

Draft instrument



ASIC
Australian Securities &
Investments Commission

ASIC Corporations (Discretions for Setting the Issue Price and Withdrawal Price for Interests in Managed Investment Schemes) Instrument 2023/XX

I, Kate Metz, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Date 2023

[DRAFT ONLY – NOT FOR SIGNATURE]

<signature>

<insert name>

Contents

Part 1—Preliminary	3
1 Name of legislative instrument	3
2 Commencement	3
3 Authority	3
4 Definitions	3
Part 2—Declaration	4
5 Amount of consideration to acquire interest or to be paid upon withdrawal..	4
6 Discretions affecting the amount of consideration to acquire interests and payments for withdrawal	11
7 Disclosure of information about discretions	11
8 Application	12
Part 3—Repeal	14
9 Repeal	14

Part 1—Preliminary

1 Name of legislative instrument

This is the *ASIC Corporations (Discretions for Setting the Issue Price and Withdrawal Price of Interests in Managed Investment Schemes) Instrument 2023/XX*.

2 Commencement

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

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

3 Authority

This instrument is made under subsections 601QA(1) and 1020F(1) of *Corporations Act 2001*.

4 Definitions

In this instrument:

Act means the *Corporations Act 2001*.

Part 2—Declaration

5 Amount of consideration to acquire interest or to be paid upon withdrawal

- (1) Chapter 5C of the Act applies to a responsible entity as if provisions of that Chapter were modified or varied by:
 - (a) in section 601GA:
 - (i) in paragraph (1)(a) before “the”, inserting “except as provided by sections 601GAD and 601GAE,”; and
 - (ii) in subsection (4) omit “must:”, substituting “must, subject to section 601GAF:”; and
 - (b) after section 601GAC inserting:

“601GAD Constitutional provisions about the amount of the consideration for the acquisition of interests

- (1) The constitution of a registered scheme does not have to make adequate provision for the amount of the consideration that is to be paid to acquire an interest in the scheme to the extent that it contains provisions that have the effect of enabling the responsible entity to set the acquisition price of interests in any of the circumstances set out in subsections (2) to (9).

Placements

- (2) The responsible entity may set the amount of the consideration to acquire interests where:
 - (a) the interests are in a class of interests that are quoted on:
 - (i) the financial market operated by ASX; or
 - (ii) an approved foreign marketand the quotation of interests in that class is not suspended; and
 - (b) except where the interests are in a class of interests quoted on the financial market operated by ASX, either of the following applies:
 - (i) the issue, together with any related issue in the previous year does not, immediately before the issue, comprise more than 15% of the interests in that class; or
 - (ii) all of the following apply:

- (A) members who hold interests in the same class approve the issue by a placement resolution;
- (B) unless the responsible entity reasonably considers that the issue will not adversely affect the interests of members in another class (if any)—members in that other class approve the issue by a placement resolution;
- (C) any notice convening a meeting to vote on the issue contains particulars of the use to be made of the money raised by the issue.

Rights issues

- (3) The responsible entity may set the amount of the consideration to acquire interests where both of the following apply:
 - (a) the responsible entity offers the interests to persons who are members of the scheme on a date determined by the responsible entity, in proportion to the value of each member's interests in the scheme or, where the offer is made only to members who hold interests in a particular class of interest in the scheme, in that class of interest in the scheme at that date subject to the exclusion of any member from the offer where it is not a contravention of paragraph 601FC(1)(d);
 - (b) where the interests are to be issued on exercise of an option for the issue of interests and the responsible entity offers the option to persons who are members of the scheme on a date determined by the responsible entity, in proportion to the value of each member's interests in the scheme or, where the offer is made to members who hold interests in a particular class of interest in the scheme, in that class of interest in the scheme at that date subject to the exclusion of any member from the offer where it is not a contravention of paragraph 601FC(1)(d).

Interest purchase plans

- (4) The responsible entity may set the amount of the consideration to acquire interests issued in accordance with *ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547*.

Distribution reinvestment plans

- (5) The responsible entity may set the amount of the consideration to acquire interests where the whole or part of any money payable to a member under the constitution, by way of distribution of capital or income, is applied in payment for the issue of interests in the scheme.

Negotiated fees

- (6) The responsible entity may affect the amount of the consideration to acquire interests by applying a fee payable in connection with the issue that is permitted under the exemption provided in *ASIC Corporations (Registered Schemes—Differential Fees) Instrument 2017/40*.

Stapled securities

- (7) The responsible entity may set the amount of the consideration to acquire interests that form part of stapled securities if the constitution contains adequate provision for the amount of the consideration to acquire the stapled securities or has provisions about the amount of the consideration to acquire the stapled securities that would be permitted by other subsections of this section or by section 601GAE if the stapled securities were interests in the registered scheme.

Schemes where there is limited or no pooling

- (8) The responsible entity may set the amount of the consideration to acquire interests where the only contributions that may be used in common with or pooled with any other asset in the scheme are:
- (a) money placed in an account with an ADI held as scheme property pending disbursement of the money to pay fees or expenses, acquire investments or carry on business; or
 - (b) not proprietary rights and no income in which a member has any interest is to be paid or worked out by dividing up a pool; or
 - (c) used in common or pooled between joint tenants or tenants in common where:
 - (i) none of the tenants is the responsible entity or an associate of the responsible entity; and
 - (ii) each tenant is a person known to each other tenant before being offered an interest for issue or invited to offer to acquire an interest.

Forfeited interests

- (9) The responsible entity may set the amount of consideration to acquire interests that have, in accordance with the constitution, been forfeited to the responsible entity on trust for members of the scheme where all or part of the amount (the **outstanding amount**) payable by the member in relation to the interest has not been paid when called and both of the following apply:
- (a) on the payment of the outstanding amount, the interest would be in a class of interests that are quoted on the financial market operated by ASX;
 - (b) the sale of the forfeited interest is in accordance with section 254Q, other than subsections (1), (9), (10) and (13), as if the interests were shares, the scheme was the company and the responsible entity was each director of the company.
- (10) For the purposes of this section:

approved foreign market has the meaning given by section 9.

Note: The definition of **approved foreign market** is notionally inserted by ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669.

ASX means ASX Limited.

foreign member means a member of a registered scheme who has a registered address outside of this jurisdiction.

offer includes, in relation to an issue of interests, inviting an application for the issue of interests.

placement resolution means, in relation to the approval of an issue of interests, a special resolution where votes are only permitted to be cast in respect of interests that are held by a member:

- (a) who will not acquire any of the interests that are to be issued or an interest in those interests; and
- (b) who does not hold the interests on trust for or on behalf of another person, unless that person will not acquire any of the interests that are to be issued or an interest in those interests.

related issue means, in relation to an issue of interests, an issue of interests in the same class at a price set by the responsible entity, which has not been:

- (a) approved or ratified by members in accordance with a provision in the constitution to the effect of subparagraph (2)(b)(ii); or
- (b) issued in accordance with a provision of the constitution other than one to the effect of subsection (2).

stapled security means two or more financial products including at least one interest in a registered scheme:

- (a) that under the constitution must be transferred together;
- (b) where there are no financial products in the same class as those financial products which may be transferred separately;
- (c) where one or more of the financial products is a share of a body corporate, the body corporate has not issued any share that may be transferred separately; and
- (d) where one or more of the financial products is an interest in a managed investment scheme, no interests in that scheme may be transferred separately.

601GAE Discretions in constitutional provisions that set the amount of the consideration for the acquisition of interests

- (1) The constitution of a registered scheme may provide a formula or method that is to be used to determine the amount of the consideration to acquire interests in the scheme that complies with subsection (2) but gives the responsible entity a discretion to do one or more of the following:
 - (a) decide a matter that affects the value of a factor included in the formula;
 - (b) decide a matter that is an aspect of the method;
 - (c) determine the amount of an adjustment to the amount determined by the formula for the costs in acquiring or disposing of scheme property, for assets of the scheme that are not scheme property or otherwise.

Note: The responsible entity may appoint an agent or otherwise engage a person to do anything it is authorised to do in relation to a scheme: see subsection 601FB(2).

- (2) The formula or method must:
 - (a) if it applies when the interests in the scheme:

- (i) are not in a class of interests that is traded on a financial market; or
- (ii) for exchange traded funds or managed funds—are in a class of interests that are able to be traded on a financial market operated by ASX or Cboe,

be based on the value of scheme property attributable to interests in that class at the time of issue less any liabilities that under the constitution may be met from that property attributable to interests in that class divided by the number of interests on issue in that class; or

- (b) if it applies when the interests in the scheme are in a class of interests that are able to be traded on a financial market and the scheme is listed on the financial market—be based on the market price of the interests in that class on the market at or around the time of issue.

Note: A reference to interests in a particular class includes a reference to all interests in the scheme if there are no separate classes of interest: subsection 57(2).

- (3) A discretion in the constitution of the kind referred to in subsection (1) must not be exercised on the basis that it will result in a particular amount being set as the amount of the consideration to acquire an interest in the scheme.
- (4) For the purposes of this section:

ASX means ASX Limited.

Cboe means CBOE Australia Pty Ltd.

exchange traded fund means a registered scheme in relation to which all of the following are satisfied:

- (a) interests in the scheme are in a class that are able to be traded on a financial market operated by ASX or Cboe but the scheme is not listed on either of those markets;
- (b) the responsible entity has the power and approval to issue interests in that class on any day that those interests are able to be traded on the relevant financial market;
- (c) the responsible entity allows applications for and redemptions of interests in that class on any day that those interests are able to be traded on the relevant financial market;

- (d) the price or value of any financial product, index, currency, commodity or other thing that the scheme invests in or tracks is continuously disclosed or can be immediately ascertained;
- (e) the name of the scheme does not contain the expression “managed fund” or “hedge fund”.

managed fund means a registered scheme:

- (a) that satisfies paragraphs (a) to (d) of the definition of *exchange traded fund*; and
- (b) whose name contains the expression “managed fund” or “hedge fund”.

601GAF Discretions in constitutional provisions about amounts to be paid on withdrawal

- (1) The constitution does not have to specify the right to withdraw from a scheme or set out adequate procedures for making and dealing with withdrawal requests to the extent that it provides a formula or method that is to be used to work out an amount that will be paid to a member making a withdrawal that complies with subsection (2) but gives the responsible entity a discretion to do one or more of the following:
 - (a) decide a matter that affects the value of a factor included in the formula;
 - (b) decide a matter that is an aspect of the method;
 - (c) make an adjustment to the amount determined by the formula for the costs in acquiring or disposing of scheme property, for assets of the scheme that are not scheme property or otherwise.
- Note: The responsible entity may appoint an agent or otherwise engage a person to do anything it is authorised to do in relation to a scheme: see subsection 601FB(2).
- (2) The formula or method must be based on the value of scheme property attributable to interests of the relevant class less any liabilities that under the constitution may be met from that property attributable to interests in that class divided by the number of interests on issue in that class.
 - (3) A discretion in the constitution of the kind referred to in subsection (1) must not be exercised on the basis that it will result in a particular amount being set as the amount that will be paid to a member making a withdrawal.”

6 Discretions affecting the amount of consideration to acquire interests and payments for withdrawal

- (1) Chapter 5C of the Act applies to a responsible entity as if provisions of that Chapter were modified or varied by, after subsection 601FC(1), inserting:

“Exercise of discretion on issue or withdrawal

- (1A) The responsible entity must ensure that the manner in which a discretion affecting determination of the amount of consideration to acquire interests or the terms of any payment or removal of liability arising from withdrawal from the scheme is exercised is as far as practicable:
- (a) if the discretion relates to working out the value of scheme property—consistently with ordinary commercial practice for valuing property of the relevant kind; and
 - (b) if the discretion relates to working out the market price of interests in the scheme which are quoted on a financial market—consistently with ordinary commercial practice for working out the market price of interests of the same kind in relation to an issue of the interests; and
 - (c) in either case, consistently with producing a value or price that is reasonably current at the time of the issue or withdrawal.

Documentation of exercise of discretion

- (1B) If a discretion affecting the amount of the consideration to acquire interests or the terms of any payment or removal of liability arising from withdrawal from the scheme is exercised, the responsible entity must:
- (a) only exercise the discretion if it is reasonable to do so; and
 - (b) unless the discretion was exercised in accordance with a current written policy—prepare a written explanation of how the discretion was exercised and why such exercise was reasonable.”

7 Disclosure of information about discretions

- (1) Part 7.9 of the Act applies in relation to a responsible entity as if Part 7.9 of the Act were modified or varied by, after section 1013DA, inserting:

“1013DAA Responsible entity discretions about issue and withdrawal

If a Product Disclosure Statement relates to a managed investment product and the responsible entity of the registered scheme to which the product

relates may exercise a discretion referred to in subsection 601FC(1B), the Product Disclosure Statement must include statements to the effect that copies of documents relating to discretions about pricing of interests are available from the responsible entity at no charge.”.

8 Application

- (1) Sections 5 to 7 only apply to a responsible entity in relation to a managed investment scheme:
 - (a) if it became a registered scheme after 30 September 2013; or
 - (b) in relation to which the responsible entity has:
 - (i) at any time before commencement of this instrument published on its website a notice that it will rely on ASIC Class Order [CO 13/655]; or
 - (ii) at any time published on its website a notice that it will rely on this instrument.
- (2) A notice under paragraph 8(1)(b) cannot be revoked.
- (3) Chapter 5C of the Act applies to a responsible entity in relation to a managed investment scheme:
 - (a) which became a registered scheme on or before 30 September 2013; and
 - (b) in relation to which paragraph 8(1)(b) applies;

as if provisions of that Chapter were modified or varied by, before section 601GB, inserting:

“601GAG Notice of reliance

A responsible entity to which paragraph 8(1)(b) of *ASIC Corporations (Discretions for Setting the Issue Price and Withdrawal Price for Interests in Managed Investment Schemes) Instrument 2023/XX* applies in relation to a registered scheme must publish and maintain on its website a notice that it is relying on that instrument in relation to the scheme.”.

- (4) Subsection (3) does not apply to a responsible entity in relation to a managed investment scheme in relation to which subparagraph (1)(b)(i) applies and which maintains on its website a notice that it will rely on ASIC Class Order [CO 13/655] until the earlier of:
 - (a) the day the responsible entity publishes a notice on its website that it is relying on this instrument in relation to the scheme; and

(b) 30 June 2024.

Part 3—Repeal

9 Repeal

This instrument is repealed at the start of 1 October 2028.