



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

Office address (inc courier deliveries):
Level 5, 100 Market Street,
Sydney NSW 2000

Mail address for Sydney office:
GPO Box 9827,
Brisbane QLD 4001

Tel: +61 1300 935 075

www.asic.gov.au/

By email only

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Dear Superannuation Trustee

Annual Performance Assessment 2023

This year is the first year that the annual performance assessment (**performance test**) in Part 6A of the Superannuation Industry (Supervision) Act 1993 (**SIS Act**), will apply to both trustee-directed products (**TDPs**)¹ and MySuper products.

Given the large number of TDPs that will be tested, we are sending this letter to all superannuation trustees. It contains information that will be relevant if one or more products you offer fail the performance test. It also contains information that is relevant for you if you offer an investment option that, while not assessed as a TDP for you, fails the performance test for another trustee.

If, by 31 August, the Australian Prudential Regulation Authority (**APRA**) gives you notification of a determination that one or more of your products failed the performance test, you will need to meet certain obligations. These will depend on whether it is the first year the product has failed, or a second or subsequent year (in 2023, this is only possible in the case of a MySuper product). If you do not comply with these obligations, you may breach a trustee covenant or otherwise commit an offence².

This letter directs you to some guidance available on the website of the Australian Securities and Investments Commission (**ASIC**) and on the APRA website. It also highlights some obligations where we feel further information is useful.

¹ Trustee-directed product is defined in reg 9AB.2 of the Superannuation Industry (Supervision) Regulations 1994 (**SIS Regulations**).

² For example, under s52(14) of the SIS Act the obligation to notify beneficiaries under s60E(2) is a trustee covenant (see s54B of the SIS Act re civil and criminal consequences of breach of s52) and a breach of s1017DA of the Corporations Act 2001 (**Corporations Act**) is an offence.

Available guidance

ASIC has reviewed compliance with performance test communication obligations for the previous two years and prepared the following, which provide relevant guidance for future compliance:

- [Report 729](#) *Review of trustee communications about the MySuper performance test (REP 729)*.
- Media Release ([23-093MR](#)) *Super trustees told to focus more on their members in communications about performance test failure (23-093MR)*.

We strongly encourage you to read these documents if any of your products are likely to fail the performance test. Both are available on the [Super news and reports](#) page of the ASIC website (see [asic.gov.au](#)). Although ASIC's work has focused to date on MySuper products, many of the insights in the documents above will also be relevant to your compliance obligations concerning any TDP failure.

Additional considerations

In addition to the available guidance, the following considerations may also be relevant if one or more of your products fail the performance test.

Administrative arrangements

We expect trustees to prepare early and to engage early with those relevant for the implementation of the trustee's obligations. This may include administrators, or if a product needs to be closed, employers or advisors arranging for contributions to be paid.

Given the number of products being tested this year, it is possible that trustees will have several products that fail, and so preparedness will be key to meet the legal timing requirement for sending notices to members³.

Some things to consider:

- The form of notice to be sent to members. This will differ depending on whether the product is failing for a first or subsequent time and whether it is a MySuper product or TDP.
- Preparing by identifying and having up to date contact details of members in each failed product.
- Postal deadlines so notices are provided within 28 days of a trustee being advised of its determination by APRA.

See also pages 13-14 of REP 729.

³ Section 60E of the SIS Act requires notices to be given no later than 28 days after APRA gives you a determination.

Website disclosure - multiple products failing the test

Trustees must make information about a performance test failure publicly available on the fund's website. The information must be available on the website as of Friday, 1 September 2023, being the first business day after 31 August 2023.⁴

If trustees have more than one product fail the performance test, this disclosure obligation will apply equally to all products. We expect website material to be presented in a manner that is clear and prominent. It is most appropriate to put the material on the relevant fund's homepage as well as on any key webpage featuring the product.

Further, you should consider updating other parts of your website where performance of the products that fail the performance test is mentioned to minimise member confusion.

Notice to members – recently amended

If a product fails the performance test, the letter that must be sent to members is a standard form notice, provided for in the SIS Regulations.

The SIS Regulations were updated as of 3 August 2023 so that there are now five template letters, applicable in different circumstances⁵. One standard form notice relates to MySuper products and is applicable to first and subsequent fails. The other four notices relate to TDPs. For TDPs only, if more than one of your products fail the performance test you may have the option to send a consolidated notice referring to multiple TDPs in the same notice. Instructions are provided in the SIS Regulations and should be read carefully.

Section 60E(3) of the SIS Act requires notices to be given no later than 28 days after APRA gives you a determination. If your MySuper product or TDP is likely to fail the performance test, you should be doing all planning necessary to ensure this deadline is met.

Product disclosure statements and significant event notices

You will need to consider whether your obligations to update your PDS or to issue a significant event notice are triggered, either arising as a consequence of one of your products failing the performance test or of consequences or steps taken that follow on from this failure.

⁴ See s1017DA of the Corporations Act and reg 7.9.07ZB, item 6 of the Corporations Regulations. See the Explanatory Statement for the Treasury Laws Amendment (Financial Reporting and Auditing of Registrable Superannuation Entities) Regulations 2023 for further guidance on determining timing.

⁵ See sch 2A of the SIS Regulations as amended by the Superannuation Industry (Supervision) Amendment (Your Future, Your Super – Addressing Underperformance in Superannuation) Regulations 2023.

Communications – investment options that fail as a TDP

TDPs have to meet the requirements in reg 9AB.2 of the SIS Regulations. These requirements mean that an investment option may not be a TDP subject to the performance test for one trustee, but will be when offered by another trustee. This may happen where a trustee offers another trustee's product on the first trustee's platform.

If any investment option you offer fails the performance test as it applies to another trustee, we endorse APRA's view that you should consider whether it is in the best financial interests of members for the option to continue to be offered. See [APRA's FAQs⁶](#).

Design and distribution obligations – TDP

You should consider your design and distribution obligations⁷ if your TDP fails the performance test, you may need to consider whether your target market determination remains appropriate, your review triggers and whether any distribution conditions remain reasonable. You should also consider any obligations you may have as distributor of an investment option that fails the performance test as a TDP for another trustee.

Relief applications

Relief can be provided to defer the time period in which the notice about failing the performance test must be sent: see REP 729, pg 6 and [APRA FAQ General FAQ 6](#). It cannot be given to waive the requirement to give the notice. The notice provides important information to members and relief will only be given in very limited circumstances. As with 2021, in 2022, the only instance of relief given was one where the relevant fund merged with another within weeks of the performance test results being released.

All communications to be consumer centric

Any communication you make in relation to the performance test, your product and your performance (separate to the mandatory notification) should provide information in a balanced and factual way, that is not misleading or deceptive. While in some instances trustees may conclude that the interests of members receiving the fail notice are served by additional explanatory material accompanying the notice, particular care should be taken in drafting this material so as not to minimise the significance of the failure. In addition to positive assertions being misleading, omission of information can be misleading if it leads people to an incorrect conclusion, due to their existing specific knowledge (or lack of it) and general understanding⁸. See REP 729, pages 9 – 12.

⁶ Your Future, Your Super Frequently Asked Questions, Trustee directed products FAQ 3

⁷ See Part 7.8A of the Corporations Act

⁸ See Regulatory Guide 53 *The use of past performance in promotional material*, para 6.3.

We strongly encourage all trustees to read REP 729 and 23-093MR and to be member-centric and consistent across all messaging.

If you have any questions, please contact Melissa Andersson (0478 542 650, melissa.andersson@asic.gov.au) or Melissa Trees (0435 126 039, melissa.trees@asic.gov.au).

Yours sincerely

Jane Eccleston
Senior Executive Leader, Superannuation and Life Insurance
Australian Securities and Investments Commission