



Investment & Financial Services Association Ltd

**Response to ASIC Consultation Paper:  
Review of ASIC Policy on  
Investor Directed Portfolio Services**

**Dated 12 September 2007**

## **INTRODUCTION:**

This submission is IFSA's response to the 42 specific questions set out in the Consultation Paper.

In 2000 (and in previous years where ASIC gave relief for wrap accounts on a case-by-case basis), a relatively small share of the investment market was channelled through such services. Accordingly, at that time, it was not inappropriate to regulate them as a special case. However, since that time they have become an important and increasingly significant part of the investment market, and it is expected that their importance will continue to increase.

IFSA believes it is in the interests of investors, operators and other participants alike to re-think the mechanism by which such services are regulated. The regulatory foundations on which IDPSs are built must be certain and robust. Currently, where there are a number of operators and intermediaries, or where one or more participants are taken to provide the IDPS service to the investor, the investor will often receive multiple documents explaining the IDPS (FSG and SOA) in addition to the IDPS Guide.

We note the following statement in the April 2006 Corporate and Financial Services Review Consultation Paper.

### **7.2 INVESTOR DIRECTED PORTFOLIO SERVICES**

The current arrangements for exempting Investor Directed Portfolio Services (IDPS) from a number of provisions in the Corporations Act are complex and dated.

IDPSs are arrangements for the custody of investments including consolidated reporting, commonly referred to as 'wrap accounts'. ASIC currently treats these products as types of managed investments and therefore regulates them under Chapter 5C of the Corporations Act. They are also subject to various ASIC class orders that exempt them from a number of provisions of the Corporations Act. The current class order arrangements are complex and lack transparency. They date to the period before the current financial services regulatory regime and it may therefore be questioned whether they are still necessary.

#### **Consultation Issue**

Comments are sought on removing the ASIC class orders that currently create a special regulatory regime for Investor Directed Portfolio Services products that sits outside the Corporations Act framework. In place of the class orders, these products could be dealt with as a financial service under the existing provisions of Chapter 7 of the Corporations Act.

IFSA members offering IDPS and IDPS-like arrangements believe that the current review should be focussed primarily on disclosures made to customers in relation to an IDPS offering, financial products made available through the IDPS, and the responsibility to customers of parties involved in the operation or distribution of an IDPS.

## RESPONSE TO SPECIFIC QUESTIONS:

**Question 1: Do you think 'investor directed portfolio service' is an appropriate name? If not, why not? Should ASIC redefine 'IDPS' or 'IDPS like scheme? If so, why?**

### Issue:

1. The accuracy of the description/label currently attached to transaction and portfolio administration services offered to the retail customer and whether that description/label is meaningful to retail customers. Is it clear, concise and effective?
2. Are there problems with the existing definitions of IDPS and IDPS-like scheme? If so, why?

### Discussion:

1. While, from a customer perspective, the term Investor Directed Portfolio Service (IDPS) is not readily understandable, we do not consider that there is any significant advantage in now changing the term. It is a term which is by necessity now used in all IDPS documentation. If a change is made, it should not impact the delivery or operation of established IDPS arrangements, other than possibly the description of the service in supporting documentation in which case there should be appropriate transitional arrangements. .

IDPS services are collectively marketed by different operators using a range of various names, the most common being WRAP to describe a number of different services being offered to the client under the arrangement.

2. RG 148.5 describes an IDPS as a "service for acquiring and holding investments that involve arrangements for the custody of assets and consolidated reporting" with various features outlined at paragraph RG 148.12. The description provides the fundamental elements of a retail IDPS offering. However, the definition in the IDPS Class Order itself is more complex and long (around one page of text). The definition is a threshold issue. The relief only applies to operators and others involved in an "IDPS" as defined.

There are a number of elements of the definition that give rise to uncertainty and in our view the following matters should be addressed.

- The exceptions to the proposition that the client must have the sole discretion to decide what assets will be acquired in paragraphs (a)(i) and (a)(ii) give rise to uncertainty. In particular, the phrase "particular asset in particular circumstances" can be interpreted broadly or narrowly, ie as a particular class of assets or a particular asset;
- Paragraph (d) of the definition does not serve any clear policy objective and seems to have been designed to ensure that an IDPS is included within the definition of "managed investment scheme"; and
- It should be made clear that services relating to non custodial assets (such as transactional and reporting services) do not form part of the IDPS and are, therefore, not subject to the class order conditions.

Further, the definition is more complex than is desirable or necessary. Rather than reflecting the key commercial concepts in a neutral way that does not artificially limit product development, the definition reflects historical features of IDPS and possibly the desire of ASIC at the time the initial class order was drafted, to establish through the definition that an IDPS is a managed investment scheme (at a time when this and the need for relief was not broadly accepted).

An IDPS-like scheme is defined in ASIC Class Order 02/296 as a managed investment scheme, where the constitution specifies that a member may direct an amount to be invested in specified accessible investments and distributions of capital and income are determined by amounts received by the custodian in relation to accessible investments acquired in accordance with that direction.

**Response:**

IFSA considers that the definition of IDPS should be simplified to provide a brief functional and not overly restrictive description of an IDPS. An IDPS should be distinguished from a managed discretionary account (**MDA**) on one hand and from a scheme where the investor has no investment discretion on the other. The definition should otherwise leave flexibility for innovative development of financial products that provide the same functional service as an IDPS.

The definition should be considerably shorter and clearer. IFSA would welcome the opportunity to work with ASIC on the refinement of a simpler definition.

**Question 2: Do you think that our proposed policy objectives are appropriate? If not why not?**

**Issue:**

Does the proposed policy depart significantly from the existing ASIC policy? If so, will this raise new, or aggravate existing, commercial issues and burdens?

**Discussion:**

We do not consider that the proposals represent any significant departure from existing ASIC policy. While the proposals do not address all of the issues raised in our submission to the Treasury dated 2 June 2006, they do address a number of significant practical issues. The fact that these proposals can be introduced quickly, without the need for legislation is welcome.

The underlying policy objective should be to facilitate the delivery to consumers of efficient and effective services while maintaining adequate consumer protection through disclosure, reliable client reporting, effective compliance controls and custodial and transactional integrity. This policy is consistent with the statutory objectives of ASIC under section 1(2) of the *Australian Securities and Investments Commission Act 2001 (ASIC Act)* to:

- (a) Maintain, facilitate and improve the performance of the financial system and entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy.
- (b) Promote the confident and informed participation of investors and consumers in the financial system.

**Response:**

Overall, we do not see the proposals as making any significant departure from existing ASIC policy. Our views on particular elements of ASIC's policy proposals are set out in the balance of this submission.

**Question 3: Are there any other policy objectives we should consider? If so, please specify.**

**Issue:**

What should the policy objectives be?

**Discussion:**

As stated in the IFSA submission to Treasury dated 2 June 2006, which was also provided to ASIC, IFSA believes that a review of the Class Order provides an important opportunity to bring the regulatory framework for IDPSs into line with current and expected future circumstances. In this context, IFSA has identified a number of key objectives which should be achieved through the current review process, most of which are not being met under the current regulatory arrangements.

The following key outcomes are sought by IFSA and the industry participants:

- a) **reallocating regulatory responsibilities** amongst the various licensees involved in the operation and use of IDPS. Legal obligations of the parties involved in an IDPS should be aligned with practical responsibility;
- b) **rationalising the consequences of breach.** Currently, any breach of the Class Order effectively invalidates an IDPS. The law should have a regulatory framework that enables IDPS operators to provide their service with certainty. The consequences that flow from a breach of the law should be proportionate to that breach;
- c) **achieving regulatory harmonisation** so that, wherever practicable, the regulation of IDPS is consistent with other services;
- d) **rationalising disclosure obligations** that arise under the IDPS Guide requirements and the financial services guide ('FSG') disclosure obligations under the Corporations Act;
- e) **rationalising underlying disclosure obligations** both in relation to section 1012IA disclosure requirements and the mechanism for providing IDPS and underlying disclosure documents to clients;
- f) **maintaining the existing regime for periodic reporting;**
- g) **ensuring that any obligations imposed apply only in respect of retail clients;**
- h) **ensuring a smooth transition** and/or grandfathering in relation to any structural changes brought about by this review; and
- i) **focusing on policy outcomes** rather than regulatory restraints.

**Response:**

Consistent with the statutory objectives of ASIC under section 1(2) of the ASIC Act, the policy objectives should include paragraphs (a) to (i) above.

**Question 4: Should ASIC continue to provide the relief it provides for IDPS operators and responsible entities of IDPS – like schemes? If not, why not?**

**Issue:**

Is existing relief required? Are there any problems with the existing regime?

**Discussion:**

It can be argued that post the FSR Refinements changes that the existing IDPS relief was unnecessary because the FSR changes clearly contemplate that IDPS arrangements would be regulated as 'financial services' under the Corporations Act. However, given the continued compliance of IDPS arrangements with ASIC Class Order [02/294], and that further legislative

amendments to the Corporations Act are unlikely in the short term, we welcome the Consultation Paper to refine the requirements applying to IDPS and IDPS-like arrangements.

IDPS-like schemes are 'financial products' for the purposes of the Act will continue to require relief if current operations are to continue. Operational aspects of the relief should more closely reflect the operation of IDPS arrangements

**Response:**

It is critical that this relief continue by way of either legislative reform or by modification to the existing ASIC relief. Full compliance with the existing ASIC Class Order [02/294] in its current form is inefficient and burdensome.

**Question 5: Do you think that any other relief or guidance is needed for IDPS or IDPS-like schemes? If so, please specify.**

**Issue:**

Is additional guidance or relief needed?

**Response:**

Our suggestions for modified relief are as indicated in this submission.

**Question 6: Are any other substantive change to the policy in [PS 148] or the terms of [CO 02/294] or [CO 02/296] not discussed in this paper appropriate? If so, please specify.**

**Issue:**

What matters have NOT been addressed in the CP?

**Discussion and Response:**

The following matters should be addressed in the policy statement and class orders.

Issue	Discussion	Response
Value of the assets reflected on clients' investor statements.	Paragraph 2(e)(xii)(D) of [CO 02/294] requires the value of assets to be the "net market value". Clients use a number of brokers, as well as utilising off market transfers which do not incur selling costs. Because of this, it is not possible to determine one amount which is representative of the likely selling costs of an asset. If an operator was to determine one such amount, this could lead to the position where the net market value of a client's assets are over or understated which may be misleading.	Amend this paragraph by deleting the words "after deducting costs expected to be incurred in realising the proceeds of such a disposal"

<p>Quarterly reports containing the value of the assets held through the IDPS by the client and corresponding liabilities.</p>	<p>Paragraph 2(e)(xii)(D) of [CO 02/294] require the value of assets to be that value “on the quarter day”. Accounting Standard AASB 1033 “Presentation and Disclosure of Financial Instruments” refers to the net market value of an asset “as of that day”, rather than the quarter end value. As the pricing frequency differs between each managed investment scheme, the most appropriate value to report on the quarterly investor statement is the last available value, rather than the quarter end value.</p>	<p>Amend this paragraph to change from “net market value on the quarter day” to “net market value as of the quarter day”</p>
<p>Giving a client a copy of accessible investment communications</p>	<p>Paragraph 2(e)(v) of the class Order requires the operator to give to the client on request a copy of all communications that are required by law to be given to the holder of an accessible investment (including communications that are required to be given on request) where that accessible investment is required to be held on trust for the client by the operator or a custodian. The client may make a request in relation to a particular future communication or a standing request in relation to a class of future communications. The operator must give a copy of the communication as soon as practicable after the information is received or otherwise becomes available to be provided to the client.</p>	<p>“Give” is defined in paragraph 2(m). While ASIC proposes to modify the Class Order to allow IDPS operators to give documents to clients by giving them to another person who is acting as agent for the client, which IFSA supports, the relief should go further and allow IDPS operators to give accessible investment communications (if not other documents as well) to clients by making them readily accessible on a web site. This would be entirely consistent with s314(1AA)(b) of the Corporations Act, which allows Annual Reports for registered schemes to be given by making a copy readily accessible on a web site.</p>

**Question 7: Do you think that the proposals in this consultation paper are cumulatively burdensome, complex or lacking in transparency? If so, please specify how and suggest how they could be lessened or simplified consistently with our objectives in this review.**

**Issue:**

What is the overall sense of the proposal?

**Response:**

Overall, the proposals will reduce complexity. We have noted a number of particular issues such as 'cooling off' (see Question 23) where relief should be extended.

**Question 8: Do you think that we should give the proposed relief for IDPS operators and responsible entities operating IDPS-like schemes on an unconditional basis? If so, please specify how the interests of consumers will be protected and confidence in the use of IDPSs and IDPS – like schemes maintained?**

**Issue:**

- a) Should IDPS and IDPS-like arrangements be treated as financial services for the purposes of the Corporations Act?
- b) How are consumer interests protected?

**Discussion:**

- a) It should be noted that IDPS and IDPS-like arrangements are offered to consumers on different legal bases. The relationship between the IDPS Operator and the client is a contractual agreement for the provision of a bundle of services whereas, an IDPS-like arrangement is offered to the client as an offer for an interest in a managed investment scheme regulated under Chapter 5C of the Corporations Act. To the extent that the administration platforms used by IDPS and IDPS-like arrangements are similar, relief from operational requirements should be the same.

Consistent with the IFSA Submission dated 2 June 2006, it would be appropriate to provide relief to IDPS arrangements on an unconditional basis. However, consistently with that submission, we would expect that appropriate modifications to relevant disclosure obligations be made to reflect the particular nature of the service provided.

- b) Consumer interests are protected the same way as they are in relation to the provision of any other equivalent financial product or service. By recognising the individual responsibilities of participants in the IDPS chain, the rights of the client can be more clearly spelt out.

One approach would be to use the approach adopted by ASIC in the managed discretionary account Class Order (CO 04/194) that the relief is not conditional on complying with the conditions of this Class Order.

**Response:**

IFSA recommends that unconditional relief be granted. This will avoid the consequence that an operator loses relief simply because there is an isolated breach of the conditions of relief. In general, IFSA believes that IDPS services should be regulated as financial services as was originally intended.

**Questions 9: Do you think that retail clients should be entitled to receive appropriate advice about whether to use (or switch to) an IDPS or IDPS-like scheme, together with an SOA that reflects that advice? If not, why not?**

**Issue:**

1. The question posed is raised in the context of an IDPS being treated as a *service* (per PS 148.15) and accordingly whether it should be subject to the same personal advice requirements as for a *product*?
2. Should the retail client receive an SOA which contains the financial product advice and recommendation to use an IDPS?

**Discussion:**

As a financial service an IDPS would not be subject to the SOA requirements of the law. However, there are some elements of the IDPS for which it is appropriate for advice to be given and an SOA supplied, specifically:

1. disclosure of specific adviser remuneration arrangements;
2. costs to client; and
3. details of what basis the features offered (including risks & benefits) by the IDPS are appropriate for the client.

Additionally, there are limited situations where a recommendation is made to use or switch investment platforms (IDPS or IDPS-like) without advice being provided in relation to financial products available through the service. However, even in these limited situations (eg when a recommendation is made to a client to move their securities portfolio onto an IDPS, or to transfer existing holdings from one IDPS to another investment platform), we consider that an SOA is appropriate as these recommendations are likely to result in a different cost for the client, different remuneration for the adviser, and different rights for the client to transact on their investments.

**Response:**

IFSA supports a requirement for an SOA where a recommendation is made to a client to use an IDPS or switch platforms between IDPS and IDPS-like arrangements.

**Question 10: Are there any practical difficulties in complying with the requirements about personal advice for a switch from one IDPS or IDPS-like scheme into another? If so, please specify.**

**Issue:**

Should the personal advice requirements be applied to switches from one IDPS or IDPS-like service to another?

**Response:**

While there are certain practical and administrative implications in treating an IDPS as a financial product for the purposes of the SOA requirements, IFSA supports the provision of an SOA in relation to the switch from one IDPS or IDPS-like service to another.

**Question 11: Can you quantify any costs that would be incurred in an AFS licensee meeting the requirements for financial product advice for an IDPS or IDPS-like scheme?**

**Issue:**

Is the cost of providing personal advice for an IDPS the same as for other advice given in respect of other products? If so, what are the cost differences? (This information may be required for RIS purposes.)

**Discussion:**

The costs associated with making available an IDPS to a client would, if calculated on a time basis, be similar to the costs advice given to a retail client where fee for service payment structures are in place.

The average cost associated with producing an SOA is estimated at \$700 - \$1,000. This is based on the average cost of outsourcing (eg. engaging para-planners) and depending on complexity of the advice, could increase to anything up to \$2,000. This latter cost also correlates with the cost of producing an SOA in-house on the higher end of the cost scale.

Ongoing compliance and other fixed and incidental costs (eg. work related to meet any new regulatory requirements) are not included in these figures.

**Response:**

There should be no appreciable difference in the basis for calculating the client cost for receiving advice on an IDPS or IDPS-like arrangement.

**Question 12: Do you agree that the items in 3.4 are the key points that should be addressed in an SOA for an IDPS or IDPS-like scheme? If not, why not?**

**Issue:**

If recommending the use of an IDPS, should key disclosures regarding the service and related information about the benefits and remuneration be contained in the SOA?

**Discussion:**

Yes.

**Response:**

The SOA should include the matters listed at 3.4 of the CP.

**Question 13: Are there any other key points that should be addressed in an SOA for an IDPS or IDPS-like scheme? Please specify.**

Refer to comments outlined in Question 12 above.

**Question 14: Would it assist if ASIC provided guidance on how the personal advice and SOA obligations in Part 7.7 apply to the provision of advice to retail clients about whether to use (or switch to) an IDPS or IDPS-like scheme? If so, please give details as to what guidance should be given. Would it be appropriate for ASIC, in consultation with industry, to prepare sample wording on the basis of a Response to switch to an IDPS or IDPS-like scheme?**

**Issue:**

1. Should ASIC provide guidance on the factors that consumers should consider when considering the use of an IDPS or an IDPS-like arrangement?
2. How should the guidance be provided?

**Discussion:**

One of the objectives of this review is to “*maintain adequate consumer protection by ensuring good advice about using an IDPS, adequate disclosure about the IDPS and securities and financial products accessible via the IDPS ...*”.

Guidance in respect of how personal advice and SOAs apply to retail clients considering a switch to or between IDPS and IDPS-like schemes would be useful especially considering the different types of IDPSs available on the market, some with more complex structures than others. Developing sample wording, together with alternatives, would be encouraged, in terms of promoting shorter and effective SOAs. In turn, this would also have an effect on reducing the cost of producing an SOA provided a balance of the interest of reducing the regulatory/compliance burden on industry while maintaining consumer protection is achieved.

As part of a consumer education program, ASIC could provide information to consumers on what they should be looking for when considering the use of an IDPS or IDPS-like arrangement. The information could be provided through the ASIC fido website and IFSA could likewise develop a Fact Sheet on the matter.

Industry would welcome engaging with ASIC in the development of consumer education fact sheets. IFSA issues a range of Fact Sheets providing information to the public about various aspects of the financial services industry and its operation. These Fact Sheets are often used by our members for the purpose of producing their own investor information publications.

**Response:**

IFSA and ASIC should coordinate their efforts in the production of a consumer education publication on IDPS and IDPS-like arrangements. The publication should explain what IDPS and IDPS-like arrangements are, and should highlight factors that consumers should take into account when choosing an investment platform.

Guidance in respect of how personal advice and SOAs apply to retail clients considering a switch to or between IDPS and IDPS-like schemes would be useful especially considering the different types of IDPSs available on the market. Developing sample wording, together with alternatives, would be encouraged, in terms of promoting shorter and effective SOAs.

**Question 15: What financial impact would arise if compliance with the personal advice obligations in Part 7.7 were not required? If possible, please quantify.**

See Question 11 above.

**Questions 16: Do you agree with our proposal to replace the current specific content requirements of the IDPS Guide with a general disclosure test? If not, why not? Can you quantify any costs that would be incurred in meeting the proposed disclosure requirement?**

**Issue:**

1. Are there any issues associated with replacing the IDPS Guide disclosure requirements under the Class Order(s) with a general disclosure test?
2. What would be the costs, if any, associated with the change?

**Discussion:**

The IDPS Guide is effectively the FSG for the service.

Section 942B(3) of the Act already imposes a general disclosure test by requiring an FSG to contain such information about a matter required under section 942B(2):

“as a person would reasonably require for the purposes of making a decision whether to acquire the financial services from the providing entity as a retail client”.

In the event that an item listed at paragraph (2)(f) of the Class Order is not otherwise covered by section 942(2) and ASIC considers that disclosure significant, consideration should be given to recommending to Government the imposition of the requirement by regulations made pursuant to section 942B(2)(k) of the Act.

Subject to a review of the matters to be prescribed by regulation, we do not consider that IDPS Guide will significantly change.

**Response:**

IFSA supports a general disclosure test rather than a directed disclosure approach but notes that this test is already imposed under section 942B(2). In order to avoid unnecessary costs of providing new IDPS Guides, there should be transitional provisions to the effect that an IDPS Guide that meets the existing class order requirements will be deemed to satisfy the general disclosure test, at least until the end of a transitional period of two years.

**Question 17: Do you think that applying the PDS content and presentation requirements of the enhanced fee disclosure regulations and the proposed explanation about the impact of fees in the IDPS and in accessible investments will assist consumers to understand the fees and costs of an IDPS? If not, why not?**

**Issue:**

Will extending the PDS enhanced fee disclosure content requirements to IDPS arrangements assist customers understanding fees and costs?

**Discussion:**

Excluding any consideration about the effectiveness of the current presentation requirements, greater consistency of fee disclosure across products and services is likely to aid understanding if only by providing for an easier comparison of fees and charges. In this respect, it is noted that a number of IDPS operators already disclose IDPS fees and charges in their IDPS FSG/Guide(s) in a very similar manner to the disclosure (in PDSs, in accordance with Schedule 10) of their super/pension master trust and IDPS-like scheme fees and charges.

As a financial service, operators not only need to provide an IDPS Guide, but also an FSG for their IDPSs and, in most cases, operators produce a combined document. To the extent that an IDPS is equated to a super/pension master trust and/or IDPS-like schemes for fee disclosure purposes, the issue arises as to why IDPS FSGs need to also comply with the

FSG fee disclosure provisions of the Act (in s942B(2)(e)) and regs (r7.7.04) (“FSG fee disclosure provisions”). If IDPSs will need to provide fee disclosure in accordance with Schedule 10, they should be given relief from the FSG fee disclosure provisions.

Fee disclosure is currently required to be included in the IDPS Guide of the IDPS (paragraph 2(f)(iii) and (iv) of CO 02/294) and in the PDS of an IDPS-like arrangement (paragraph 2(c)(v) and (vi) of CO 02/296). The type of fee disclosure appropriate to the provision of IDPS, IDPS-like financial services and super/pension master trusts should be reconsidered/reviewed and, if the current fee disclosure is not considered to be clear, concise and effective, recommendations for change should be made to the Government.

The disclosure of the fees and charges applying to underlying investments acquired through an IDPS, IDPS-like scheme or master trust could be better presented. As it is, in the context of Schedule 10, these fees are currently disclosed as an “amount paid or payable for investing in the assets of the fund” under item 102(e) of Schedule 10. The requirement would be clearer if there was a direct reference to an ICR or ICRs (range of ICRs) for “particular financial product(s) acquired under a custodial arrangement” and this underlying investment fee information should be clearly separated from the fees and charges for the IDPS, IDPS-like scheme and/or master trust through which they are acquired.

Additionally, it is noted that, while “custodial arrangement” is referred to in items 102(b) and (h) of Schedule 10, it is not in fact mentioned in item 102(e). Equally, there is no mention of “custodial arrangement” in item 102(h) relating to performance fees and there is a significant amount of uncertainty as to whether underlying fund performance fees need to be disclosed at all, if not included in the ICR provided to the IDPS operator by the underlying fund manager. It is submitted that there should be no separate requirement to disclose performance fees for financial product(s) acquired under a custodial arrangement other than as part of an ICR publicly quoted by the fund manager to the IDPS operator.

### **Response**

We support the introduction of uniform fee disclosure (consistently with the enhanced fee disclosure regulations) to more easily allow investors to compare fees and charges between products, at the same time seeking a review of:

- The application to IDPSs of the FSG fee disclosure provisions; and
- item 102 in Schedule 10 requiring disclosure of the fees, charges and other costs applying to financial products acquired through an IDPS, IDPS-like scheme and super/pension master trust; and
- whether enhanced fee disclosure (based on Schedule 10) is appropriate for annual periodic statement reporting with flexible transitional arrangements.

The outcome of the reviews referred to should be clearer, simpler disclosure of the fees (including performance fees) and charges applying to financial product(s) acquired under a custodial arrangement.

**Question 18: Do you foresee any practical problems with applying the PDS content and presentation requirements of the enhanced fee disclosure regulations to IDPSs? If so, please give details. Can you quantify any costs that would be incurred in making these disclosures?**

### **Issue:**

Will there be practical problems implementing PDS enhanced fee disclosure requirements?

### **Discussion :**

In satisfying the requirements of the existing IDPS and IDPS-like Class Order requirements, operators will generally currently comply with the enhanced fee disclosure requirements. There should be no significant issues with implementing the proposal however, as indicated in

the response to Question 17, a review of the appropriateness of the disclosure for IDPS and IDPS-like arrangements should be undertaken.

#### *Costs*

Any change to current fee disclosure would give rise to reprinting costs. An estimate of costs for the 5 largest platforms, based on reprinting of IDPS Guides and PDSs for IDPS-like arrangements, will be provided.

#### **Response:**

Any change should be subject to appropriate transitional requirements.

**Question 19: Are there any other disclosures that should be specifically required to be made about the IDPS or IDPS-like scheme? If so, what are they and why is it not sufficient to rely on a general disclosure test?**

#### **Response:**

From a consumer perspective there is no need for additional disclosures.

**Question 20: Do you agree with our proposal to facilitate multiple IDPS operators preparing a single FSG? If not, why not?**

#### **Issue:**

Should multiple operators involved in an IDPS be able to issue a single FSG?

#### **Discussion :**

The question (which refers to 'IDPS operators') is differently worded to section 4.11 which refers to 'providing entities'. There is a distinction between operators and providing entities and for the purposes of this response we have taken the wording from 4.11 rather than the question.

There are no issues with this proposal. It would be important that this was an optional approach rather than a mandatory requirement when multiple parties are involved. Updating a joint FSG may present significant complexity and additional costs as the document must go through multiple internal consideration and sign-off processes for each of the parties.

#### **Response:**

The proposal is welcome but should be optional.

**Question 21: What benefits do you think will result from the proposals in this section? Do you think it is possible to quantify those benefits?**

#### **Response:**

To the extent that the proposals are aligned with the treatment of IDPS arrangements as services, the proposals will enable greater clarity to be provided to customers and clearly identify responsibility for individual services provided.

Further, we support the proposals of allowing incorporation by reference and to allow for non-materially adverse information to be provided through a facility like a website. These will provide the benefits of more clear and concise IDPS Guides.

The only significant additional cost or benefits from the proposals relates to the preparation of new IDPS Guides. This cost impact could be reduced by flexible transitional arrangements.

**Question 22: Will the proposals in this section have any financial impacts that you have not referred to in the answers to the questions above? Please quantify.**

No – financial impacts for the proposals have been considered in the previous answers.

**Question 23: Do you think that retail clients should be entitled to:**

- receive the same quality of information about investments accessed via an IDPS; and
- benefit from the same remedies,

**as they would receive if they invested directly? If not, why not?**

**Issue:**

- a) What are IDPS and IDPS-like arrangements?
- b) What are the rights of clients using an IDPS or an IDPS-like arrangement for investment purposes?
- c) Is it practical or reasonable to give IDPS clients identical information rights and identical remedies to direct investors?

**Discussion:**

IFSA considers that it is desirable for IDPS investors to have access to the information about the investments accessible through the service that direct investors receive. However, as discussed elsewhere in this submission, it should be sufficient that the IDPS investor has access to the information (eg via a website or receipt of electronic or hard copy on request), rather than having to be sent the information, provided that the IDPS investor is advised of their rights to access the information (eg in the FSG/IDPS Guide). We agree with ASIC's proposals on dividend reinvestment and regular savings plan investments.

IFSA generally agrees with ASIC's proposals in relation to IDPS investor access to information. However, we think that some direct investor remedies cannot be reasonably and practically applied to IDPS investors. Specifically, it is not viable to duplicate the investment cancellation rights under sections 724, 1016E and 1016F of the Corporations Act where the offer document for the accessible investment is defective. Those sections do not provide for an investor to elect to cancel only part of their investment, which could happen where some IDPS clients wanted to cancel and others did not. This would also be a problem with the normal cooling-off right under sections 1019A and 1019B (in addition, those 2 sections only apply where the applicant is a retail client, which an IDPS operator or custodian would not be).

In any event, an IDPS investor who invested in reliance on a defective PDS would have a right to compensation from the issuer pursuant to sections 1022B(1)(c)(ii) and (2)(c) of the Corporations Act in addition to possible common law remedies for misrepresentation and negligence.

IFSA believes that its position on remedies is reasonable if IDPS investors are made aware that there are pros and cons of investing via an IDPS and that the benefits of investing via an IDPS also involve a trade-off of some of the rights that direct investors have.

**Response:**

In general, IFSA agrees with ASIC's proposals in relation to IDPS investor access to information. However, IFSA does not agree with ASIC's proposals about extending the sections 724, 1016E and 1016F remedies to IDPS investors.

**Question 24: Can you quantify the cost of giving or ensuring access to PDSs and Ch 6D disclosure documents to IDPS and IDPS-like scheme clients before they make an investment?**

**Issue:**

The cost of an operator providing access to disclosure documents.

**Response:**

IDPS and IDPS-like arrangements provide clients and their advisers with an electronic facility by which to access disclosure documents and initiate investment transactions permitted through the service. Advisers and their clients will generally download disclosure documents from the facility.

It is difficult to quantify the cost of providing access as costs may include the cost of development and maintenance of IT infrastructure that underlies IDPS facilities. It is difficult to separate out overall IT costs attributable to ensuring access to offer documents.

Some discrete costs such as the cost of posting to investors print versions of the offer documents for investments available through the IDPS could be quantified but generally do not represent a significant cost.

**Question 25: Can you quantify the cost of the custodian making investments on behalf of IDPS or IDPS-like scheme clients in response to a PDS or under a Ch 6D disclosure document, and informing clients of any rights they have in relation to defective disclosure if an option is given by the issuer?**

**Issue:**

Custodial costs.

**Discussion:**

All service costs, including costs associated with the custodian holding assets, maintaining records in respect of individual clients and transaction costs are set out in the relevant IDPS Contract, IDPS Guide, or IDPS-like PDS. There would also be internal costs (ie costs in staff time and possibly legal costs) in negotiating or amending the necessary standing agreement with product/securities issuers (currently operators do not apply for underlying investments in the traditional sense of completing an application form. These orders are processed electronically).

The amount of cost would depend on the method the operator used to notify clients (eg electronic or post) but such costs would also include staff time, postage, telephone/email costs, printing and probably internal or external legal costs.

The cost of notifying all affected clients that a product/securities issuer had notified withdrawal of an investment option because of a defective offer document would be substantial, as would the cost of acting on each affected IDPS investor's election.

**Response:**

The costs would be disproportionate to the benefit.

**Question 26: What benefits do you think will result from the proposals in this section? Do you think it possible to quantify those benefits?**

- There would be clear but unquantifiable benefits to IDPS investors in having access to information about accessible investments.
- There would be benefits to IDPS operators in retaining the proposed relief relating to dividend reinvestment and regular savings plans (ie avoidance of extra cost).
- There would be potentially significant costs to IDPS operators if ASIC's proposal relating to investment cancellation rights were implemented.

**Question 27: Will the proposals in this section have any financial impacts that you have not referred to in the answers to the questions above when making disclosure about investments to IDPS clients? Please quantify.**

We are not currently aware of additional financial impacts.

**Question 28: Do you agree with our proposal to allow IDPS operators, IDPS-like scheme responsible entities and superannuation trustees to rely on agents who are associated persons or licensees and authorised representatives passing on disclosure to IDPS clients and members? If not, why not?**

**Issue:**

1. Does the recognition that persons other than the Operator are involved in distribution of disclosure documents to clients reflect operational and commercial reality?
2. Is ASIC proposing that annual client statements and auditor reports cannot be sent to an adviser as the client's agent even if the adviser is not associated with the operator?

**Discussion:**

As a preliminary point, IFSA would like ASIC to clarify whether it is proposing that annual client statements and auditor reports will not be able to be sent to an adviser as the client's agent even if the adviser is not associated with the Operator. The focus of paragraphs 4.35 – 4.36 of the Paper is on associated advisers but 4.36(a) might imply that annual client statements and auditor reports will not be able to be sent to an unassociated adviser (instead of their client) even if that adviser has the client's authority to receive those documents as the client's agent. This would narrow the existing provisions of the Class Order and force some Operators to change current procedures and incur extra costs (eg by multiple mailouts to each client rather than a single mailout to the (same) adviser who is representing all of those clients). IFSA would oppose this.

Subject to the foregoing comments on annual financial statements and auditor reports, IFSA welcomes ASIC's proposals to allow IDPS operators, IDPS-like scheme responsible entities and superannuation trustees (**Operators**) to rely on agents who are associated persons or licensees and authorised representatives passing on disclosures to IDPS clients and members (paragraphs 4.35 and 4.36 of the CP). IFSA considers that these proposals both:

- seek to align the legal obligations of the parties involved in IDPSs, IDPS-like schemes and superannuation entities with the commercial realities and contractual arrangements that typically apply between Operators and licensed financial advisers; and
- acknowledge that where clients use IDPSs, IDPS-like schemes and superannuation products through their licensed financial adviser, the adviser is in the best position to ensure that the client receives required disclosure and appropriate advice.

In the less frequent cases where no licensed financial adviser is involved, and Operators have a direct relationship with the client, IFSA recommends that the IDPS policy permit Operators to provide underlying disclosure documents by electronic means including:

- sending the PDS in electronic form to an electronic address nominated by the member; and
- making the statement available in a way agreed to by the member (for example, a 'member-only' electronic facility such as a secure area of the Operator's website).

This would make the IDPS Policy consistent with ASIC's policy on section 1012IA (see in particular paragraph 184.31 of ASIC Policy Statement 184).

**Response:**

We agree with the approach taken. Additionally, IFSA seeks the further relief in relation to the passing on of disclosure, that would be consistent with section 314(1AA)(b) of the Corporations Act, which allows annual reports for registered schemes to be given by making a copy readily accessible on a web site. This same approach should be taken for accessible investment communications required to be given by an operator to a client under paragraph 2(e)(v) of the Class Order. See also IFSA's response to question 6.

**Question 29: Our proposal for passing on disclosures gives two options to reduce the risk of non-disclosure to clients and members. Which option do you think is preferable or should both apply? Please give reasons and quantify the costs associated with your preferred option(s). Are there any other ways to achieve this outcome? If so, please give details.**

**Issue:**

Responsibility for the provision of disclosure documents to the client.

**Discussion:**

The proposals put by ASIC are:

- firstly, requiring the agent to enter into a contract with the IDPS operator binding the agent to give the disclosure to the client; or
- modifying the Corporations Act so that where an AFS Licensee or authorised representative agrees to act as agent in receiving the disclosures it must give the disclosures to the client or contravene the Corporations Act.

IFSA considers that the second option (ie: modifying the Corporations Act so that where an AFS Licensee or authorised representative agrees to act as agent in receiving the disclosures it must give the disclosures to the client or contravene the Corporations Act), is a stronger option and will reduce the risk of non-disclosure to clients.

Currently, a number of Operators have contractual arrangements in place with advisers and dealer groups which require advisers to provide clients and members with underlying disclosure documents. This contract-based approach is often a difficult and inefficient process to monitor and enforce, and does not reflect the practical commercial reality of responsibility for services under the arrangements. Further, the ongoing monitoring of advisers by Operators involves:

- an extension of the Operator's compliance measures beyond its own authorised representatives and employees, the cost of which is often not commercially viable;
- a duplication of compliance functions between the Operator and advisers or advisers' dealer groups; and

- interference by the Operator in the advisers' customer relationships.

IFSA also considers that a regulatory rather than contractual obligation will encourage better compliance by advisers with this obligation as regulatory obligations should be built into advisers' and dealer groups' internal compliance arrangements and monitored accordingly.

There would be costs in implementing this option, including changes to contractual arrangements with advisers, distributors and fund managers as well as updating disclosure to reflect the new regulatory regime. One IFSA member has estimated that updating these documents would potentially cost that member approximately \$1 million although there would be cost savings in respect of not needing to monitor such contractual requirements with advisers.. Accordingly, IFSA would strongly support a transitional period for compliance with the new regime which coincides with IDPS Guide rolls.

Another way to achieve this outcome could be to impose conditions on advisers' AFS Licences so that where an AFS Licensee or authorised representative agrees to act as agent in receiving the disclosures it must give the disclosures to the client or breach a condition of its AFS Licence.

**Response:**

Imposing an obligation on advisers through a modification of the law aligns better with the policy of allocating responsibility to the adviser as it ensures complete coverage. A contractual based mechanism is burdensome and open to less than complete coverage/allocation.

**Question 30: Should the approach above also apply to the IDPS Guide or PDS for the superannuation entity? If so why? Do IDPS operators rely on associated licensees or authorised representatives who receive documents to give them to clients? If so, how do they ensure compliance and what costs apply? Please quantify.**

**Issue:**

Responsibility for the provision of disclosure documents to the client.

**Discussion:**

*Provision of IDPS Guides or PDS*

IFSA considers that the same approach as outlined in Question 29 above should apply for the IDPS Guide or PDS.

Currently, many Operators rely on hard copy application forms that have been attached to the IDPS Guide or PDS. Receipt of such an application form permits the Operator to form a reasonable belief that the client has received the IDPS Guide or PDS. With the increasing trend towards electronic delivery of disclosure documents and electronic application mechanisms, receipt of an application form may, in the future, cease to be a reliable way for Operators to form a reasonable belief that an IDPS Guide or PDS has been received. Accordingly, modifying the Corporations Act and/or AFS Licence conditions so that failure by an AFS Licensee or authorised representative to provide clients with IDPS Guides or PDSs that they have received as the client's agent will contravene the Corporations Act and/or breach its AFS Licence conditions, should serve to reduce the risk of non-disclosure to clients and members.

*Reliance on associated licensees*

Yes, IDPS operators do rely on associated licensees or authorised representatives who receive documents to give them to clients. Operators ensure compliance by:

- putting contractual arrangements in place with associated licensees and their authorised representatives (**Associated Advisers**) requiring them to provide clients and members with underlying disclosure documents;

- requiring Associated Advisers to make a declaration to the effect that they have provided a client with the requisite underlying disclosure documents each time they submit transaction instructions to the Operator on behalf of a client; and
- relying on the internal compliance and monitoring arrangements of Associated Advisers.

**Response:**

The person or entity actually dealing with the client should be responsible for the giving of disclosure documents

**Question 31: Do you agree with our proposal for the continuing application of [PS 132] and [PS 133] to some IDPS operators? If not, why not?**

**Issue:**

Three issues are raised by the question they are:

1. Does PS132 formally apply to IDPS operators at present as ASIC says?
2. Is PS 133 (as modified by the Class Order) appropriate for IDPSs? Is it appropriate for some IDPS Operators but not others?
3. Is the purpose and effect of the modification to PS 133 for IDPS Operators (ie the exclusion of PS 133.26(a) relating to measure to ensure the identification and segregation of scheme property)?

**Discussion:**

As a threshold issue, it is appropriate to clarify that it is our understanding, contrary to what ASIC implies in the policy proposal that PS 132 (*Managed Investments: Compliance Plans*) does not formally apply to IDPS Operators. That is, there is nothing in the standard IDPS licence conditions in PF 209 or in the Class Order that requires compliance with PS 132.

ASIC's IDPS Policy Statement (see PS 148.23) does say that ASIC will consider PS 132 when assessing an IDPS licence application but that seems to be the only place that PS 132 is mentioned in IDPS regulatory documents. Nevertheless, we recognise that PS 132 is a useful guide to help an operator comply with its obligation under Class Order paragraph 2(k).

Generally, we think that PS 133 (as modified in the way specified in PF 209) remains appropriate for IDPS operators.

In relation to the standard condition exempting compliance with paragraph PS 133.26(a), we think it would be useful to clarify the intended effect of this. We take this to mean that the IDPS Operator is not obliged by the Class Order to keep the assets of the IDPS in separate legal holdings from the assets of other schemes or IDPSs (whilst not in any way derogating from its obligations to hold assets on trust and appropriately account for IDPS assets on an individual client basis).

Further in relation to custody, it would be useful to clarify the meaning of the Class Order requirement that assets "are held on trust for the relevant client or clients". ASIC's standard licence conditions indicate that this can be done via a chain of custody (ie custodian holding on trust for operator who in turn holds on trust for relevant client) but the Class Order is not itself clear on that. Some lawyers have interpreted the Class Order as meaning that any third party custodian used by the operator must hold directly for the client rather than the operator – that would be an impractical outcome in some cases as it would complicate the legal relationships between the 3 parties involved and also be inconsistent with the position for managed investment schemes.

**Response:**

Agree generally with the continued application of PS 133 subject to seeking clarification as referred to above. Agree that PS 132 is a useful tool but do not agree to its mandatory application.

**Question 32: Do you agree with our proposal to retain the current NTA requirements where transactional functions are performed? If not, why not?**

**Question 33: Do you think we should continue to require IDPS operators not performing custodial or transactional functions to have at least \$50,000 NTA? Please give reasons.**

**Issue:**

Do the NTA requirements achieve their intention? Are they proportionate and in the right amounts? Are they practical?

**Discussion:**

We are not aware of any particular problems or discontent with the NTA requirements.

**Response:**

Agree with the proposals.

**Question 34: Do you agree with our proposal to limit the requirements for auditing of internal controls to those relating to custodial and transactional functions? If not, why not? Can you quantify the costs that would be saved as a result of this proposal?**

**Issue:**

1. Is this proposal just to limit the scope of the audit or is it also to limit the scope of the Operator's obligations under Class Order sub-paragraph 2(k)(i)?
2. Will ASIC make clear what obligations it regards as coming within the meaning of "custodial and transactional functions"? Will this expand on the definition of "transactional functions" in PF 209 by adding a reference to holding of assets? Will it specify which provisions of the Act it regards as relating to custodial and transactional functions?

**Discussion:**

There should be a narrowing of the scope of the operator's obligations under sub-paragraph 2(k)(i). The first sentence of paragraph 5.9 of the policy proposal implies this but the rest of 5.9 – 5.11 indicate that it is just the audit scope that is to be narrowed.

Specifically, the reference in sub-paragraph 2(k)(i) of the Class Order to "compliance with the [entire] Act" is inappropriately wide. To take an extreme example as illustration, why should procedures to ensure that the Operator's ACN/ABN appears on its business letters be the subject of IDPS regulation? Broader matters of compliance with the entire Act are more appropriately covered by the general licensee obligations under section 912A of the Act, by standard licence conditions, and by the fact that there are penalties for non-compliance with the Act. The words "the Act and" should therefore be deleted.

In relation to the audit itself, most auditors would not be auditing as widely as the literal wording of paragraph 2(k) requires. They are not qualified to do so and it would be impractical and excessively burdensome to do so. It is, therefore, desirable to narrow the scope as proposed to focus on the essential and most important features of the IDPS. However, it is also important that ASIC gives sufficient detail about what the audit should cover.

The proposal would save costs compared to the cost if an audit in accordance with paragraph 29(k) was truly carried out.

**Response:**

Agree to the proposal but also seek some narrowing of Operator's obligation. ASIC should provide further details about the proposed new audit scope.

**Question 35: Alternatively, do you think we should not require any additional requirements beyond those in regulation 7.8 13 and [PF 209] adapted to refer to the IDPS trust account? Please give reasons. What reduction in compliance costs would occur? Please quantify.**

**Response:**

Disagree with the alternative proposal, basically for the reasons given by ASIC.

**Question 36: Alternatively, do you think we should continue to require that internal controls to ensure compliance with the Act should be documented and audited? Please give reasons.**

**Issue:**

Is ASIC proposing a narrowing of the Operator's obligations, in addition to a narrowing of the audit scope?

**Discussion:**

By using the word "documented" Question 36 implies that ASIC is proposing that the Operator's obligations be narrowed. However, the policy proposal 5.9 – 5.11 indicates otherwise. See previous discussion above.

**Response:**

Disagree with alternative of keeping status quo.

**Question 37: Do you agree with our proposal to remove requirements for particular conditions of the IDPS contract and rely on existing obligations and rights under current legislation? If not, why not?**

**Response:**

IFSA supports the proposal to remove the prescriptive "contract with client" requirements and agrees with ASIC that there are other protections in place for investors.

**Question 38: What benefits do you think will result from the proposals in this section? Do you think it is possible to quantify those benefits?**

**Response:**

Will reduce regulatory overlap/duplication. Impossible to quantify benefits. Not significant in financial terms.

**Question 39: What effect (if any) will the proposals in this section have on compliance costs? Please quantify.**

**Discussion:**

Unlikely to have any quantifiable or material impact on compliance costs.

**Response:**  
See above.

**Question 40: Do you think we should retain the current licence conditions applying to an IDPS operator outsourcing custodial or transactional functions? If not, why not? Should we instead rely on the general outsource obligations in PS 164? Please give reasons for your preferred option.**

**Issue:**  
Retention of operator licence conditions for custodial arrangements.

**Response:**  
IFSA considers that it is appropriate to retain the licence conditions applying to an IDPS Operator outsourcing custodial or transactional functions. In order for IFSA members to meet their internal compliance requirements they would need to put similar agreements/conditions in place that are currently required under the licence conditions.

**Question 41: Does complying with a licence condition in the form of conditions 34 or 38 of [PF 209] impose costs? Can you quantify those costs?**

**Discussion:**  
Condition 34 deals with arrangements with external custodians. The major IDPS Operators do not outsource custodial functions.

Complying with licence condition 38 of PF 209, imposes costs associated with the following activities:

- day to day management of the contract;
- costs in negotiating the inclusion of the requirements in contracts with custodians (the language of the condition leaves scope for debate as to how it should be incorporated in contracts with custodians); and
- periodic and annual steering committees to monitor performance of the contract.

**Response:**  
Compliance with the licence conditions does impose costs (internal and external legal and administration costs).

**Question 42: What benefits do you think will result from the proposals in section 5?**

**Issue:**  
Benefits arising from proposals in relation to operational and other issues.

**Response:**  
IFSA considers that the main benefits that will result from the proposals in section 5 are:

- Para 5.9: The proposal to narrow the scope of the audit of operators' internal controls is likely to result in cost benefits and efficiencies for Operators.
- Para 5.12 – 5.15: The proposal to regulate the conduct of IDPS Operators via legislative provisions rather than requiring specific contractual provisions may, if these contractual provisions are included in IDPS Guides, reduce the disclosure burden on Operators. This may also result in more clear, concise and effective IDPS Guides.
- Para 5.26: The proposal that contravention of a condition of relief will not automatically result in a complete loss of relief should have significant benefits for Operators, investors and other participants.

A more certain regulatory regime would also foster and encourage a better and more proactive compliance culture amongst all industry stakeholders.