

EXPLANATORY STATEMENT for
ASIC Corporations (Foreign Financial Services Providers – Limited
Connection) Instrument 2017/182

and

ASIC Corporations (Repeal) Instrument 2017/255

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes *ASIC Corporations (Foreign Financial Services Providers – Limited Connection) Instrument 2017/182* (**the Instrument**) under subsection 926A(2) of the *Corporations Act 2001* (**Act**).

ASIC makes *ASIC Corporations (Repeal) Instrument 2017/255* 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*.

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.

Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of the Act), where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

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 Australian financial services (AFS) licence covering the provision of the financial services.

In 2003, ASIC issued ASIC Class Order [CO 03/824] (**[CO 03/824]**) to provide relief from the requirement to hold an AFS licence where the person providing the financial services is:

- (a) not in this jurisdiction;
- (b) dealing only with wholesale clients; and
- (c) carrying on a financial services business by engaging in conduct that is intended to induce people in this jurisdiction to use the financial services the person provides, or is likely to have that effect: see s 911D(1).

The relief granted by [CO 03/824] was to ensure that infrequent, arms-length transactions by a foreign financial services provider (**FFSP**) with Australian wholesale clients would not require a licence where there is a limited connection between the overseas financial services provider and Australia. It was largely made due to concerns that overseas counterparties to derivatives and foreign exchange transactions may be caught engaging in ‘inducing’ activities under s 911D, requiring an AFS licence, when issuing financial products to Australian wholesale clients. This would require those overseas counterparties to be licensed to entering into derivatives and foreign exchange contracts on an ad hoc basis with Australian wholesale clients.

This instrument operates to extend the effect of [CO 03/824] until 27 September 2018.

'Passport' relief for foreign financial services providers

Between 2003 and 2004, ASIC conditionally exempted certain FFSPs 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.

Until recently, this relief was contained in the following class orders:

- [CO 03/1099] *UK regulated financial service providers*;

- [CO 03/1100] *US SEC regulated financial service providers*;
- [CO 03/1101] *US Federal Reserve and OCC regulated financial service providers*;
- [CO 03/1102] *Singapore MAS regulated financial service providers*;
- [CO 03/1103] *Hong Kong SFC regulated financial service providers*;
- [CO 04/829] *US CFTC regulated financial services providers*; and
- [CO 04/1313] *German BaFin regulated financial service providers*.

The original policy rationale behind this relief was to attract additional investment and liquidity to Australian markets by addressing the duplicated regulatory burden arising from compliance with Australia's regulatory regime where FFSPs were already subject to sufficiently equivalent regimes in their home jurisdictions.

In September 2016, ASIC temporarily extended its relief for FFSPs for another two years in *ASIC Corporations (Repeal and Transitional) Instrument 2016/396 (the FFSP Instrument)*. We further extended the FFSP relief for a limited term to entities regulated in Luxembourg in 2016: see *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109*.

Section 911A(2E) of the Act

Section 911A(2E) was inserted by reg 7.6.02AG of the *Corporations Regulations 2001*. Section 911A(2E) provides that a person (person 1) is exempt from the requirement to hold an AFS licence for a financial service they provide to a person (person 2) in the following circumstances:

- (a) person 1 is not in this jurisdiction;
- (b) person 2 is a professional investor; and
- (c) the service consists of any or all of the following:
 - (i) dealing in derivatives, foreign exchange contracts, carbon units, Australian carbon credit units or eligible international emissions units;
 - (ii) providing advice on derivatives, foreign exchange contracts, carbon units, Australian carbon credit units or eligible international emissions units;
 - (iii) making a market in derivatives, foreign exchange contracts, carbon units, Australian carbon credit units or eligible international emissions units.

It was thought that the major types of financial services covered in [CO 03/824] would be covered by the AFS licensing exemption afforded in s 911A(2E), given that [CO 03/824] was made largely due to concerns that overseas counterparties to derivatives and foreign exchange transactions may be caught under s911D of the Act. However, s 911A(2E) has a narrower scope of relief than [CO 03/824].

The relief granted in s 911A(2E) is different to [CO 03/824] in two key ways:

- (a) the financial services listed in s 911A(2E) is limited to dealing, advising or making a market in derivatives, foreign exchange contracts and a range of financial products related to carbon emissions, whereas [CO 03/824] applies to the provision of any financial service; and
- (b) the financial services listed in s 911A(2E) must be provided to a professional investor (see: s 9 of the Act) which has a narrower definition than a wholesale client, as defined in s 761G of the Act.

2. Purpose of the instrument

The purpose of the Instrument is to preserve the effect of [CO 03/824] in its existing form until 27 September 2018. This date aligns with the expiry of *ASIC Corporations (Repeal and Transitional) Instrument 2016/396*, which provides relief for some FFSPs operating from a number of designated countries.

ASIC Corporations (Repeal) Instrument 2017/255 is made to repeal the relief provided by [CO 03/824].

3. Operation of the instrument

Part 1—Preliminary

Section 1 provides that the name of the legislative instrument is to be *ASIC Corporations (Foreign Financial Services Providers – Limited Connection) Instrument 2017/182*.

Section 2 provides that the instrument commences on the day after it is registered on the Federal Register of Legislation.

Section 3 provides that the instrument ceases to apply on 27 September 2018, the same date as the expiry of date aligns with the expiry of *ASIC Corporations (Repeal and Transitional) Instrument 2016/396*.

Section 4 provides that the instrument is made under subsection 926A(2) of the Act. [CO 03/824] had been made under paragraph 911A(2)(l). Although this instrument is made under subsection 926A(2), it operates in the same way as [CO 03/824] did when it was made under paragraph 911A(2)(l) apart from the duration of the instrument. We have made the instrument under s926A(2) to simplify and expedite ASIC's procedures for temporarily extending the relief contained in [CO 03/824].

Section 5 outlines relevant definitions for key terms used in the instrument. 'Act' is defined as meaning the *Corporations Act 2001*.

Part 2—Exemptions

Section 6 provides that:

- (1) A person that is carrying on a financial services business in this jurisdiction only because of section 911D of the Act does not have to comply with subsection 911A(1) of the Act in relation to the provision of a financial service to a wholesale client.
- (2) Subsection (1) does not apply to a person who holds an AFS licence covering the provision of the financial service.

4. Consultation

As part of its review of [CO 03/824], ASIC released Consultation Paper 268 *Licensing relief for foreign financial services providers with a limited connection to Australia (CP 268)*. ASIC received 12 responses to CP 268 (including five confidential responses) from industry bodies, law firms, investment managers and foreign banks.

Proposal to repeal [CO 03/824]

In CP 268, ASIC sought feedback on a proposal to repeal [CO 03/824] on the basis that its substantive effect is now covered by s 911A(2E).

Respondents strongly supported the continuation of [CO 03/824] because s 911A(2E) is not a complete replacement for [CO 03/824] due to the subsection's limited scope. It was submitted that there are no viable alternatives that would allow entities relying on [CO 03/824] to continue their Australian activities without an AFS licence. The submissions illustrated that in practice [CO 03/824] has come to operate as a pre-cursor to an entity relying on the FFSP relief.

Acknowledging the feedback ASIC received in response to CP 268, *ASIC Corporations (Foreign Financial Services Providers – Limited Connection) Instrument 2017/182* will roll-over the effect of [CO 03/824] until 27 September 2018.

During this roll-over period, ASIC will commence a more comprehensive review of the underlying policy settings for FFSPs providing services to Australian clients. ASIC will consult on the relief that it has issued for FFSPs covered by *ASIC Corporations (Foreign Financial Services Providers – Limited Connection) Instrument 2017/182* and *ASIC Corporations (Repeal and Transitional) Instrument 2016/396*, including any changes that are proposed as a result of the comprehensive review that it intends to undertake during the transition period specified in those instruments which ends on 27 September 2018.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Foreign Financial Services Providers – Limited Connection) Instrument 2017/182

And

ASIC Corporations (Repeal) Instrument 2017/255

ASIC Corporations (Foreign Financial Services Providers – Limited Connection) Instrument 2017/182 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 (Foreign Financial Services Providers – Limited Connection) Instrument 2017/182 provides an exemption to a person from the requirement to hold an AFS licence for financial services they provide to wholesale clients and, as a result of s 911D only, the person is carrying on a financial services business by engaging in conduct that is intended to induce people in Australia to use the financial services it provides, or is likely to have that effect.

ASIC Corporations (Repeal) Instrument 2017/255 is made to repeal the relief provided by [CO 03/824].

Human rights implications

This legislative instruments do not engage any of the applicable rights or freedoms.

Conclusion

This legislative instruments are compatible with human rights as it does not raise any human rights issues.

Australian Securities and Investments Commission