

## EXPLANATORY STATEMENT for ASIC Corporations (Repeal and Transitional) Instrument 2016/396

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (ASIC) makes *ASIC Corporations (Repeal and Transitional) Instrument 2016/396* under paragraph 911A(2)(l) of the Act.

Paragraph 911A(2)(l) of the Act provides that ASIC may exempt a person from the requirement to hold an Australian financial services licence for a financial service they provide. This is done by granting an exemption in writing and publishing it in the *Gazette*.

This instrument operates to repeal the following class orders while providing transitional relief to extend their effect for two years:

- [CO 03/1099] *UK FCA regulated financial service providers* ([CO 03/1099]);
- [CO 03/1100] *US SEC regulated financial service providers* ([CO 03/1100]);
- [CO 03/1101] *US Federal Reserve and OCC regulated financial service providers* ([CO 03/1101]);
- [CO 03/1102] *Singapore MAS regulated financial service providers* ([CO 03/1102]);
- [CO 03/1103] *Hong Kong SFC regulated financial service providers* ([CO 03/1103]);
- [CO 04/829] *US CFTC regulated financial services providers* ([CO 04/829]); and
- [CO 04/1313] *German BaFin regulated financial service providers* ([CO 04/1313]) (collectively, the Instruments).

### 1. Background

Paragraph 911A(1) provides that a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services.

**2003-2004: licensing relief for foreign financial services providers**

ASIC made the Instruments that conditionally exempt foreign financial services providers from the requirement to hold an Australian financial services licence when providing financial services to Australian wholesale clients where:

- the particular financial services are provided to wholesale clients only;
- the particular financial services are regulated by an overseas regulatory authority;
- the regulatory regime overseen by the overseas regulatory authority is sufficiently equivalent to the Australian regulatory regime;
- there are effective cooperation arrangements between the overseas regulatory authority and ASIC; and
- the foreign financial services provider meets all the relevant conditions of relief contained in the Instruments.

ASIC made the Instruments to address the potential duplicated regulatory burden arising from compliance with Australia's regulatory regime where foreign financial services providers were already subject to sufficiently equivalent regimes to the Australian regime in their home jurisdictions. A further aim of the Instruments was to attract additional investment and liquidity to Australian markets.

**2013-2015: International Organisation of Securities Commissions (IOSCO) Task Force on Cross-Border Regulation prepares a report on cross-border regulatory issues**

In June 2013, IOSCO established a Task Force on Cross-Border Regulation (Task Force) which announced it would prepare a report (Report) to consider cross-border regulatory issues and provide policy-makers and regulators with a toolkit to assist in addressing challenges posed by cross-border regulation. In anticipation of new IOSCO guidelines on cross-border regulation that were expected to flow from the Report, ASIC postponed its sunset review of the Instruments until the finalisation of the Report.

Though the Report (released in September 2015) made some important observations about the current state of cross-border regulations, including that the trend was clearly towards recognition of foreign regulatory regimes, it did not set out a timeline for further cross-border work amongst member regulators. It instead announced some likely next steps to facilitate recognition, including possible workshops to assist regulators and policy makers in assessing foreign regimes. ASIC notes that some work may follow these workshops, but we currently anticipate that any substantial cross-border guidelines will not likely be released in the near future.

**2014-2015: The Financial System Inquiry**

The 2014 Financial System Inquiry (FSI) also considered amongst other matters the policy settings underpinning financial sector competition. The final report of the FSI recommended that the Government, in relation to financial sector competition:

- Review the state of competition in the sector every three years
- Improve reporting of how regulators balance competition against their core objectives
- Identify barriers to cross-border provision of financial services
- Include consideration of competition in the Australian Securities and Investments Commission's mandate.

In its response to the FSI, the Government stated that it will task the Productivity Commission to review the state of competition in the financial system by the end of 2017. The Government also stated that it will develop legislation to introduce an explicit reference to consideration of competition in ASIC's mandate in the second half of 2016.

ASIC considers that a new competition mandate and any recommendations to flow from a review into the state of financial sector competition may affect its approach to the ongoing regulation of foreign financial service providers. Six of these legislative instruments ([CO 03/1099], [CO 03/1100], [CO 03/1101], [CO 03/1102], [CO 04/829] and [CO 04/1313]) were due to sunset on 1 October 2016, before effect could be given to these FSI recommendations relating to competition.

### **Extending ASIC's relief for foreign financial services providers**

In order to provide certainty while the FSI recommendations relating to competition are implemented, ASIC has extended the effect of the Instruments for two years in *ASIC Corporations (Repeal and Transitional) Instrument 2016/396*.

In the interests of certainty and transparency about the scope of ASIC's powers to obtain information from a foreign financial service provider, ASIC has clarified in this instrument that any written notice given by ASIC that directs a foreign financial services provider to lodge information with ASIC may request information about its financial service business operated in this jurisdiction. This reflects existing powers ASIC has under the Corporations Act and the ASIC Act to obtain such information.

## **2. Purpose of the instrument**

The purpose of the *ASIC Corporations (Repeal and Transitional) Instrument 2016/396* is to preserve the effect of the Instruments for two years while the FSI recommendations relating to competition are implemented and we engage in consultation with industry about the operation of the substantive relief provided by the Instruments.

### **3. Operation of the instrument**

*ASIC Corporations (Repeal and Transitional) Instrument 2016/396* operates to repeal the sunseting Instruments while providing transitional relief to extending their effect for two years.

#### **Schedule 1 - Repeal of sunseting legislative instruments**

Clause (1) of Schedule 1 provides that [CO 03/1099] is repealed in full.

Clause (2) of Schedule 1 provides that [CO 03/1100] is repealed in full.

Clause (3) of Schedule 1 provides that [CO 03/1101] is repealed in full.

Clause (4) of Schedule 1 provides that [CO 03/1102] is repealed in full.

Clause (5) of Schedule 1 provides that [CO 03/1103] is repealed in full.

Clause (6) of Schedule 1 provides that [CO 04/829] is repealed in full.

Clause (7) of Schedule 1 provides that [CO 04/1313] is repealed in full.

#### **Schedule 2 - Transitional licensing relief**

Subitem (1) of Schedule 2 provides that the exemptions specified in the Instruments continue to apply by force of this Instrument, in the circumstances and on the conditions specified in relation to the exemption.

Subitem (2) provides that an exemption that continues to apply by force of subitem (1) applies provided any person relying on the exemption complies with any written notice given by ASIC directing the person to give to ASIC, within the time specified in the notice, a written statement containing specified information about the financial service business operated by the person in this jurisdiction.

Subitem (3) provides that subitems (1) and (2) have effect for a period of 2 years from the date of the commencement of the instrument.

### **4. Consultation**

ASIC consulted stakeholders on its proposal to continue the effect of the Instruments for a period of two years to accommodate, amongst other things, the implementation of FSI recommendations relating to competition. The four stakeholder responses were generally supportive of this proposal for the extension on the understanding that there would be comprehensive consultation undertaken by ASIC about the substantive relief during the extension period.

Once there is more certainty around the implementation of FSI recommendations relating to competition, ASIC will review *ASIC Corporations (Repeal and Transitional) Instrument 2016/396* and the underlying exemptions provided by the Instruments. This review will also include further assessment of the impact of international regulatory and economic developments on the underlying exemptions.

Following the review, ASIC will publically consult on any proposed changes to the underlying exemptions and their associated conditions.

## **Statement of Compatibility with Human Rights**

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

ASIC Corporations (Repeal and Transitional) Instrument 2016/396

*ASIC Corporations (Repeal and Transitional) Instrument 2016/396 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**

*ASIC Corporations (Repeal and Transitional) Instrument 2016/396 repeals seven class orders while extending their effect for two years from the commencement of this instrument. These class orders provided conditional relief from the requirement to hold licence an Australian financial services when providing certain financial services to Australian wholesale clients for the following foreign financial services providers:*

- BaFin regulated financial service providers
- CFTC regulated financial service providers
- FCA regulated financial service providers
- Federal Reserve and OCC regulated financial service providers
- MAS regulated financial service providers
- SEC regulated financial service providers
- SFC regulated financial service providers

### **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**