

28 April 2023

[REDACTED]  
Investment managers, Financial Services and Wealth  
Australian Securities and Investments Commission  
GPO Box 9827  
Brisbane QLD 4001

Submitted via email: [im.sunsettingconsultation@asic.gov.au](mailto:im.sunsettingconsultation@asic.gov.au)

Dear [REDACTED]

**ASIC Consultation Paper 369: Remaking ASIC Class Orders (CO) on platforms CO 13/172 & CO 13/763**

The Financial Services Council (FSC) welcomes the opportunity to provide feedback to ASIC on the above consultation.

The FSC is supportive of re-making the above Class Orders for the stated reasons, subject to the following specific issues in which the FSC and its members are concerned. These concerns are in relation to ASIC CO 13/763 – *Investor Directed Portfolio Services (IDPS)* Instrument and proposed “re-made” replacement only. That is, that they are or will not operate as effectively as they could.

**Request to add option as basis for Licensee providing electronic access to information to clients**

Members have expressed concern that obtaining the required “agreement” from pre-existing clients, as referred to in paragraph (27)(b)(i), as the only basis of providing electronic access to information, rather than Quarterly Reporting, would be unworkable in the context of current market practice.

*Background*

Paragraph (27) of CO 13/763 provides:

*Quarterly report or electronic access on a substantially continuous basis*

(27) The licensee:

- (a) must give to each client a quarterly report complying with subsection (29) within one month after each quarter day; or
- (b) give electronic access to the information referred to in subsection (30) on a substantially continuous basis to clients who:
  - (i) have agreed to obtain information concerning transactions and holdings through the IDPS electronically in lieu of receiving a quarterly report; and
  - (ii) the licensee has no reason to doubt can electronically access this information on a substantially continuous basis.

Paragraph (27) provides in effect that licensees can either provide a Quarterly Report within a month of the end of the quarter – (27)(a) (and refer to Paragraph 29) or electronic access to similar information but being

current up to 48 hours before access (*and refer to Paragraph 30*).

Since the 2013 commencement of the existing CO 13/763, there has been an increasing number of platform clients operating such accounts online. Businesses have considered providing electronic access to similar information in lieu of providing a quarterly report which even in soft copy appears to be more suited to a non-digital business model. In this regard, clients can access such information electronically as and when they want it and the information is more current (as Quarterly Reports could be up to 1 month old).

Consequently, access to this information electronically would appear to be a superior outcome for clients.

From an industry perspective, the required “agreement” to provide electronic access from pre-existing clients, as referred to in paragraph (27)(b)(i), is impracticable because of the following factors:

- such an agreement may not be expressly provided for in their original application/contract and related IDPS guide(s);
- obtaining agreement post application is difficult because clients historically tend to be disengaged and may not respond to any request for consent. In this regard, FSC members have provided feedback that clients tend not to think about their IDPS investments day to day (that is why many use an adviser) and therefore it is hard to get them to turn their mind to this particular issue and provide the requested response even if it may benefit them;
- there has been a large increase of clients investing through platforms and obtaining the required agreement for each client individually would be difficult and disruptive.

**Recommendation**

the FSC and its members recommends that the following addition (in bold) be made to paragraph (27)(b)(i) of the Class Order:

***27 (b) (i) “have agreed, or have received reasonable notice of such access and be able to opt-out, to obtain information concerning transactions and holdings ....electronically” .***

The above addition would avoid the foreseeable scenario of a client not responding to a request for the current “agreement” requirement and resulting in a restriction on the licensee to provide what industry would consider to be a better service. The client would not be disadvantaged by this change because of the combination of reasonable notice and ability to opt out at any time.

The FSC submits that the above proposal would address this issue and better align the Class Order to current market practice and provide a better outcome for both licensees and their clients.

**Disapplication of Part 7.9 of the Corporations Act and need to reinstate s1017E in CO 13/763**

FSC and its Members are concerned that the effect of the Class Order is to disapply s1017E of the Corporations Act which leaves a gap in terms of there being no statutory basis on which IDPS operators receive and deal with money from a third party to acquire financial products before any product is issued.

CO 13/763 disapplies the whole of Part 7.9 of the Corporations Act, including section 1017E which governs application trust accounts and money received before any product is issued, so there is a lack of clarity around what an IDPS operator must do with client money and the basis on which they hold it. Part 7.8 Division 2 about licensee trust accounts also doesn’t apply because section 981A(2)(c) exempts circumstances where money is paid to acquire a financial product from the licensee, presumably to avoid

overlap with section 1017E. It would be better for consumer protection and general clarity of IDPS operator obligations if 1017E were to be reinstated.

**Recommendation**

The FSC recommends that s1017E is expressly carved out from the disapplication of Part 7.9.as currently provided.

**Reference to Design Distribution Requirements (DDO)**

It is noted that the DDO regime came into effect after the last class order was released. Under that regime, IDPS providers and advisers are regarded as “distributors” and in that capacity cannot distribute to retail clients without having produced and released a Target Market Determination (TMD).

**Recommendation**

As a matter of completeness, the FSC submits that the class order should be updated to take into account DDO requirements. In particular, to clarify that the distributors of IDPS products/services do not offer accessible investments in Managed Investment Schemes (MIS) to retail clients unless there is a TMD for each MIS.

The FSC would welcome a further opportunity to discuss the matters raised and proposed solutions or relief at your earliest convenience.

If you have any queries or wish to discuss any matters raised in this submission, please contact [REDACTED] in the first instance at [REDACTED].

Yours sincerely,

[REDACTED]