delegates;
- (i) the diversity and structure of the applicant's operations (including the geographical spread of the operations and the extent to which any functions are outsourced);
- (j) the volume and size of the transactions the applicant is responsible for;
- (k) whether the applicant's main business is undertaking funds management; and
- (l) the number of staff in the applicant's organisation.

‘Adequacy’ of alternative regulation

- RG 136.24 We may also consider whether there would be any available adequate alternative regulation or protection if the relief is granted.
- RG 136.25 This is aimed at both assessing the regulatory detriment of any relief and considering whether relief can be granted to remove any unnecessarily duplicated legislative or regulatory requirements.
- RG 136.26 When considering whether an alternative regulatory regime is ‘adequate’, we may generally consider how effectively the regime addresses:
- (a) efficient, honest and fair service provision;
 - (b) service provider resources and competence;
 - (c) service provider compliance, conflicts management and risk management practices;
 - (d) initial and ongoing disclosure to retail clients about the provision of a service;
 - (e) protection of client assets;
 - (f) financial and transaction record keeping;
 - (g) access by retail clients to internal and external dispute resolution services; and
 - (h) the provision of any advice to retail clients on a reasonable basis.

Statutory preconditions for Australian Passport Rules relief

- RG 136.27 We will only grant exemptions and modifications in relation to the Australian Passport Rules for an Australian passport fund (as its home regulator) if:
- (a) all of the relevant host regulators of the Australian passport fund have agreed to the terms of the sought relief (see RG 136.28–RG 136.31); and
 - (b) we publish details of any relief granted (see RG 136.32–RG 136.33).

Agreement of all relevant host regulators

- RG 136.28 An exemption or modification in relation to the Australian Passport Rules can only be granted for an Australian passport fund if all of the host regulators have agreed to the exemption being granted or the declaration being made: see s1217A(3)(a). The host regulators are the passport regulators of the participating economies where the Australian passport fund is permitted, or has applied, to offer interests.

- RG 136.29 This requirement is aimed at promoting the consistent and seamless application of the Passport Rules.
- RG 136.30 When we receive an application seeking relief from the Australian Passport Rules, we may seek to confirm any information provided with any relevant host regulator. We may also share the application with other passport regulators and seek their views.
- RG 136.31 The application will need to explain whether the applicant has obtained or is seeking agreement from each relevant host regulator for the relief sought. We may seek confirmation that agreement has been provided by the relevant passport regulators under the arrangements concerning cross-border supervisory cooperation under Annex 4 to the [Memorandum of Cooperation](#). It is not possible for ASIC to grant relief from the Australian Passport Rules for an Australian passport fund until all relevant host regulators have agreed to the proposed relief.

Exemptions and modifications to be made publicly available

- RG 136.32 If we grant an exemption or modification in our capacity as a home regulator for an individual Australian passport fund, its operator or a person responsible for compliance with a provision in the Australian Passport Rules, we will generally publish the details of the exemption or modification on the Asia Region Funds Passport Register. This includes any variation or revocation.

Note: Where we grant an exemption or modification in relation to a class of funds, we will not publish these details on the Asia Region Funds Passport Register.

- RG 136.33 This requirement promotes transparency around how the Asia Region Funds Passport is being administered by all passport regulators.

C Common forms of individual relief

Key points

This section outlines and explains some of the more common forms of individual relief we have granted.

The common forms of relief outlined in this section provide transparency around the material considerations we have taken into account in past decisions, so that prospective applicants for relief may have insight into the factors we consider in deciding whether to exercise our discretion to grant relief.

We assess applications for relief on a case-by-case basis and consider all the relevant circumstances of each application. If we grant relief, it may be based on conditions other than what is set out in this section.

Compliance plan audits and compliance committees

- RG 136.34 We may consider granting:
- (a) relief from the obligation to prepare and lodge a compliance plan audit;
 - (b) an extension of time to establish a compliance committee; and
 - (c) an extension of time to replace a compliance committee member.

Relief from the compliance plan audit requirements

- RG 136.35 Under s601HG(1), the responsible entity of a registered scheme must ensure that, at all times, a registered company auditor, an audit firm or an authorised audit company is engaged to audit compliance with the scheme's compliance plan.
- RG 136.36 Section 601HG(3) sets out the auditor's powers and responsibilities, which are to:
- (a) examine the compliance plan;
 - (b) audit compliance by the responsible entity with the compliance plan; and
 - (c) report to the responsible entity on whether the responsible entity has complied with the compliance plan during the financial year and whether the plan continues to meet the requirements of Pt 5C.4.
- RG 136.37 The auditor of the compliance plan must lodge with ASIC the compliance plan audit report at the same time as the financial statements and reports for the registered scheme: see s601HG(7).

- RG 136.38 The purpose of a compliance plan audit is to identify whether there has been any non-compliance with the compliance plan by the responsible entity, and whether the plan continues to meet the requirements of Pt 5C.4.
- RG 136.39 We would generally only consider an application for individual relief from the requirement to conduct a compliance plan audit and lodge a compliance plan audit report with ASIC for a financial year if the responsible entity has:
- (a) complied with its compliance plan for the financial year to be covered by the sought relief;
 - (b) not had any significant reportable breaches for the financial year to be covered by the sought relief;
 - (c) lodged its compliance plan audit reports for previous financial years; and
 - (d) provided us with information on any concerns raised by an auditor in previous compliance plan audit reports.
- RG 136.40 The requirement for a compliance plan audit is a fundamental obligation of the managed investment regulatory regime. It provides that adequate processes are in place to ensure that a registered scheme is operated in accordance with the obligations contained in the constitution and the law. It also ensures that the compliance plan meets the requirements of Pt 5C.4.
- RG 136.41 We would generally only grant relief from a requirement under s601HG if a person could demonstrate that meeting the compliance plan audit provisions would be impossible or disproportionately burdensome in the circumstances—for example, if a scheme is being wound up or, for a short period, pending deregistration.
- RG 136.42 Factors we may take into account when deciding whether to grant relief include:
- (a) whether the benefits of conducting the compliance plan audit and preparing the compliance plan audit report are outweighed by the associated burden and costs. When we consider the benefits, we will take into account the likely relevant users of such reports and the likely nature and extent of their use. When we consider the costs and burden, we will take into account the amount and who will bear the expected compliance costs;
 - (b) the ability of the likely relevant users of such information to independently obtain, in a timely manner, other reliable information on the registered scheme's compliance; and
 - (c) the underlying purposes of a compliance plan audit and audit report as set out at RG 136.38 and RG 136.40.

RG 136.43 We will generally include a condition on any relief that requires the responsible entity to publish a notice explaining the relief in a prominent place on its website.

Extension of time for compliance committee establishment

RG 136.44 Under s601JA(1), the responsible entity of a registered scheme must establish a compliance committee if ‘less than half of the directors of the responsible entity are external directors’.

Note: Section 601JA(2) provides a definition of an ‘external director’.

RG 136.45 The responsible entity must establish the compliance committee within 14 days after it is required to do so under s601JA(1), unless we have agreed in writing to a longer period: see s601JA(3). In agreeing to a longer period, we may include conditions that the responsible entity must comply with.

RG 136.46 We will consider granting an extension of time to establish a compliance committee if:

- (a) there are exceptional circumstances that justify relief; or
- (b) it may be impractical to establish a committee with a sufficient number of external members within the 14-day period for reasons other than due to the responsible entity’s default.

RG 136.47 However, we are generally not likely to grant an extension of time to establish a compliance committee when a responsible entity is registering a scheme. The responsible entity should not apply for registration unless it is in a position to establish a board or compliance committee immediately after the scheme is registered.

RG 136.48 Factors we may take into account in deciding whether to grant relief include:

- (a) whether the responsible entity is doing all it can reasonably do to appoint sufficient external directors or to establish a compliance committee; and
- (b) whether any reduction in investor protection from the lack of a compliance committee is minimised.

RG 136.49 If an extension of time is granted, we will generally include conditions on the responsible entity requiring it to:

- (a) use its best endeavours to establish the compliance committee or appoint the required external directors to the board of the responsible entity as soon as practicable, and, in any event, before the extended time limit ends; and
- (b) appoint external auditors to carry out substitute compliance monitoring for the period of relief.

RG 136.50 Extensions will be given only for a specified period and for as long as appears necessary.

Compliance committee membership

RG 136.51 Under s601JB(1), a compliance committee must have at least three members, and a majority of them must be ‘external members’.

Note: ‘External members’ is defined under s601JB(2) and qualified by s601JB(3) and (4).

RG 136.52 The need for a compliance committee may also arise due to changes in the composition of the board of the responsible entity and an extension of time may be sought to reconstitute the board with sufficient external directors.

RG 136.53 We consider it is important that vacancies in the external members of a compliance committee are filled quickly so that investor protection is not reduced. Similarly, if at least half of the directors of a responsible entity are not external, a compliance committee should be established quickly. This is because a compliance committee with a majority of external members gives investors protection by regularly monitoring compliance.

RG 136.54 There will be costs associated with finding appropriate external compliance committee members. However, this is an intended cost associated with establishing appropriate investor protection and the responsible entity should factor it into budgets at an early stage.

RG 136.55 The Corporations Act imposes significant restrictions on who may be an external member of a compliance committee or of the board of the responsible entity. We consider that a member of a compliance committee must be a natural person. An external member must not be, and may not within the previous two years have been, substantially involved in business dealings or involved in a professional capacity with the responsible entity or a related body corporate: see s601JB(2)(b). These restrictions reflect the importance for investor protection and credibility of regulation—for there to be oversight by persons who are manifestly independent.

RG 136.56 In our view, the reference to ‘substantially involved’ means that a person who is employed by an entity that has had business dealings or a professional relationship with the responsible entity, or a related body corporate of the responsible entity, would not be excluded as an external member or director merely because they have had a trivial involvement with the dealings of, or a trivial relationship with, the entity. We also consider the term ‘substantial’ qualifies the degree of an individual’s involvement, rather than the nature of the business dealings or professional relationship. In our view, the provisions should not be interpreted as meaning involvement in substantial business dealings.

- RG 136.57 We consider the following persons are likely to be substantially involved in business dealings or in a professional capacity with the responsible entity:
- (a) an employee of the auditor of the responsible entity who:
 - (i) has decision-making responsibility in relation to audits of the responsible entity; or
 - (ii) may have been exposed to any form of conflict of interest in acting as a compliance committee member because of involvement with the audits;
 - (b) an employee or officer of a custodian for the responsible entity who:
 - (i) has decision-making responsibility in relation to the dealings between the custodian and the responsible entity; or
 - (ii) may have been exposed to any form of conflict of interest in acting as a compliance committee member because of their involvement in the business relationship with the responsible entity; or
 - (c) a solicitor who is responsible for legal advice provided to the responsible entity.
- RG 136.58 A member of a partnership with a substantial involvement is also not eligible as an external member: see s601JB(2)(c).
- RG 136.59 The requirements for being external are intentionally strict and are designed to ensure the unambiguous appearance of independence, as well as actual independence. Because of this, we will generally not grant relief that allows a person who may not be external to be counted as external. We will generally not grant relief on the basis of submissions that:
- (a) there is no actual conflict of interest—for example, a partner of a firm of solicitors who has no business dealings with the responsible entity in the case where the firm has substantial involvement in business dealings with the responsible entity; or
 - (b) there are difficulties in finding alternative candidates.
- RG 136.60 Under s601JB(5), if the compliance committee ceases to satisfy the membership requirements under s601JB(1), the responsible entity must make appointments to the committee within 14 days after this requirement is no longer satisfied. This is unless we have agreed in writing to a longer period. Our consent to a longer period may be made subject to conditions and there is a statutory obligation on the responsible entity to comply with those conditions: see s601JA(6).
- RG 136.61 When a responsible entity needs to constitute or reconstitute a compliance committee after a scheme is registered, we recognise that it may be impracticable to find suitable compliance committee members within 14 days. For example, this may be difficult on the sudden death of an external member of the compliance committee or board of the responsible

entity. It may be especially difficult for smaller, specialised registered schemes and schemes based in remote locations. Similarly, when multiple vacancies occur in a compliance committee, we recognise that compliance is more likely to be impracticable.

RG 136.62 The responsible entity should apply promptly after it appears that an extension is likely to be necessary. We may, however, extend the time after the end of the 14-day period.

RG 136.63 We will consider granting an extension of time if:

- (a) there are exceptional circumstances to justify relief; or
- (b) it may be impractical to appoint a sufficient number of external members within the 14-day period for reasons other than due to the responsible entity's default.

Note: See RG 136.61 for examples.

RG 136.64 Factors we may take into account in deciding whether to grant relief include:

- (a) whether the responsible entity is doing all it can reasonably do to appoint the external member(s); and
- (b) whether any reduction in investor protection due to the compliance committee not having the required member composition is minimised.

RG 136.65 If an extension of time is granted, we will generally include conditions on the relief that require the responsible entity to:

- (a) use its best endeavours to appoint the required external member(s) to the compliance committee. This must be as soon as practicable, and, in any event, before the extended time limit ends; and
- (b) ensure that the number of external members as a proportion of the total number of members of the compliance committee does not become less than the proportion at the date the application for relief was made.

Stapled securities

RG 136.66 Section 601FC(1) prescribes the duties of the responsible entity. This includes to:

- (a) act in the best interests of members (see 601FC(1)(c)); and
- (b) not make use of information in order to gain an advantage for itself and/or any other person or cause detriment to the members of the scheme (see s601FC(1)(e)).

RG 136.67 Similar duties apply to the officers of the responsible entity: see s601FD(1)(c) and 601FD(1)(d). Section 601FD(1)(e) imposes a duty on officers of the responsible entity not to make improper use of their position

as an officer to gain an advantage for themselves and/or any other person or to cause detriment to members of the scheme.

- RG 136.68 There is also a duty for employees of the responsible entity not to make improper use of their position as an employee to gain an advantage for themselves and/or any other person or to cause detriment to members of the scheme: see s601FE(1)(a).
- RG 136.69 Section 601LC prohibits the giving of financial benefits by a responsible entity to a related party of the responsible entity unless a relevant exception is available.
- RG 136.70 We may consider granting relief for stapled securities, a component of which is an interest in a registered scheme, from the following provisions:
- (a) s601FC(1)(c) and 601FC(1)(e)—to allow a responsible entity to consider the interests of the members or to use information, having regard to them being stapled security holders;
 - (b) s601FD(1)(c), 601FD(1)(d), 601FD(1)(e) and 601FE(1)(a)—to allow officers or employees to consider the interests of the members or to use information or their position, having regard to them being stapled security holders; and
 - (c) s601LC—to allow a responsible entity to give a financial benefit to itself or a related party where this increases stapled scheme property, while decreasing the property in the registered scheme.
- RG 136.71 We may consider granting relief for stapled securities where:
- (a) the stapled group consists of two or more financial products, including at least one interest in a registered scheme. This is where:
 - (i) under the terms on which each of the products is to be traded, they must be transferred together; and
 - (ii) there are no financial products in the same class as those financial products that may be transferred separately; and
 - (b) each interest in the scheme must, under the terms upon which it is to be traded, only be transferred with one or more shares or interests.
- RG 136.72 We may grant relief for stapled securities to facilitate the operation and management of the stapled group, rather than the component parts that make up the stapled group. We consider there is no detriment to members given they are also members of the other component parts of the stapled group.
- RG 136.73 Factors we may take into account when deciding whether to grant relief for stapled securities include:
- (a) whether all interests in the registered scheme remain stapled with shares in a company (or interests in another scheme) on a one-for-one basis, and are traded as stapled securities;

- (b) whether there is any ‘leakage’—that is, whether the stapled security holders own all of the shares in the stapled company and no benefit leaks from the stapled structure for the benefit of others; and

Note: Benefits may be able to be paid from the scheme property to wholly-owned subsidiaries of a company that is wholly owned by the stapled security holders.

- (c) where the stapling occurs after members have acquired an interest in the scheme, we may request a copy of the proposed disclosure to be sent to members about resolutions to staple, to ensure that the disclosure is adequate.

Change of responsible entity

RG 136.74 If the responsible entity of a registered scheme wants to retire, it must call a members’ meeting to explain its reasons for wanting to retire and to enable the members to vote on a resolution to choose a new responsible entity: see s601FL(1). The resolution must be an extraordinary resolution if the scheme is not listed.

RG 136.75 Section 601FL provides registered scheme members with the opportunity to exercise voting rights to choose a new responsible entity to replace a retiring responsible entity. In our view, this is an important safeguard for the change of responsible entity, which cannot be effected by too few members.

RG 136.76 We may consider granting relief from the requirement to hold a members’ meeting for a change of responsible entity if:

- (a) the change is to a related body corporate of the responsible entity (see RG 136.77–RG 136.79);
- (b) there are a small number of members (see RG 136.80–RG 136.83); or
- (c) a significant percentage of the interests in the registered scheme are held by investment platforms that have a non-voting policy (see RG 136.84–RG 136.87).

Change to a related body corporate

RG 136.77 We will consider granting relief from the requirement to hold a members’ meeting for a change of responsible entity if:

- (a) the existing responsible entity and the proposed new responsible entity are related companies and the change of responsible entity is unlikely to have an adverse impact on the administrative, custodial or asset management of the registered scheme or give rise to any significant changes in the manner in which the scheme operates; and
- (b) the existing responsible entity and the proposed new responsible entity are related companies and the costs of strict compliance with the

meeting requirements under s601FL(1) are disproportionately burdensome compared to the benefits of holding a meeting.

- RG 136.78 Factors we may consider when deciding whether to grant relief include:
- (a) whether the current and replacement responsible entity are related companies within the same corporate group;
 - (b) whether the current and replacement responsible entity share or have the following in common:
 - (i) resources (including key staff);
 - (ii) corporate governance arrangements (particularly directors and compliance committee members); and
 - (iii) control structures (e.g. reporting lines, compliance systems and procedures for monitoring service providers, and accounting, computer and IT systems);
 - (c) whether, if relief is granted, there would be any adverse impact on members' interests; and
 - (d) whether, if relief is granted, there would be substantial cost savings for the responsible entity, and, ultimately, for the members of the registered scheme.

- RG 136.79 If relief is granted, we will generally include conditions on the relief that require the responsible entity to:
- (a) notify members of the proposed change of responsible entity and include in the notice all the information that members would reasonably need to make an informed assessment as to whether to request an all-member vote to choose a new responsible entity;
 - (b) give members 21 days to consider the notice, and, if they wish, request that the responsible entity hold an all-member postal vote to choose a new responsible entity;
 - (c) conduct a postal vote (based on the conditions set out in the relief) if 100 members or members holding at least 5% of the total value of interests held by members eligible to vote request one; and
 - (d) effect the change of responsible entity within three months.

Small number of members

- RG 136.80 We may consider granting relief from the requirement to convene and hold a members' meeting to change a responsible entity if:
- (a) there are only a small number of members and all of those members would be prevented from voting under s252R or 253E; or
 - (b) the only members are a small number of wholesale clients.

- RG 136.81 We may grant this relief to facilitate members being able to approve a change of responsible entity when:
- (a) it may not be possible to convene and hold a meeting of members; or
 - (b) due to the small number of members, the costs and effort of doing so are unnecessary—on the basis that the consent of members to the change of responsible entity can be obtained in a more cost-effective way.
- RG 136.82 Factors we may consider when deciding whether to grant relief include:
- (a) whether the registered scheme is able to meet the quorum requirement of two members under s252R;
 - (b) whether all members would be unable to pass a resolution to change the responsible entity in a members' meeting because they would be prevented from voting on the resolution under s253E; and
- Note: Section 253E provides that the responsible entity of a registered scheme and its associates are not entitled to vote on a resolution at a members' meeting if either the responsible entity or the associate has an interest in the resolution or matter other than as a member. This restriction applies to the resolutions for retirement and replacement of the responsible entity under s601FL.
- (c) whether the registered scheme would incur unnecessary costs and inconvenience to convene and hold a members' meeting.
- RG 136.83 If relief is granted, we will generally include conditions on the relief that require:
- (a) the responsible entity to give members materials dealing with the change of responsible entity which are similar to the explanatory memorandum that would have been provided with a notice of meeting; and
 - (b) unanimous member approval to ensure that there is no reduction of members' rights because this is a higher threshold for member approval than that required by s601FL.

Investment platforms that have a non-voting policy

- RG 136.84 Member approval for a change of responsible entity may be difficult to obtain when a significant proportion of the interests in the registered scheme are held by investment platforms that have a policy of not voting. This may make it difficult to obtain the requisite number of members to vote on a change of responsible entity. This is particularly relevant for unlisted schemes that require a change to be approved by an extraordinary resolution.

Note: For more information on investment platforms and the requirements for them to have and disclose a voting policy, see RG 148.56–RG 148.62 in [RG 148](#).

- RG 136.85 We will consider granting relief from s601FL(1) to facilitate a change of responsible entity when a significant percentage of the interests in the registered scheme are held by investment platforms that have a written

policy of not voting, and so abstain from voting. We will generally do this by excluding these platform interests from the total votes that may be cast under an extraordinary resolution.

- RG 136.86 Factors we may consider when deciding whether to grant relief include:
- (a) whether the applicant provides evidence of the published voting policy of the relevant platform which demonstrates that the platform has a policy of not voting;

Note: For example, for an IDPS, we would ordinarily request the relevant extract from the IDPS Guide.
 - (b) whether all members had the opportunity to vote on the resolution, subject to the self-imposed voting practices of the platform operators that have a written policy of not voting;
 - (c) whether the responsible entity has demonstrated that it is not possible for a sufficient number of members to vote on the resolution after having held a members' meeting to consider the proposed resolution;
 - (d) whether the platform operators have undertaken consultation with their own underlying clients about the proposed resolution;
 - (e) whether the impact on members as a result of the change of responsible entity will be limited; and
 - (f) whether there are other commercial benefits that would flow from granting relief, including any cost savings of pursuing alternatives and avoiding the entrenchment of a responsible entity that seeks to retire.

- RG 136.87 If relief is granted, we have generally included conditions on the relief that require the responsible entity to:
- (a) notify all members in writing that if a platform operator has a policy of not voting and abstains from voting, the vote will exclude the members that are holding for platforms;
 - (b) ensure a reasonable period of time passes before the meeting can be reconvened and the vote counted (which would then exclude the votes of any non-voting platforms); and
 - (c) ensure members who have previously submitted proxies for the original meeting may, for a period of at least 10 business days, withdraw or change their proxies after they have been given notice of the adjourned meeting.

Offers to foreign members in a restructure

- RG 136.88 Under s601FC(1)(d), a responsible entity has a duty to treat members who hold interests of the same class equally and members who hold interests of different classes fairly.

- RG 136.89 We will consider granting relief from s601FC(1)(d) so that foreign members in a registered scheme can be treated differently from other members. We will generally do this if it is impracticable or unlawful to offer or issue interests to foreign members as part of a restructure of the scheme or similar proposal involving the scheme.
- RG 136.90 Factors we may consider when deciding whether to grant relief include:
- (a) whether the foreign members would have an equal opportunity to vote on the proposal;
 - (b) whether it would be disproportionately burdensome for the responsible entity to comply with foreign fundraising laws due to:
 - (i) the number of foreign jurisdictions involved; and
 - (ii) there being a relatively small number and percentage of foreign members of the registered scheme;
 - (c) whether any relevant costs of complying with such laws would be borne by all members of the registered scheme; and
 - (d) whether the foreign members receive cash or are entitled to participate in a cash-out facility to dispose of their existing interests, which other members receive.
- RG 136.91 If relief is granted, we will generally include conditions on the relief that require the responsible entity to:
- (a) fully inform foreign members of the proposed transaction; and
 - (b) give foreign members an equal opportunity to vote on the proposed transaction.

Withdrawal arrangements

- RG 136.92 We may consider granting relief to enable:
- (a) withdrawal on hardship grounds for ‘frozen funds’ (see RG 136.93–RG 136.101);
 - (b) ‘rolling’ withdrawal offers (see RG 136.102–RG 136.113); and
 - (c) registered schemes that provide marketplace lending products to offer withdrawals when the scheme is not liquid (see RG 136.114–RG 136.117).

Hardship relief for ‘frozen funds’

- RG 136.93 Under s601KA(3), if a registered scheme is not liquid, a responsible entity must not allow a member to withdraw from the scheme except in accordance with the scheme’s constitution and s601KB–601KE.

- RG 136.94 The responsible entity of a registered scheme must treat the members who hold interests of the same class equally and members who hold interests of different classes fairly: see s601FC(1)(d).
- RG 136.95 We will consider granting relief to a responsible entity from the withdrawal provisions in s601KA(3)(b) and 601KB and the equal treatment provisions in s601FC(1)(d) to allow members suffering hardship to be paid in priority to other members if:
- (a) members invested in the registered scheme on the basis that the scheme would be liquid;
 - (b) the constitution gives members a right to withdraw;
 - (c) there is a reasonable expectation that members could ordinarily redeem their interests from time to time; and
 - (d) redemptions in the registered scheme are subsequently, and remain, suspended (also known as ‘frozen’).
- RG 136.96 This relief may apply if the payment meets one of the following hardship withdrawal criteria and conditions:
- (a) *severe financial hardship*—if the amount requested is needed to enable the person to meet reasonable and immediate living expenses for themselves and/or their dependants;
 - (b) *unemployment*—if the person has not been in gainful employment for a period of at least three months and has no other means of financial support (except government assistance, such as unemployment benefits);
 - (c) *compassionate grounds*—if the person does not otherwise have the financial capacity to meet one of the following expenses and the amount requested is needed by the person and/or the person’s dependant to:
 - (i) help pay for medical costs (and transport costs) required to treat a life-threatening illness or injury, to alleviate acute or chronic pain, or to alleviate an acute or chronic mental disturbance, where two registered medical practitioners (at least one of whom must be a specialist) have provided certified statements confirming the medical condition to this effect;
 - (ii) fund specific modifications to a principal place of residence or vehicle that are necessary to accommodate special needs arising from a severe disability;
 - (iii) assist with funeral and other expenses related to the death of the person or the person’s dependant;
 - (iv) enable the person to provide care for another person who is dying from a terminal illness, including home care;

- (v) prevent the person's mortgagee (lender) from selling their principal place of residence;
 - (vi) meet a binding financial obligation entered into by the person before the responsible entity determined the registered scheme was non-liquid or otherwise determined that withdrawals should be suspended; or
 - (vii) meet expenses in other cases consistent with the grounds mentioned in paragraphs (i)–(vi); or
- (d) *permanent incapacity*—where the person has ceased gainful employment due to mental or physical ill health and the responsible entity is satisfied that the person is unlikely to ever again commence the type of employment for which the person is reasonably qualified by education, training or experience.

RG 136.97 The relief allows a responsible entity to make hardship payments to members. However, the decision to make such payments will be at the responsible entity's discretion. This is because it will remain bound by its duties in determining, for example, whether the fund has sufficient liquidity to make hardship payments. The withdrawals remain subject to the provisions of the constitution.

RG 136.98 A decision by the responsible entity to allow members to withdraw from a registered scheme that is frozen must be based on the hardship criteria specified in RG 136.96.

RG 136.99 Factors we may consider when deciding whether to grant relief include:

- (a) whether the fund is frozen (e.g. the scheme has become non-liquid or redemptions are suspended for an extended period);
- (b) whether retail client investors would have had a reasonable expectation when they invested that they could redeem on the basis that the fund is liquid;
- (c) whether a member has experienced hardship or is likely to experience hardship if the member is not allowed to withdraw;
- (d) the amount of available cash relative to the amount of registered scheme assets and funds under management;
- (e) the amount of anticipated hardship withdrawals that would need to be made and their impact on the fund's liquidity;
- (f) whether there would be sufficient remaining cash available for the day-to-day operation of the registered scheme;
- (g) whether the constitution allows the responsible entity to make hardship payments; and
- (h) the reasons why, and for how long, the fund has been frozen.

RG 136.100 Our consideration of the factor described in RG 136.99(c) also includes:

- (a) *where the member is an operator*—whether a person (‘instructor’) who has asked the operator to exercise a right to withdraw has experienced hardship or is likely to experience hardship if the operator is not allowed to withdraw; and

Note: An ‘operator’ in RG 136.100(a) means a person who is a member of the scheme in its capacity as responsible entity or custodian of a registered scheme, a life insurance company, trustee of a trust, trustee or custodian of a superannuation entity within the meaning of the *Superannuation Industry (Supervision) Act 1993* (SIS Act), trustee of a self-managed superannuation fund within the meaning of the SIS Act or provider or acquirer in relation to a custodial arrangement as defined in s1012IA of the Corporations Act.

- (b) *where the member is dead*—whether a beneficiary of the estate has experienced hardship or is likely to experience hardship if the executor or administrator of the estate is not allowed to withdraw.

RG 136.101 If relief is granted, we will generally include conditions on the relief that require the responsible entity to:

- (a) be satisfied on a reasonable basis that:
- (i) following the withdrawal, the registered scheme property would include sufficient liquid assets for the day-to-day operation of the scheme;
 - (ii) satisfying the hardship withdrawal request would not result in breaching the applicable cap(s) on hardship withdrawals;

Note: For more information on the applicable caps on hardship withdrawals, see [Information Sheet 111](#) *Information for investors in frozen funds* (INFO 111).

- (iii) any amount paid would not exceed the specific amount that is the subject of a hardship withdrawal request in respect of the hardship of the member, instructor or beneficiary; and
 - (iv) any amount paid on withdrawal to an operator, executor or administrator of an estate will be paid to the instructor or beneficiary after deduction of any fees and charges payable to the operator, executor or administrator;
- (b) document how and why a decision to permit or refuse a hardship withdrawal was made; and
- (c) retain its decision documentation for seven years.

Relief to enable ‘rolling’ withdrawal offers

RG 136.102 Section 601KA(2) provides that if a registered scheme is not liquid, any withdrawal offer must satisfy the requirements of the constitution and s601KB–601KE. The responsible entity must not allow withdrawals on the member’s request to be made on any other basis: see s601KA(3)(a).

- RG 136.103 The requirements for a responsible entity to make a withdrawal offer to members while a registered scheme is non-liquid are outlined in Pt 5C.6. These requirements include:
- (a) a withdrawal offer may be made to the extent that particular assets are available and able to be converted to money in time to satisfy withdrawal requests that members may make;
 - (b) only one withdrawal offer may be open at any time; and
 - (c) if there is an insufficient amount of money available from the assets specified in the withdrawal offer to satisfy all withdrawal requests, the requests are to be satisfied proportionately.
- RG 136.104 We consider the non-liquid provisions provide an important distinction between withdrawal offers for non-liquid registered schemes and liquid registered schemes. Liquid schemes can offer at-call withdrawal provided that the scheme has 80% of its assets in liquid assets.
- RG 136.105 The non-liquid provisions were designed so that withdrawal offers for non-liquid registered schemes could only be made to the extent that particular assets are available and are able to be converted to money in time to satisfy withdrawals.
- RG 136.106 Under s601KB(3), the withdrawal offer made to members must specify:
- (a) the period during which the offer will remain open (this period must be for at least 21 days after the offer is made);
 - (b) the assets that will be used to satisfy withdrawal requests;
 - (c) the amount of money that is expected to be available when those assets are converted to money; and
 - (d) the method for dealing with withdrawal requests if the money is insufficient to deal with all requests.
- RG 136.107 Under Pt 5C.6, a responsible entity is unable to make a withdrawal offer unless there is sufficient information on the assets and money that will be used to satisfy the withdrawal offer. This is to ensure that members have fair and equal access to liquidity.
- RG 136.108 The policy reason for the withdrawal offer—specifying the assets that will be used to satisfy withdrawal requests, and the amount of money that is expected to be available when the assets are converted into money—is so that members will have a degree of certainty about whether they should participate in the withdrawal offer (and to what extent). Members are able to consider the assets that will be sold, the assets that will remain in the fund and the amount of cash available to satisfy requests.
- RG 136.109 We may consider granting relief from Pt 5C.6 to allow a responsible entity to implement a 12-month ‘rolling’ withdrawal offer where:

- (a) the registered scheme is frozen; and
- (b) the 'rolling' withdrawal offer has the following features:
 - (i) the offer exists for one calendar year and applies to all withdrawal opportunities made by the responsible entity over that calendar year;
 - (ii) all members can opt to provide withdrawal requests to the responsible entity, which may apply to all withdrawal opportunities offered by the responsible entity:
 - (A) over the calendar year; or
 - (B) from the time the withdrawal request is received by the responsible entity, to the time the withdrawal request is amended or withdrawn; and
 - (iii) all members can lodge a withdrawal request with the responsible entity at any time during the calendar year.

RG 136.110 Factors we may consider when deciding whether to grant relief include:

- (a) whether the relief will improve members' access to their money invested in a registered scheme; and
- (b) the impact on members of changing or removing the content that is required to be specified in the withdrawal offer under s601KB(3)(b) and 601KB(3)(c).

RG 136.111 Where we grant relief, we will require the rolling withdrawal offer to specify:

- (a) the number of withdrawal opportunities the responsible entity proposes to make over the 12-month term;
- (b) how often the opportunities would be made and the terms on which the opportunities would be made;
- (c) the period during which the rolling withdrawal offer would remain open;
- (d) the basis on which money would be raised to pay for the withdrawal opportunities; and
- (e) the method for dealing with withdrawal requests if the money was insufficient to satisfy all requests.

RG 136.112 We may also limit the relief to a defined period or until the registered scheme becomes liquid.

RG 136.113 We will generally include conditions on the relief that require the responsible entity to:

- (a) provide all members with information on the amount of each withdrawal opportunity and how the withdrawal opportunity will be funded, before the withdrawal opportunity is open;
- (b) include reminders about members' ability to participate in the rolling withdrawal in member communications (e.g. in any correspondence, statement or disclosure provided to members);
- (c) notify all members in writing of the outcome of each withdrawal opportunity within a reasonable period after the outcome is known;
- (d) maintain a website that contains all relevant and up-to-date information on the rolling withdrawal offer;
- (e) distribute all available cash to members for as long as withdrawal requests exceed available cash; and
- (f) provide ASIC with details for each withdrawal opportunity as soon as practicable after the withdrawal amounts are paid. This includes the amount made available to satisfy each withdrawal opportunity.

Relief for marketplace lending withdrawals

RG 136.114 Section 601GA(4) requires that if members are to have a right to withdraw from a registered scheme, the constitution must:

- (a) specify the right; and
- (b) if the scheme is not liquid, provide for the right to be exercised under Pt 5C.6 and set out adequate procedures consistent with Pt 5C.6.

RG 136.115 We will consider granting relief from the requirements under s601GA(4) and Pt 5C.6 to facilitate cash withdrawals for a registered scheme that provides marketplace lending products where the scheme is not liquid. This means that:

- (a) the constitution would not be required to include provisions about a member's right to withdraw from a scheme while it is not liquid; and
- (b) a withdrawal offer that complies with Pt 5C.6 would not need to be given to members who exercise their right to withdraw their cash.

RG 136.116 Factors we may consider when deciding whether to grant relief include:

- (a) whether the policy rationale for fair and equal access to liquidity behind the withdrawal provisions in Pt 5C.6 is compromised, having regard to the impact on a particular member and the impact on the other members. When we consider whether the policy rationale is compromised, we will generally consider whether the member has access to information on their available cash balance and the withdrawal process. When we consider the impact on other members, we will generally consider whether each member's interests comprise a separate class and are segregated from other members' investments;

- (b) whether the requirements under Pt 5C.6 would be relevant or necessary for a withdrawal of a cash component of a member's interest. This takes into account the commercial structure of the registered scheme and whether cash is funding any withdrawal; and
- (c) whether the relief would provide members with a choice to withdraw their money in a timely manner, rather than having it remain invested in the registered scheme.

RG 136.117 If relief is granted, we will generally include conditions on the relief that require the responsible entity to:

- (a) specify the procedures for withdrawal of the cash component in the registered scheme's constitution;
- (b) disclose the following in the Product Disclosure Statement (PDS) and on the relevant online platform:
 - (i) the withdrawal procedures; and
 - (ii) prominent disclosure of any restrictions on the withdrawal right—for example:
 - (A) any money invested in a loan cannot be withdrawn during the term of the loan; or
 - (B) if a request exceeds any available balance, that a member can only withdraw up to that available balance;
- (c) remind members about their standing arrangement (if any) and how this may be amended upon completion of a member's withdrawal request;
- (d) confirm to a member in writing how long it takes for a withdrawal request to be processed following a member's request; and
- (e) determine that satisfaction of a member's withdrawal request will not affect the assets of another member's portfolio.

Deregistration of a registered scheme

RG 136.118 Under s601PA(1), the responsible entity of a registered scheme may lodge an application for voluntary deregistration of the scheme with ASIC only if:

- (a) the scheme:
 - (i) has 20 or less members and all the members agree that the scheme should be deregistered; and
 - (ii) is not required to be registered by s601ED(1)(b) or (c);
- (b) the scheme is not required to be registered and all the members agree that the scheme should be deregistered—because of s601ED(2); or
- (c) the scheme is not a managed investment scheme.

- RG 136.119 On an application by an Australian passport fund operator, ASIC must deregister the Australian passport fund as a registered scheme when:
- (a) the fund satisfies one of the criteria in RG 136.118(a)–RG 136.118(c);
 - (b) there are no members of the fund who became members (whether in this jurisdiction or any host economy) after the fund became an Australian passport fund; and
 - (c) there are no members of the fund who became members (whether in this jurisdiction or any host economy) on the expectation that the fund would become an Australian passport fund (see s601PBB(3)).
- RG 136.120 We have granted relief to allow a responsible entity to lodge an application to deregister a scheme where all the members:
- (a) agree that the scheme should be deregistered;
 - (b) were wholesale clients at the time they acquired (by way of issue or transfer) their interest in the scheme;
 - (c) are wholesale clients at the time an application for deregistration is lodged; and
 - (d) are each a body corporate.
- RG 136.121 We may grant this relief because s601PA(2) does not appear to address the circumstances where retail client members of a registered scheme have exited and the registered scheme becomes a scheme with only wholesale client members. The provisions of Ch 5C are directed to retail client protection. In our view, granting relief in circumstances where all of the members of the scheme are wholesale clients will not compromise retail client protection.

D Closely related schemes

Key points

This section explains when we will consider managed investment schemes as closely related so that they should be aggregated in determining if some exemptions for small schemes apply.

Section 601ED determination

- RG 136.122 Under s601ED(3), we may determine in writing that a number of managed investment schemes are closely related and that each of them has to be registered at any time when the total number of members of all of the schemes exceeds 20.
- RG 136.123 We will consider making a determination under s601ED(3) when:
- (a) the managed investment schemes are promoted by different persons but the circumstances and the similar nature of the schemes indicate that the promoters are likely to be associated;
 - (b) the businesses or activities of the managed investment schemes are similar, the schemes form part of a systematic promotion and there is doubt about whether the schemes fit within s601ED(1)(a) or (b). This doubt may arise because:
 - (i) the interests being offered relate to separate pools or common enterprises and might not all be part of one scheme; or
 - (ii) the schemes might not have been promoted as a business; or
 - (c) the managed investment schemes are:
 - (i) so similar that the one PDS might reasonably relate to offers of interests in the schemes; and
 - (ii) structured as separate schemes so that the offers do not require a PDS to be given, because no more than 20 issues are made in 12 months for each scheme and s1012E applies.
- RG 136.124 In our view, s601ED(3) is an anti-avoidance mechanism. It prevents promoters avoiding the registration requirement by structuring their offers as separate managed investment schemes with each having no more than 20 members, but, which, in aggregate, have more than 20 members. We consider it also allows us to prevent promoters from relying inappropriately on the exclusion in s1012E for schemes that issue interests to no more than 20 members in 12 months raising up to A\$2 million, by calculating the 20 issues separately for each separate but related scheme.

RG 136.125 A managed investment scheme must also be registered if it is promoted by a person who is in the business of, or whose associate is in the business of, promoting managed investment schemes: see s601ED(1)(b). We can determine that schemes are closely related and can require schemes to be registered when their total membership is over 20: see s601ED(1)(c) and 601ED(3).

RG 136.126 We may make a determination under s601ED(1)(c) to:

- (a) prevent avoidance by separate promoters offering similar schemes;
- (b) provide certainty when there are questions as to whether s601ED(1)(a) or (b) apply because it is not clear if:
 - (i) closely related common enterprises or pools may form part of one scheme; or
 - (ii) the promoters are in the business of promoting schemes; or
- (c) prevent use of the exclusion in s1012E for schemes that issue interests to no more than 20 members in 12 months raising up to A\$2 million, when it is inappropriate. We think it is inappropriate to rely on that exclusion if the one PDS could cover the relevant schemes in a cost-effective way, but schemes have been established separately for avoidance purposes. We will infer avoidance purposes unless a reasonable alternative explanation is provided to us.

Key terms

Term	Meaning in this document
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
Asia Region Funds Passport Register	An ASIC register that will include prescribed details of Australian passport funds, notified foreign passport funds, deregistered Australian passport funds and funds that have been removed as notified foreign passport funds
ASIC	Australian Securities and Investments Commission
Australian passport fund	A registered scheme that is also registered as a passport fund under Pt 8A.3 of the Corporations Act
Australian Passport Rules	Annex 3 to the Memorandum of Cooperation as incorporated by legislative instrument into Australian law under s1211 and 1211A of the Corporations Act
Ch 5C (for example)	A chapter of the Corporations Act (in this example numbered 5C), unless otherwise specified
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Div 2 (for example)	A division of the Corporations Act (in this example numbered 2), unless otherwise specified
foreign passport fund	A passport fund with a home economy other than Australia
home economy	The participating economy in which a passport fund is first registered, approved or authorised as a regulated collective investment scheme
home regulator	The passport regulator in a passport fund's home economy
host economy	A participating economy that is not the passport fund's home economy and either: <ul style="list-style-type: none"> permits the fund to offer interests in the fund in that economy under the Asia Region Funds Passport; or has accepted an application from the fund to offer interests in the fund in that economy under the Asia Region Funds Passport (but not to register the fund as a passport fund in that economy)
host regulator	The passport regulator in a passport fund's host economy
IDPS	An investor directed portfolio service as defined in Class Order [CO 13/763] <i>Investor directed portfolio services</i> or any instrument that amends or replaces that class order

Term	Meaning in this document
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-like scheme	An investor directed portfolio services-like scheme as defined in Class Order [CO 13/762] <i>Investor directed portfolio services provided through a registered scheme</i> , or any instrument that amends or replaces that class order
managed investment scheme	Has the meaning given in s9 of the Corporations Act
member	A member of a registered scheme
Memorandum of Cooperation	The Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport
notified foreign passport fund	A foreign passport fund that has become a notified foreign passport fund under s1213C of the Corporations Act.
participating economy	An economy that is a participant under the Memorandum of Cooperation (while it is in effect) and has: <ul style="list-style-type: none"> • advised the Asia Region Funds Passport Joint Committee that it has implemented the Asia Region Funds Passport; and • not withdrawn from the Memorandum of Cooperation
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 <p>Note: Some regulated collective investment schemes, or sub-funds of regulated collective investment schemes, that have been deregistered as passport funds remain subject to obligations as if they were still a passport fund.</p>
passport fund operator	An entity that operates a passport fund
passport regulator	The entity that regulates passport funds in a participating economy <p>Note: See also the definition of 'passport regulator' in the Passport Rules.</p>
Passport Rules	The requirements in Annex 3 to the Memorandum of Cooperation, as incorporated into the domestic law of a participating economy
PDS	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>Note: See s761A for the exact definition.</p>

Term	Meaning in this document
platform	<p>An investor directed portfolio service (IDPS) and IDPS-like scheme</p> <p>Note: This term does not extend to nominee and custody services, superannuation master trusts or other superannuation funds, self-managed superannuation funds, or managed discretionary accounts, as defined in Regulatory Guide 179 <i>Managed discretionary accounts</i> (RG 179).</p>
Pt 5C.6 (for example)	A part of the Corporations Act (in this example numbered 5C.6), unless otherwise specified
registered scheme	A managed investment scheme that is registered under s601EB of the Corporations Act
regulated collective investment scheme	A regulated collective investment scheme as defined by the Passport Rules for a participating economy
responsible entity	A responsible entity of a registered scheme as defined in s9 of the Corporations Act
responsible Minister	The Australian Minister responsible for the Asia Region Funds Passport
retail client	A client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of the Corporations Regulations
RG 51 (for example)	An ASIC regulatory guide (in this example numbered 51)
s1012E (for example)	A section of the Corporations Act (in this example numbered 1012E), unless otherwise specified
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
wholesale client	A client who is not a retail client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of the Corporations Regulations

Related information

Headnotes

application for relief, Asia Region Funds Passport, Australian passport fund, Australian Passport Rules, closely related schemes, compliance committee, compliance plan, deregistration, discretionary powers, exemption, managed investment scheme, members, modification, operator, registered scheme, relief, responsible entity, stapled securities, withdrawal arrangements

Regulatory guides

[RG 43](#) *Financial reports and audit relief*

[RG 49](#) *Employee incentive schemes*

[RG 51](#) *Applications for relief*

[RG 76](#) *Related party transactions*

[RG 80](#) *Managed investment schemes: Interests not for money*

[RG 87](#) *Charitable schemes and school enrolment deposits*

[RG 91](#) *Horse breeding schemes and horse racing syndicates*

[RG 138](#) *Foreign passport funds*

[RG 140](#) *Strata schemes and management rights schemes*

[RG 144](#) *Mortgage investment schemes*

[RG 148](#) *Platforms that are managed investment schemes and nominee and custody services*

[RG 160](#) *Time-sharing schemes*

[RG 161](#) *Share and interest sale facilities*

[RG 174](#) *Relief for externally administered companies and registered schemes being wound up*

[RG 195](#) *Group purchasing bodies for insurance and risk products*

Legislation

Corporations Act, Chs 5C, 8A, Pts 5C.4, 5C.6, 7.9, s252R, 253E, 601ED, 601FC, 601FD, 601FE, 601FL, 601FL, 601GA, 601HG, 601JA, 601JB, 601KA, 601KB-601KE, 601LC, 601PA, 601PBB, 601QA, 926A, 951B, 992B, 1012E, 1012IA, 1020F, 1211, 1211A, 1217, 1217A

SIS Act

Information sheets

[INFO 111](#) *Information for investors in frozen funds*

Consultation papers and reports

[CP 296](#) *Funds management*

[REP 582](#) *Response to submissions on CP 296 Funds management*

Other documents

[Memorandum of Cooperation](#)