

EXPLANATORY STATEMENT for ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes the *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109* under subsection 926A(2) of the *Corporations Act 2001* (Act).

Subsection 926A(2) of the Act provides that ASIC may exempt a person or a financial product or class of persons or financial products from all or specified provisions of Part 7.6 of the Act (other than Divisions 4 and 8); or declare that Part 7.6 of the Act (other than Divisions 4 and 8) applies in relation to a person or a financial product or class of persons or financial products as if specified provisions were omitted, modified or varied.

1. Background

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

AFS licensing relief for foreign financial services providers

Regulatory Guide 176: *Foreign financial services providers* (RG 176) sets out guidance about relief we may give to conditionally exempt foreign financial services providers from the requirement to hold an AFS licence when providing financial services to Australian wholesale clients where:

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

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

ASIC has previously made seven legislative instruments for:

- [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]).

In September 2016 ASIC made a legislative instrument that continues the effect of the seven legislative instruments for two years. This instrument commenced on 28 September 2016. ASIC will, over the course of the two years review the operation of these instruments.

Application for AFS licensing relief for Luxembourg fund managers

We received an application for relief on behalf of Luxembourg fund managers (LFM) who hold a current licence or authorisation granted by the Commission de Surveillance du Secteur Financier (CSSF), the financial services regulator in Luxembourg, authorising them to provide financial services and are either:

- (a) management companies, which can manage undertakings for collective investment in transferable securities (UCITS) established under Part I of the Law dated 17 December 2010 *relating to the undertaking for collective investment of Luxembourg* (2010 Law) that come under Chapter 15 of the 2010 Law (Chapter 15 Management Companies); or
- (b) investment companies established under Part I of the 2010 Law that have designated themselves as “self-managed” (Self-Managed UCITS).

We decided to grant the relief sought in the form of a legislative instrument similar to CO [03/1099] *UK regulated financial service providers* for the same period as this legislative instrument was extended and on the condition that the LFMs holds a current licence or authorisation granted by the CSSF and is a Chapter 15 Management Company or a Self-Managed UCITS.

2. Purpose of the instrument

The purpose of the *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109* is to allow LFMs that are Chapter 15 Management Companies or Self-Managed UCITS who have been granted a licence or authorisation by the CSSF to provide certain types of financial services in relation to certain types of financial products to wholesale clients in Australia without holding an AFS licence.

3. Operation of the instrument

Section 6 provides that a CSSF regulated financial service provider is conditionally exempt from the requirement to hold an AFS licence when providing financial product advice, dealing in a financial product, making a market for a financial product or providing a custodial or depository service in this jurisdiction to wholesale clients.

This relief applies only in respect of the following financial products: eligible deposit products; derivatives; foreign exchange contracts; securities; debentures, stocks or bonds

issued by a government; managed investment products; or interests in a managed investment scheme that is not required to be registered under Chapter 5C of the Act.

Section 7 sets out a number of upfront and ongoing conditions that an LFM must comply with in order to rely on the exemption. These requirements substantively replicate the corresponding conditions that were contained in the previous class order relief in [CO 03/1099].

The exemption is available to an LFM that is either a registered foreign company or has appointed a local agent and satisfies a number of upfront conditions requiring the provision to ASIC of:

- (a) evidence that the LFM is a foreign financial services provider;
- (b) a written notice that it will provide financial services in this jurisdiction in reliance on the *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109*;
- (c) written consents to the disclosure by the overseas regulatory authority to ASIC and ASIC to the overseas regulatory authority of any information or document that the overseas regulatory authority or ASIC has that relates to the LFM; and
- (d) an irrevocable deed of the LFM for the benefit of and enforceable by ASIC and certain other persons in relation to potential enforcement action regarding its operations in Australia.

Once the LFM has been notified by ASIC that it may rely on the exemption in *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109* a number of ongoing conditions must be complied with. These require the LFM to:

- (a) provide written disclosure to all persons to whom the financial services are provided that the LFM is exempt from holding an AFS licence and is regulated by the CSSF under their laws which differ from Australian laws;
- (b) the LFM undertakes to provide each of the financial services in a manner which would comply with overseas regulatory requirements applicable to LFMs; and
- (c) notify ASIC within 15 business days of each significant change to the LFM's licence or registration, each significant exemption or relief obtained from the CSSF and each significant disciplinary or enforcement action or significant investigation.

The exemption will cease to apply where an LFM fails to comply with a condition set out in subsection (7) where:

- (a) 15 business days have passed since the LFM became aware or should reasonably have become aware of matters giving the LFM reason to believe it had failed to comply with the condition without providing full particulars of the failure to ASIC (to the extent that the LFM knows those particulars or would have known them if it had undertaken reasonable enquiries); or
- (b) 30 business days have passed from ASIC receiving those particulars from the LFM without ASIC notifying the foreign financial services provider that it may continue to rely on this instrument.

4. Consultation

ASIC consulted with industry stakeholders on its proposal to make *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109*.

ASIC proposes to review *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109* in two years. At this time we will consult publically on any changes that we propose to make.

Statement of Compatibility with Human Rights

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

ASIC Corporations Instrument 2016/XXX

ASIC Corporations Instrument 2016/XXX 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 Instrument 2016/1109 provides conditional relief LFM that are Chapter 15 Management Companies or Self-Managed UCITS who have been granted a licence or authorisation by the CSSF to provide certain types of financial services in relation to certain types of financial products to wholesale clients in Australia without holding an AFS licence.

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

