



# ASIC

Australian Securities &  
Investments Commission

## REPORT 769

# Response to submissions on CP 367 Remaking ASIC class orders on financial requirements

September 2023

### About this report

This report highlights the key issues that arose out of the submissions received on [Consultation Paper 367](#) *Remaking ASIC class orders on financial requirements: [CO 13/760], [CO 13/761] and ASIC Instrument 2022/449 (CP 367)* and details our responses to those issues.

### 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.

### Disclaimer

This report 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.

This report does not contain ASIC policy. Please see [Regulatory Guide 166 AFS licensing: Financial requirements](#) (RG 166).

# Contents

<b>A</b>	<b>Overview and consultation process .....</b>	<b>4</b>
	Responses to consultation.....	5
<b>B</b>	<b>Key issues from the submissions .....</b>	<b>6</b>
	Definition of 'value of fund assets': gross or net basis .....	6
	Treatment of deferred tax assets.....	8
	Assets invested in by an AFS licensee.....	9
	Dormant AFS licensees .....	9
	Revenue of authorised representatives.....	10
	Duration of the legislative instruments.....	11
	<b>Appendix: List of non-confidential respondents .....</b>	<b>12</b>

## A Overview and consultation process

- 1 In [Consultation Paper 367 Remaking ASIC class orders on financial requirements: \[CO 13/760\], \[CO 13/761\] and ASIC Instrument 2022/449](#) (CP 367), we consulted on proposals to remake these instruments for some categories of Australian financial services (AFS) licensees. The consultation period was open for four weeks, from 3 March 2023 to 31 March 2023.
- 2 In CP 367 we proposed to issue new legislative instruments that would remake, without substantive changes:
  - (a) [Class Order \[CO 13/760\] Financial requirements for responsible entities and operators of investor directed portfolio services](#);
  - (b) [Class Order \[CO 13/761\] Financial requirements for custodial or depository service providers](#); and
  - (c) [ASIC Corporations \(Financial Requirements for Corporate Directors of Retail Corporate Collective Investment Vehicles\) Instrument 2022/449](#).
- 3 After considering the submissions, we have issued the following new legislative instruments:
  - (a) [ASIC Corporations \(Financial Requirements for Responsible Entities, IDPS Operators and Corporate Directors of Retail CCIVs\) Instrument 2023/647](#) (ASIC Instrument 2023/647)—This instrument remakes [\[CO 13/760\]](#) and [ASIC Instrument 2022/449](#) for responsible entities, investor directed portfolio services (IDPS) operators and corporate directors of retail corporate collective investment vehicles (CCIVs).
  - (b) [ASIC Corporations \(Financial Requirements for Custodial or Depository Service Providers\) Instrument 2023/648](#) (ASIC Instrument 2023/648)—This instrument remakes [\[CO 13/761\]](#) for custodians.
- 4 Both legislative instruments will expire on 1 October 2028 (i.e. in approximately five years).
- 5 This report highlights the key issues that arose out of the submissions received on CP 367 and our responses to those issues.
- 6 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 367. We have limited this report to the key issues.

## Responses to consultation

- 7 We received seven responses to [CP 367](#). All responses were non-confidential. We are grateful to respondents for taking the time to send us their comments.
- 8 For a list of the respondents to CP 367, see the appendix. Copies of these submissions are currently on the ASIC website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 367.
- 9 The feedback on CP 367 generally supported our proposals to remake [\[CO 13/760\]](#), [\[CO 13/761\]](#) and [ASIC Instrument 2022/449](#) without substantive changes.
- 10 The key issues raised by respondents related to whether:
- (a) the definition of ‘value of fund assets’ in [ASIC Instrument 2023/647](#) should clarify if assets or property are calculated on a gross or net basis;
  - (b) the intangible assets limb in paragraph (a) of the definition of ‘excluded assets’ should exclude deferred tax assets;
  - (c) paragraph (c) of the definition of ‘excluded assets’, which deals with investments by AFS licensees in a managed investment scheme, superannuation product or CCIV, should be changed to only apply where the AFS licensee or an associate has power or control over the managed investment scheme, superannuation product or CCIV;
  - (d) the net tangible assets (NTA) requirement should apply to a ‘dormant’ AFS licensee—that is, an AFS licensee that holds a relevant licence authorisation to provide a financial service, but does not provide the financial service temporarily or permanently; and
  - (e) our guidance on including the revenue of an authorised representative of the AFS licensee in the licensee’s revenue should be retained and reflected in the new legislative instruments.
- 11 Respondents also queried whether the new legislative instruments should have a duration of more than five years.

## B Key issues from the submissions

### Key points

This section outlines the key issues raised in the submissions on our proposal to remake [\[CO 13/760\]](#), [\[CO 13/761\]](#) and [ASIC Instrument 2022/449](#) and our response to those submissions.

In particular, it discusses:

- applying the gross value of assets in the definition of ‘value of fund assets’ (see paragraphs 12–14);
- including deferred tax assets in the intangible assets limb of the definition of ‘excluded assets’ (see paragraphs 15–18);
- restricting paragraph (c) of the definition of ‘excluded assets’ to where the AFS licensee or an associate has power or control over the managed investment scheme, superannuation product or CCIV (see paragraphs 19–21);
- applying the NTA requirement to dormant AFS licensees (see paragraphs 22–23);
- retaining and reflecting our guidance in [RG 166](#) that a licensed custodian’s revenue includes revenue earned by an authorised representative that acts on behalf of the licensed custodian (see paragraph 24); and
- implementing a five-year term for the new legislative instruments (see paragraph 25).

### Definition of ‘value of fund assets’: gross or net basis

- 12 [ASIC Instrument 2023/647](#) defines the term ‘value of fund assets’, which is used in the definition of ‘average value of fund assets’. Under the lower NTA requirement in s912AA(4)(a) of the *Corporations Act 2001* (Corporations Act), an AFS licensee must hold NTA of the greater of:
- (a) \$150,000;
  - (b) 0.5% of the average value of fund assets of the registered schemes, IDPSs and retail CCIVs they operate; or
  - (c) 10% of their average revenue.
- 13 The term ‘value of fund assets’ in [ASIC Instrument 2023/647](#) combines the terms ‘value of scheme and IDPS property’ in [\[CO 13/760\]](#) and ‘value of CCIV assets, scheme property and IDPS property’ in [ASIC Instrument 2022/449](#) with substantially the same meaning. The value definitions refer to the value of scheme property or retail CCIV assets (excluding the value of cross-invested shares for a retail CCIV) that would appear in a balance sheet

prepared under Ch 2M of the Corporations Act. The definitions also refer to the market value of the asset in relation to IDPS property and other property of a registered scheme or retail CCIV.

- 14 Respondents asked ASIC to clarify whether the asset values should be calculated on a gross or net basis. The existing relief in [\[CO 13/760\]](#) and [ASIC Instrument 2022/449](#) and our guidance in [RG 166](#) do not specifically refer to gross or net asset value.

*ASIC's response*

We have clarified that, when calculating the 0.5% of the average value of assets and property limb of the NTA requirement, [\[CO 13/760\]](#) and [ASIC Instrument 2022/449](#) require an AFS licensee to use the value that would appear in a balance sheet under Ch 2M of the Corporations Act prepared at the time of the NTA calculation. This position continues in [ASIC Instrument 2023/647](#).

We have not changed the definition of 'value of fund assets' or 'average value of fund assets' to differentiate between the gross or net asset value. The definitions require the gross value of the assets—as they appear in the balance sheet—to be included in the NTA calculation. There is no reference to any deduction for liabilities attached to the assets. The underlying intention is to apply the 0.5% of the average value of assets and property limb to the entire carrying value of the scheme property and other assets. This is subject to the relevant cap of \$5 million that applies under the requirement.

We consider the terms used in [\[CO 13/760\]](#) and [ASIC Instrument 2022/449](#), and as applied to [ASIC Instrument 2023/647](#), are sufficiently clear. To provide greater clarity, we have noted in [RG 166](#) that:

- (a) for each asset or asset category, an AFS licensee must use the amount that appears in a hypothetical Ch 2M balance sheet for that asset or asset category;
- (b) the value used for an asset or asset category under (a) will be a carrying value and in some cases the Ch 2M balance sheet will require adjustments, such as:
  - (i) property, plant and equipment, where the balance sheet shows the gross value minus accumulated depreciation and impairment losses; and
  - (ii) accounts receivable, where the balance sheet shows a net amount that represents the total of the amounts owed minus a provision for impairments (e.g. bad or doubtful debts); and
- (c) for an asset that is subject to a liability, such as a property that is the subject of a mortgage, the gross value of the asset is used—the AFS licensee is not permitted to deduct the amount of a liability that is connected to an asset.

## Treatment of deferred tax assets

- 15 Under [\[CO 13/760\]](#), [\[CO 13/761\]](#) and [ASIC Instrument 2022/449](#):
- (a) ‘NTA’ means adjusted assets minus adjusted liabilities;
  - (b) ‘adjusted assets’ means the total value of the assets of the AFS licensee as it would appear on a balance sheet under Ch 2M of the Corporations Act, minus various adjustments that include ‘excluded assets’; and
  - (c) intangible assets are excluded assets under paragraph (a) of the definition of ‘excluded assets’.
- 16 The respondents questioned the different treatment of deferred tax assets across [\[CO 13/760\]](#) and [\[CO 13/761\]](#) and, for retail OTC derivative issuers, [ASIC Corporations \(Financial Requirements for Issuers of Retail OTC Derivatives\) Instrument 2022/705](#). In [\[CO 13/760\]](#) and [\[CO 13/761\]](#), intangible assets under paragraph (a) of the definition of excluded assets *exclude* deferred tax assets. This means that an AFS licensee is allowed to count a deferred tax asset in its NTA calculation.
- 17 In contrast, ASIC Instrument 2022/449 and ASIC Instrument 2022/705 state that intangible assets under paragraph (a) of the definition of ‘excluded assets’ *include* deferred tax assets.
- 18 This issue was raised in 2021 in several submissions to [Consultation Paper 336](#) *Financial requirements: Treatment of lease assets* (CP 336). In [Report 689](#) *Response to submissions on CP 336 Financial requirements: Treatment of lease assets* (REP 689), we stated that ASIC would revisit the treatment of deferred tax assets.

### ASIC’s response

A deferred tax asset is an intangible asset. It is an amount of tax recoverable in a future period for deductible temporary differences, the carry-forward of unused tax losses and the carry-forward of unused tax credits: see [Australian Accounting Standards Board Standard 112](#) *Income taxes*.

Our position is that, for NTA purposes, deferred tax assets should be treated the same as other types of intangible assets (except for right-of-use lease assets). We should apply a consistent approach to their treatment across ASIC Instrument 2022/705 and the new instruments that replace [\[CO 13/760\]](#), [\[CO 13/761\]](#) and ASIC Instrument 2022/449.

We have reflected this position in [ASIC Instrument 2023/647](#) and [ASIC Instrument 2023/648](#). Both instruments *exclude* deferred tax assets from the intangible assets category of excluded assets for NTA purposes.



## Assets invested in by an AFS licensee

- 19 Under paragraph (c) of the definition of ‘excluded assets’, an AFS licensee must not include three categories of assets (i.e. investments in a managed investment scheme, superannuation product or CCIV) in their calculation of adjusted assets and, consequently, NTA.
- 20 We identified an inconsistency between this definition and our pro forma licence conditions in [Pro Forma 209 Australian financial services licence conditions](#) (PF 209) and guidance in [RG 166](#).
- 21 Our policy position as set out in PF 209 and RG 166 is that the power or control restriction should apply to all three categories of an AFS licensee’s investments under paragraph (c) of the definition of ‘excluded assets’. An AFS licensee is only to exclude the three categories of assets where the AFS licensee or an associate may exercise any form of power or control over the managed investment scheme, superannuation product or CCIV.

### *ASIC’s response*

The new legislative instruments should be consistent with our policy position as set out in PF 209 and RG 166.

An AFS licensee’s investments in managed investment schemes, superannuation products and CCIVs should only be excluded from the NTA calculation if the AFS licensee or an associate has power or control over the managed investment scheme, superannuation product or CCIV.

Under [ASIC Instrument 2023/647](#) and [ASIC Instrument 2023/648](#), we have applied the power or control restriction to all three categories of an AFS licensee’s investments in paragraph (c) of the definition of ‘excluded assets’.

We note that [ASIC Instrument 2022/705](#) continues to apply the power or control restriction to superannuation products only. We will review this inconsistency in ASIC Instrument 2022/705 in due course.

## Dormant AFS licensees

- 22 Some respondents raised the ‘dormant AFS licensee’ scenario—where an AFS licensee holds a licence authorisation to provide a type of financial service, but does not provide that service. One respondent recommended that a responsible entity, IDPS operator or corporate director of a retail CCIV should not be required to hold NTA unless and until they operate a registered scheme, IDPS or retail CCIV, as the case may be.
- 23 The NTA requirement applies to an AFS licensee that holds the relevant licence authorisation. This is reflected in s912AA(1) of the Corporations Act as inserted by [\[CO 13/760\]](#), s912AC(1) as inserted by [\[CO 13/761\]](#) and s912AL as inserted by [ASIC Instrument 2022/449](#).

*ASIC's response*

Our position is that the NTA requirement takes effect if the AFS licensee holds the licence authorisation to provide financial services, rather than if the AFS licensee actually provides financial services covered by that authorisation.

We note that the financial requirements already accommodate smaller AFS licensees, or AFS licensees that have low levels of business activity under their licence authorisations, through less onerous NTA requirements. If an AFS licensee does not operate a registered scheme, IDPS or retail CCIV, the lower NTA requirement under s912AA(4)(a) applies.

A dormant custodian would fall within the definition of an 'incidental provider' and either:

- the lower NTA requirement under s912AC(4)(b) would apply; or
- the licensee would be able to rely on s912AC(5), which would mean there is no applicable NTA requirement.

It would undermine the policy principles that underpin the NTA requirement if the application of the requirement were to depend on whether the AFS licensee provided a financial service under an authorisation that attracts the financial requirements as set out in [RG 166](#): see RG 166.13 (general policy principles), RG 166.228 (responsible entities), RG 166.258 (IDPS operators), RG 166.296–RG 166.301 (custodians), and RG 166.388–RG 166.389 (corporate directors of retail CCIVs).

[ASIC Instrument 2023/647](#) and [ASIC Instrument 2023/648](#), maintain the position that the NTA requirement takes effect when an AFS licensee holds a relevant licence authorisation.

We have noted in RG 166 that an AFS licensee must comply with applicable financial requirements while it holds an authorisation for the relevant financial products and services, even during periods where the AFS licensee is not actively offering that product or service: see RG 166.27, RG 166.217, RG 166.247, RG 166.278 and RG 166.377.

## Revenue of authorised representatives

- 24 Some respondents raised concerns about the revenue of an AFS licensee's authorised representative. In the July 2022 version of RG 166, Note 3 to RG 166.167 stated that a licensee's revenue includes any revenue of an authorised representative of the licensee acting on the licensee's behalf. We received feedback that this guidance was not reflected in the proposed legislative instruments.

*ASIC's response*

Under [\[CO 13/760\]](#), [\[CO 13/761\]](#) and [ASIC Instrument 2022/449](#), 'revenue' means all of the revenue of an AFS licensee under the accounting standards. This includes:

- all revenue earned by agents acting on behalf of the AFS licensee; and
- in the case of a custodial provider, revenue earned by authorised representatives for performing custody services on behalf of the AFS licensee under s916A of the Corporations Act (as required in accordance with s912AAC(3)(d)(ii) as inserted by Class Order [\[CO 13/1410\]](#) *Holding assets: Standards for providers of custodial and depository services*).

In the July 2022 version of RG 166, Note 3 to RG 166.167 accurately reflected the treatment of revenue for the purposes of calculating NTA. In the updated RG 166, we have retained our guidance to the effect that the revenue of a custodian that holds an AFS licence includes the revenue of an authorised representative acting on behalf of the AFS licensee: see RG 166.279. We have not extended this guidance to other categories of AFS licensees.

In [ASIC Instrument 2023/648](#), we have amended paragraph (b) of the definition of 'revenue' to include certain amounts paid or payable to agents or authorised representative of the custodian.

We have also added an explanation in paragraph 22 of the Explanatory Statement to ASIC Instrument 2023/648.

## Duration of the legislative instruments

- 25 We received submissions that questioned the proposal for [ASIC Instrument 2023/647](#) and [ASIC Instrument 2023/648](#) to have a term of approximately five years, with an expiry date of 1 October 2028. In particular, one submission expressed concern that a five-year term increases pressure on scarce ASIC resources.

*ASIC's response*

If a legislative instrument does not include an expiry date, it will have a default term of about 10 years under the *Legislation Act 2003* (Legislation Act). Under s50(1) of the Legislation Act, a legislative instrument automatically expires on the first 1 April or 1 October that falls after the 10-year anniversary of the registration of the legislative instrument.

We consider that a five-year term for the new legislative instruments is the most suitable option. This term provides an appropriate level of certainty for the funds management industry. It also gives ASIC the opportunity to consider within a reasonable time the suitability of the financial requirements and the underlying policy principles.

Accordingly, ASIC Instrument 2023/647 and ASIC Instrument 2023/648 will have a term of approximately five years. The instruments will expire on 1 October 2028.

## Appendix: List of non-confidential respondents

- Deloitte Touche Tohmatsu
- Ernst & Young Australia
- Grant Thornton Australia Ltd.
- KPMG Australia
- Law Council of Australia
- McMahon Clarke
- Securities & Futures Compliance Services