

Australian Securities Investments Commission
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Via email: rri.consultation@asic.gov.au.

ASIC Class Order [CO 13/1200] Periodic Statement Relief for Quoted Securities (Class Order)

The Financial Services Council (FSC) welcomes the opportunity to provide comment on ASIC's proposal to remake the Class Order for a period of five years. We submit a proposal that would facilitate a more transparent and cost-effective means for providing periodic statements to investors via digital means rather than via paper. We also submit concerns about certain requirements introduced into section 1017D of the *Corporations Act 2001* by the Class Order.

1. Provision of electronic periodic statements: amendment requested

We submit that amendments should be made to the drafting of this Class Order or CO 2015/647 to facilitate a more transparent and cost-effective use of digital and electronic means for providing periodic statements to clients.

A key concern for the FSC's ETF product issuer members is the need to send postal letters as a notification of periodic statements being available. This is because emails are generally not available to ETF product issuers and their respective share registry providers. ETFs are substantially traded by investors either through online brokers or via intermediaries such as advisers and platforms. Therefore, direct consumer engagement is largely driven through broker, adviser, registry and platform intermediaries. The need to send physical notifications imposes significant cost and effort with little or no benefit for ETF investors.

To underscore the cost to ETF issuers, ETFs typically have more investors than unlisted products. The 2023 ASX Investor Survey indicated that of 10.2 million Australian investors with investments outside their superannuation and primary residential property, 20 per cent have investments in exchange traded funds. This is compared to 8 per cent of investors having investments in unlisted managed funds. ETF issuers have higher trading volumes and typically permit smaller individual trading amounts, which increases the need for transaction statements and exit statements. This means that the volume of physical statements and notices required to be provided to investors is much larger for ETFs than unlisted managed funds. Further, the median ETF balance would typically be lower than unlisted funds given unlisted funds have higher minimum investment amounts, and the cost of ETFs is usually lower, which means that the disclosed fees and costs on periodic statements tend to be lower and less material in comparison to unlisted funds.

ETFs are generally traded online and have a well-recognised communication mechanism via the exchange announcements platform and the registry portal. Investors expect to be made aware of important information via these channels. We note in that in *RG 221 Facilitating Online Financial Services Disclosures*, ASIC states that 'digital disclosure can allow a more timely delivery of the document and may be more easily personalised, potentially increasing the likelihood that the information will be retained by the consumer' (RG 221.96) and that 'digital disclosure also has advantages for providers in reducing the costs of printing and mailing' (RG 221.2). As ASIC notes in the example of margin-lending, digital disclosure 'might work particularly well online because clients are likely to be monitoring their investments online' (RG 221.3). This example applies more pertinently to ETFs given they are traded through online means, and therefore have a better use-case for facilitating digital disclosure.

Therefore, we are seeking on behalf of our ETF product issuer members:

1. Removal of the requirement on ETF product issuers to post periodic statement notification letters. ASIC should deem that periodic statements are “given” to investors by ETF product issuers providing the periodic statements through the share registry, which the registry then makes available on the share registry portal. Investors can log into their share registry to access their statements, or other online portal or facility such as the ETF product issuer’s website. (This is the process in practice); and/or
2. In addition to the above, permit notification to all investors via the market announcements platform to notify investors that the statement has been made available, or via website notification on the ETF issuer’s website.

ETFs are often promoted as being highly liquid, with robust and transparent pricing mechanisms, and the ability to trade efficiently and in a technology-supported environment. Clients expect engagement with product issuers to be equally timely, convenient and reliable. In particular, like other products traded on market, clients expect material information to be provided to them via the market announcement platform.

If ASIC is minded to grant the above, but considers additional notification steps should be taken, then ASIC could additionally facilitate a default of email notification to investors, but **only** where the ETF product issuer has the email address, as email addresses are not automatically provided by brokers. This could be achieved by notifying investors for which the ETF product issuer does not have an email that going forward all notification is as proposed above, and in addition requiring registry providers to provide investors’ email addresses to product issuers for the purposes of providing periodic statements.

The ultimate policy goal should be to cease all postal communication, in line with today’s digital world and ASIC’s policy of facilitating digital and electronic communication.

Current position

Periodic (annual and exit) statements are prescriptive mandatory statements required under section 1017D of the *Corporations Act 2001*. Section 1017D(6) of the Act provides that periodic statements must be given:

- (a) in writing;
- (b) electronically; or
- (c) a way specified in the regulations [or legislative instrument]. This currently includes in a way agreed to by the holder (Reg 7.9.75A(2)).

ETF product issuers must either send the actual statements or send a notification to investors that these are available online via the share registry’s investor centre. Therefore, investors who have not provided an email address on file are required to receive a notification via post that the annual or exit periodic statement is available.

This is because of how the ‘publish and notify’ method under ASIC CO 2015/647 (which enables disclosure to be sent, given, provided, notified, or delivered digitally) and *ASIC Regulatory Guide 221: Facilitating digital financial services disclosure* operates together. In order to rely on the

'Publish and Notify' method, ETF product issuers are required to meet particular requirements, including that the ETF product issuer:

1. Gives the investor a notice stating that the ETF product issuer would be making disclosures available electronically via the share registry's portal unless the investor elected not to receive electronic disclosures;
2. Gives the investor 7 days from the initial notice to opt out of electronic communications;
3. Each time the ETF product issuer makes a disclosure available through the share registry's portal, gives the investor a notice in written or electronic form notifying them that the relevant communication is available and how the investor can obtain it.

Policy considerations

Whilst it is therefore permissible to provide periodic statements in electronic format under the 'publish and notify method,' the problem is that emails are not always available to product issuers because currently brokers do not share this information to the ASX CHESS (clearing house electronic system) which passes on the email address to participant registry service providers. As at 31 January, ASX states that only 17% of all HIN accounts have an email address.

The amendments suggested by the FSC have the following benefits:

1. *Cost savings:* There are substantial costs associated with having to provide paper copies of periodic statements to unitholders, and also of having to mail periodic statement notification letters to investors where email addresses are not available. The exponential growth of the ETF industry has seen it grow to levels beyond the expectations of the initial legislation. The postal delivery of the statements has created a highly expensive cost input that is inhibiting issuers abilities to lower fees or further invest in industry capability. The cost of sending the statements for some issuers exceeds \$1million per annum, which is a cost that is far higher than the benefit derived from the statement considering the access to the internet that the vast majority of investors have.
2. *Environmental impact:* One ETF product issuer member has indicated that for all statements, periodic and annual, approximately 200,000 notifications will be issued in 2024 if no changes are made. Each postal notification is 2 pages in length, which means that approximately 300,000 pages of paper will be used. This number continues to grow each year. A number of our ETF issuer members have stated that they have never received an enquiry from an investor about a periodic statement and that feedback from advisers is that these statements are unhelpful as the advisers as well as online brokers provide more meaningful performance information as it is based on the actual trade (buy / sell) date rather than the net asset value proxy permitted under CO 13/1200 as ETF issuers do not have access to the actual trade price.
3. *Administrative efficiency:* The change requested would require no additional administration on the part of investors. Investors would not be required to provide their consent to receive notification of the availability of the periodic statement via digital means, so there is no additional administrative burden to investors of having to fill in an additional form. From the perspective of ETF product issuers, ceasing sending postal letters is clearly more administratively efficient.
4. *General move to digital receipt of information:* Statements in many financial services contexts are now accessed online. An increasing proportion of unitholders (if not most) have access to

the internet and a computer and engage with their registry provider or broker online. Accessing periodic statements online is in line with this shift.

5. *Privacy considerations*: It is submitted that if an email address has already been provided to a broker by an investor in connection with an investor's ETF investment for the purpose of proper administration of the ETF and notifications in connection with the ETF, there should be no concern that the investor has not consented to use of email for the purpose of notification by the ETF issuer for the receipt of periodic statements from the perspective of privacy law considerations. This is analogous to the provision by brokers of investors' postal addresses.
6. *Other statements*: Other statements for which an email address can be used under Class Order 2015/647 which enables disclosure to be sent given, provided notified or delivered digitally are product disclosure statements, financial services guide, annual reports, ongoing disclosure of material changes and significant events and additional product information on request. The provision of an email address would also assist with these (and AMMA statements).

Documents that may be sent by publication on a website

Under our proposal, reports and documents prescribed in the regulations are taken to be sent if these are made readily available through the ETF issuer's contracted registry service provider's website and/or other online portal or facility such as the ETF issuer's website.

A relevant example of this is the continuous disclosure requirements applicable to ETF product issuers, which requires under the relevant ASX and Cboe market operating rules that the ETF product issuer must comply with s675 of the *Corporations Act 2001*. Section 675(2) of the Act requires information to be disclosed to ASIC if the issuer becomes aware of information that is not generally available and that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the securities.

Relevantly, ASIC has facilitated that information may be published on the issuer's website instead of lodging with ASIC if the following guidelines in ASIC RG 198 are met:

1. all material information must be included on the website, information should be located in a single place on the website and there should be a prominent link on the issuer's homepage.
2. the relevant section of the webpage should contain all material information, regardless of whether it has also been disclosed in some other manner.
3. The issuer needs to be clear and concise with the material information and should avoid publishing lengthy documents where material information is buried within other information;
4. The information must be published on the website as soon as practicable after first becoming aware of the information; and
5. Material information should be kept on the website for as long as it is material to a reasonable person's determination of the price or value of the relevant securities. The issuer must also retain records of its website disclosure in accordance with usual record keeping practices. RG 198.24

We would be supportive of a similar technologically neutral approach being used for the provision of periodic statements.

Recommendation 1: Disclosure documentation, such as the periodic statements, should be able to be provided to investors in a technologically neutral way. Section 1017D(6)(c) of the *Corporations Act 2001* provides that periodic statements must be ‘given’ in a way specified in the regulations, it is clearly open to ASIC to make this change by way of regulation or legislative instrument. Accordingly, we recommend that ASIC issue the replacement instrument CO 13/1200 or if ASIC considers it appropriate, by concurrently issuing a replacement to CO 2015/647 so that either CO 13/1200 or CO 2015/647 deems that a periodic statement is ‘given’ to investors by ETF product issuers providing the periodic statements through the share registry or other online portal or facility such as the ETF product issuer’s website. Notice should be permitted to be given to all investors via the market announcements platform to notify investors that the statement has been made available or website notification on the ETF issuer’s website.

2. Investment return information in the periodic statements

We query the benefit to investors of providing the return information relative to the ETF’s investment objective (performance information) in periodic statements as required under paragraph 8(c). This performance information is already readily available to investors elsewhere such as on the ETF product issuer’s webpage and in regular reports such as monthly factsheets. This performance information is also generally provided to third party vendors. Considering how readily accessible this performance information is for investors and the added administrative burden on ETF product issuers to provide this performance information to the share registries (who are responsible for generating the periodic statements), we submit that it would better benefit investors if they were referred to the aforementioned sources for performance information instead. For example, this could be achieved by including a reference to the ETF’s webpage in the periodic statements.

Further, the information in periodic statements is always provided on a lagged-basis, and we note that, under section 1017D(3), periodic statements can be provided to investors up to 6 months after the end of the relevant reporting period. The performance information that the investors receive is likely to be outdated, whereas the performance information displayed elsewhere is updated more frequently, generally on a monthly basis.

We further note that the performance required under the Class Order is on a fund basis as opposed to an individualised basis (although we note that it is not practically possible to generate these figures as each investor is charged different spreads when they transact on market) and therefore the performance information in the periodic statement does not fully reflect each investor’s returns.

Recommendation 2: We recommend that the requirement introduced by paragraph 8 (c) in the Class Order be removed are part of this remake.

If you have any questions about this submission, please do not hesitate to contact me.

Sincerely,

Chaneg Torres
Policy Director
Investments & Funds Management