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**Short-form PDS for superannuation products**

The Government has committed to creating Product Disclosure Statements (PDSs) for superannuation funds that are substantially shorter and simpler than current PDSs. Within this context, the Government have released for public consultation draft regulations prescribing the new superannuation PDS, a commentary on the draft regulations, and a related example PDS.

The draft regulations are meant to amend the Corporations Regulations 2001 to provide a specific disclosure regime for superannuation funds.

Comments on the draft regulations and related example PDS are sought by 26 February 2010. Submissions can be sent via email to: [financialservices@treasury.gov.au](mailto:financialservices@treasury.gov.au).

The commentary notes that appropriate "application and transitional arrangements will be made at a later date, which will give stakeholders sufficient time to comply with the new requirements".

**Format**

The draft regulations state that the total length of the PDS (not including a title page, table of contents and any information incorporated by reference) must not exceed:

- ⊃ 6 A4 pages of content; or
- ⊃ 12 A5 pages of content; or
- ⊃ 18 DL pages of content; or
- ⊃ if in any other format, as long as would fit into 6 A4 pages (Schedule 10D(1)(1)).

**Content requirements**

The draft regulations move back to a very prescriptive approach with regard to the content requirements of a PDS.

The draft regulations prescribe that a PDS for a superannuation product must include sections which must be numbered and titled as follows:

1. About [name of superannuation entity]
2. How super works
3. Benefits of super
4. Risks of investing in super

5. How we invest your money
6. Fees and costs
7. How super is taxed
8. Insurance in your super
9. How to open an account (Schedule 10D(2)(1)).

The draft regulations also prescribe the content of each section. For example, section 6 on 'Fees and Costs' of a PDS must start with a general warning about the potential impact of fees and costs on the final balance for a member, illustrated with a concise example (Schedule 10D(8)(5)).

The commentary indicates, at paragraph 69, that the PDS may also include others sections and information at the discretion of the person responsible for drafting the PDS provided they fit within the prescribed page length. The commentary also adds that extra sections should be located at the end of the prescribed sections.

### **Incorporation by reference**

The draft regulations set out a number of high-level requirements applying to information in a relevant superannuation product PDS that is incorporated by reference, as permitted under the new section 1013C(2B) contained in sub-item 5B.2 of Part 5B in Schedule 10A of these Regulations. New sub-sections (2) and (2A) state that superannuation PDS may incorporate information by reference and that all information incorporated by reference is considered part of the PDS.

The commentary provided by Government on the draft regulations indicates that this is an important provision as it decides the extent and nature of the legal liability attaching to the incorporated information. As such, the PDS enforcement provision will apply to this information, allowing among other things for consumers to claim for losses or damages where the information proves to be defective.

Source

The Australian Government, Superannuation and Managed Investment Scheme Disclosure – Public Consultation, 21 December 2010.  
<http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1695>

## **Updated Regulatory Guides on dispute resolution schemes – reminder**

The Australian Securities & Investments Commission (ASIC) released two revised regulatory guides on dispute resolution schemes in May 2009 – Regulatory Guide 139: Approval of external complaints resolution schemes and Regulatory Guide 165: Licensing: Internal and external dispute resolution.

Most of the requirements included in the guide start as at 1 January 2010.

### **Regulatory Guide 165: Licensing: Internal and external dispute resolution**

#### ***What are the new Internal Dispute Resolution (IDR) requirements?***

##### Outsourcing

A financial service provider that outsources its IDR procedures to a third party service provider remains responsible for ensuring that its IDR procedures comply with the requirements in this regulatory guide.

##### AS ISO 10002-2006

The definition of 'complaint' for IDR purposes have been aligned with the Australian Standard ISO 10002-2006 Customer satisfaction—Guidelines for complaints handling in organisations, and reads as follows:

'An expression of dissatisfaction made to an organisation, related to its products or services, or the complaints handling process itself, where a response or resolution is explicitly or implicitly expected.'

ASIC indicates that this definition of complaint will promote consistent treatment of complaints and will also help in the identification of complaints earlier in the complaints handling process.

ASIC recognises that this may result in increased compliance costs if the organisation strives to deal with all minor expressions of dissatisfaction. This is why that where a complaint is resolved to the customer's satisfaction by the end of the next business day, ASIC indicates that the complaint won't be required to be captured and recorded.

However, where possible, ASIC encourages the adoption of the full IDR process.

#### Multi-tiered IDR procedures

The time frame of 45 days also applies to financial service providers that operate multi-tiered IDR procedures (IDR procedures that include internal appeals or escalation mechanisms).

What are the updated IDR requirements?

#### IDR timeframes

Timeliness in responding to complaints is a key element of successful internal complaints handling and RG 165 recommends the following:

- ⊘ establish reasonable target time limits for the internal resolution of complaints.
- ⊘ where required to be a member of an ASIC-approved EDR scheme, substantially respond to a complainant, under relevant IDR procedures, within a maximum of 45 days.
- ⊘ If unable to respond to a complaint within 45 days, or any shorter time frame as detailed in the External Dispute Resolution (EDR) scheme's Terms of Reference or under an applicable industry code of conduct or practice:
  - (a) inform the complainant of the reasons for the delay;
  - (b) advise the complainant of their right to complain to EDR; and
  - (c) provide the complainant with the name and contact details of the relevant EDR scheme to which they can complain.
- ⊘ immediately acknowledge the receipt of complaints and address complaints promptly in accordance with their degree of urgency.
- ⊘ provide a final response to a complainant within a maximum of 45 days (if member of an ASIC-approved EDR scheme).
- ⊘ Strive to regularly achieve shorter timeframes than 45 days being
- ⊘ Send 'final responses' to the complainant within 45 days informing them of:
  - (a) the outcome of their complaint;
  - (b) their right to take their complaint to EDR; and
  - (c) the name and contact details of the relevant EDR scheme to which they can take their complaint.
- ⊘ consider ways of improving your handling of complex complaints within the 45-day time frame, so errors in complaints handling can be avoided.

#### ***What are the timeframes for adopting the new and updated IDR requirements?***

AFS licensees will be required to adopt the new and updated requirements in this regulatory guide from 1 January 2010.

#### **Regulatory Guide 139: Approval of external complaints resolution schemes**

In the updated guide, ASIC announced changes with regard to the compensation caps as follows:

- ⊘ With effect from 1 January 2010, all schemes will be required to deal with claims worth up to \$500,000, even though they will be allowed to limit the maximum amount of compensation payable per claim to less than that amount, in accordance with their existing rules. Currently, EDR scheme rules bar a complaint involving more than the applicable compensation limit; and

- With effect from 1 January 2012, EDR schemes will only be allowed to limit (cap) the maximum amount of compensation payable per claim to a minimum of \$280,000 (or \$150,000 if the claim relates to an insurance broker) with the ability to opt for a higher figure in the rules of the scheme.

Please refer to the article below for further details.

Source:

Regulatory Guide 139: Approval of external complaints resolution schemes:

[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg139.pdf/\\$file/rg139.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg139.pdf/$file/rg139.pdf)

Regulatory Guide 165: Licensing: Internal and external dispute resolution:

[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg165.pdf/\\$file/rg165.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg165.pdf/$file/rg165.pdf)

## New Terms of Reference for the Financial Ombudsman Service

ASIC has approved new Terms of Reference (TOR) for the Financial Ombudsman Service Limited (FOS). The new TOR will apply to all new complaints from the 1st January 2010.

FOS deals with complaints from consumers and retail investors about member banks, credit unions, building societies, general insurers, life insurers, insurance brokers, financial planners and stockbrokers where the complaint could not be resolved in house.

All licensed financial services providers in Australia are required to be a member of an ASIC approved external dispute resolution scheme. FOS is the larger of the two such approved schemes.

ASIC has indicated that the new TOR will provide a more consistent treatment of consumers and industry members than the currently operating five separate sets of rules and guidance of FOS' predecessor schemes:

- the Banking and Financial Ombudsman Service (BFOS) – now the General Banking stream of FOS;
- the Insurance Ombudsman Service (IOS) – now the General insurance stream of FOS;
- the Financial Industry Complaints Service (FICS) – now the Investments, Life Insurance and Superannuation (ILIS) stream of FOS;
- the Credit Union Dispute Resolution Centre (CUDRC) – now the Mutuels stream of FOS; and
- the Insurance Brokers Disputes Limited (IBDL) – now the Insurance Brokers stream of FOS.

Key changes in access under the new TOR compared with under FOS' predecessor scheme rules are as follows:

Stream of FOS	Access under FOS' predecessor scheme rules	Access under the new FOS TOR
General Banking stream of FOS	Complainants can access FOS if their total monetary claim does not exceed \$280,000.	Complainants will be able to access FOS if the value of their claim does not exceed \$500,000.
General Insurance stream of FOS		FOS will be able to award compensation of up to \$280,000 for direct loss.
Mutuals stream of FOS		If compensation for consequential loss and interest is awarded it will be in addition to direct loss.
ILIS Stream of FOS	For complaints involving an income stream under a life insurance policy, complainants can access FOS if the monthly income stream does not exceed \$6,000. For all other complaints, complainants can access FOS if their total monetary claim does not exceed \$150,000.	Complainants will be able to access FOS if the value of their claim does not exceed \$500,000. For complaints involving an income stream under a life insurance policy, from 1 January 2010, FOS can award up to \$6,700 per month. (Please note: from 1 January 2012, FOS can award up to \$7,500 per month). For all other complaints, FOS can award up to \$150,000 for direct loss. (Please note: from 1 January 2012, FOS can award up to \$280,000 for direct loss). If compensation for consequential loss and interest is awarded, it will be in addition to direct loss.

Stream of FOS	Access under FOS' predecessor scheme rules	Access under the new FOS TOR
Insurance Broking stream of FOS	Complainants can access FOS if their total monetary claim does not exceed \$100,000.	<p>does not exceed \$500,000.</p> <p>Where the complaint relates to broking of a life insurance policy:</p> <ul style="list-style-type: none"> <li>↳ involving an income stream, FOS can award the monthly amount as for the ILIS stream of FOS (see above); or</li> <li>↳ for all other complaints, as for the ILIS stream of FOS (see above).</li> </ul> <p>Where the complaint relates to broking of a general insurance policy, from 1 January 2010, FOS can award up to \$100,000 for direct loss. (Please note: from 1 January 2012, FOS can award up to \$150,000 for direct loss).</p> <p>If compensation for consequential loss and interest is awarded, it will be in addition to direct loss.</p>

ASIC has indicated that ASIC is currently consulting on proposed updates to dispute resolution requirements for consumer credit and margin lending and will consult in early 2010 on updates for trustee companies that provide traditional trustee company services. These consultations are likely to result in FOS needing to update the new terms of reference during 2010 to adequately accommodate disputes relating to these areas.

Source

Australian Securities & Investments Commission, ASIC grants approval to the Financial Ombudsman Service Limited for its new single terms of reference, 18 December 2010.

### ASIC consults on confidential information and soundings

ASIC has released Consultation Paper 128 on Handling Confidential Information (CP 128) and draft Regulatory Guide.

ASIC is concerned about the leakage of price-sensitive confidential information about transactions prior to announcement to the market.

The Paper and draft Regulatory Guide set out proposals for best practice guidelines on the handling of confidential information by entities and their advisers so they can benchmark their practices and strengthen their controls and procedures.

The proposals mainly affect the internal administration of capital raising and M&A transactions within corporate Australia.

ASIC has also sought to provide guidance on how, and the circumstances in which, confidential information may be communicated to potential investors through market soundings.

#### Confidential soundings

ASIC has indicated that market soundings should be undertaken in accordance with formal procedures and in a carefully controlled manner to ensure there is no leak of price-sensitive confidential information. In particular, ASIC proposes that the following procedures should be followed:

- ↳ soundings should involve a formal process that is well understood by the issuing entity, its investment banks and the institutions involved;
- ↳ soundings should be undertaken when the market is closed or the particular stock is in a trading halt;
- ↳ only a limited number of parties should be sounded;
- ↳ individual bankers conducting the soundings should have a formal script, which gives the institution an opportunity to decline to be made an "insider" before any confidential information is disclosed;

- ↳ written confirmation (eg by exchange of emails) should be obtained, before disclosure, that institutions will comply with insider trading restrictions and keep information confidential - this is more cumbersome than current practices adopted by some investment banks, although ASIC suggests that in exceptional circumstances the initial agreement may be verbal, with subsequent written confirmation; and
- ↳ the investment bank should keep records of all contact with the institutions it has sounded and must notify ASIC within 48 hours of the sounding - this will prove to be one of the most controversial parts of the proposal.

ASIC has confirmed that details of a capital raising should never be provided to the market or the press before being released to ASX, regardless of whether the entities' securities remain subject to a trading halt.

Soundings of existing shareholders in an M&A transaction would follow a similar process.

### **Entities' handling of confidential information**

ASIC proposes that the following practices should be followed:

- ↳ the number of people with access to confidential information should be limited to the maximum extent possible and entities should maintain a register of all people, including any advisers, who are insiders on sensitive transactions;
- ↳ entities should consider implementing certain information barriers, document and IT controls, and conduct regular internal training;
- ↳ appropriate confidentiality obligations and securities trading restrictions should be incorporated into employment contracts and where appropriate, individuals involved in highly sensitive transactions should be required to sign individual confidentiality agreements;
- ↳ entities should have documented policies restricting an employee from trading in the entity's financial products in a personal capacity where that employee has confidential price-sensitive information; and
- ↳ where there is a leak or suspected leak of confidential information, a formal leak investigation should be considered.

### **Release of confidential information to third parties**

When releasing confidential information to third parties, ASIC proposes that the following practices should be followed:

- ↳ at a minimum, entities should require third parties involved in price-sensitive confidential transactions to comply with the entity's confidentiality policies and procedures;
- ↳ entities who actively participate in M&A transactions or capital raisings should consider setting up umbrella agreements relating to the general principles an adviser must adhere to when undertaking work for the entity, including in relation to the handling of confidential information; and
- ↳ advisers should be required to sign confidentiality agreements for specific transactions, including before the release of confidential information during a "beauty parade" to select advisers.

Entities should require that their advisers and other service providers have appropriate systems in place to protect the entity's confidential information. CP 128 includes best practice guidelines for advisers' and third parties' handling of an entity's confidential information (which largely mirror the above).



## ASIC consultation and timeframe for responses

ASIC is seeking feedback and comment on the financial and other impacts involved with its proposals and any alternative approaches, including whether best practice guidelines are the appropriate mechanism through which to raise the standard of handling confidential information.

Submissions on CP 128 are due by 21 February 2010, with the final regulatory guide expected to be released in April 2010.

### Source

Australian Securities & Investments Commission, ASIC releases new best practice proposals for the handling of confidential information and conduct of market soundings, 21 December 2009.

<http://www.asic.gov.au/asic/asic.nsf/byheadline/09-264AD+ASIC+releases+new+best+practice+proposals+for+the+handling+of+confidential+information+and+conduct+of+market+soundings?openDocument>

Mallesons Stephen Jaques, ASIC consults on confidential information and sounding, 22 December 2009.

<http://www.mallesons.com/publications/2009/Dec/10193173W.htm>

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