

EXPLANATORY STATEMENT for ASIC Corporations (Foreign Licensees and ADIs) Instrument 2016/186

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes *ASIC Corporations (Foreign Licensees and ADIs) Instrument 2016/186* (the Instrument) under paragraphs 926A(2)(a) and 992B(1)(a) of the *Corporations Act 2001* (the Corporations Act).

Paragraph 926A(2)(a) provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.6 (other than Divisions 4 and 8) of the Corporations Act.

Paragraph 992B(1)(a) provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.8 of the Corporations Act.

1. Background

Division 6 of Part 7.8 of the Corporations Act requires Australian financial services (AFS) licensees to prepare and lodge audited financial statements and to keep financial records in relation to their financial services businesses. These obligations apply to all AFS licensees regardless of where they are incorporated or where they carry on their businesses.

In 2003 ASIC issued Class Order [CO 03/823] *Relief from licensing, accounting and audit requirements for foreign authorised deposit-taking institutions* to exempt foreign licensees that are ADIs from certain obligations in Division 6 of Part 7.8. In 2006 ASIC issued Class Order [CO 06/68] *Conditional relief for foreign licensees from financial reporting and record keeping obligations* to exempt foreign licensees that are not ADIs from similar obligations.

The Australian financial services regulatory regime, as a general rule, does not require persons transacting on their own behalf to hold an AFS licence. However, persons who carry out particular dealings in derivatives or foreign exchange contracts cannot rely on this exemption. [CO 03/823] exempts foreign licensees that are ADIs from AFS licensing requirements in relation to such dealings.

[CO 03/823] will sunset on 1 April 2017 and [CO 06/68] will sunset on 1 April 2016.

2. Purpose of the instrument

ASIC has issued the Instrument in order to continue the relief provided by [CO 03/823] and [CO 06/68].

The relief in [CO 03/823] and [CO 06/68] was given on the basis that the obligations in question can be disproportionately burdensome for some foreign entities that hold AFS licences – in particular:

- The financial reporting and record keeping obligations apply to the whole of a foreign company, and not just their operations in Australia (which are often a relatively small part of their business).
- ASIC already has access to financial information about registered foreign companies operating as foreign licensees in Australia. Under subsection 601CK(1) of the Corporations Act, foreign companies must lodge financial statements with ASIC in the form required by the laws of the foreign licensee's home jurisdiction.
- For some entities, the sole reason for needing an AFS licence may be to carry out certain dealings in derivatives or foreign exchange contracts on their own behalf.

The content of [CO 03/823] and [CO 06/68] has been merged in order to remove unnecessary regulatory duplication.

Class Orders [CO 03/823] and [CO 06/68] are repealed by Schedule 2 to the *ASIC Corporations (Amendment and Repeal) Instrument 2016/182*.

3. Operation of the instrument

The Instrument operates in substantially the same way as [CO 03/823] and [CO 06/68].

A foreign licensee seeking to rely on the financial reporting and record keeping relief in the Instrument must lodge with ASIC at least once every calendar year a certified copy of its balance sheet, cash flow statements and profit and loss statement together with a certified copy of a document setting out the views of the licensee's auditor about the documents – as required to be prepared by the laws of the foreign licensee's home jurisdiction.

The relief relating to dealings in derivatives and foreign exchange contracts is only available where:

- The financial service consists only of dealing in derivatives and/or foreign exchange contracts;
- the financial service does not involve the making of a market for derivatives or foreign exchange contracts;
- the dealing is entered into for the purpose of managing a financial risk that arises in the ordinary course of the foreign ADI's banking business;
- the dealing is entered into on the foreign ADI's own behalf;
- the counterparty for the dealing is a wholesale client; and
- the foreign ADI does not hold an AFS licence covering the provision of the financial service.

4. Consultation

On 1 October 2015 ASIC released Consultation Paper 241 *Remaking ASIC class orders on foreign licensees and ADIs: [CO 06/68] and [CO 03/823]* (CP 241), as part of its review of

[CO 03/823] and [CO 06/68]. A draft of the instrument was attached to CP 241. ASIC did not receive any submissions in response to CP 241.

ASIC has assessed that a Regulatory Impact Statement is not necessary for this instrument as it is operating effectively and efficiently, as informed by the consultation process, and is being remade without significant changes.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

ASIC Corporations (Foreign Licensees and ADIs) Instrument 2016/186

ASIC Corporations (Foreign Licensees and ADIs) Instrument 2016/186 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview

The general purpose of the Instrument is to exempt foreign licensees from certain financial reporting and record keeping obligations in the *Corporations Act 2001* (the ***Corporations Act***) and to exempt foreign licensee that are ADIs from Australian financial services licensing obligations in the *Corporations Act* in respect of certain dealings in derivatives and foreign exchange contracts.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

Australian Securities and Investments Commission