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**EXPLANATORY STATEMENT for**  
**ASIC Corporations (Amendment) Instrument 2017/464**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (*ASIC*) makes *ASIC Corporations (Amendment) Instrument 2017/464* (***the amendment instrument***) under subsection 926A(2) of the *Corporations Act 2001* (***the Act***). This paragraph of the Act provides that ASIC may declare that the provisions in Part 7.6 (other than Divisions 4 and 8) of the Act apply in relation to a person or financial product, or a class of persons or financial products, as if the specified provisions were omitted, modified or varied as specified in the declaration.

The amendment instrument amends *ASIC Corporations (Recognised Accountants: Exempt Services) Instrument 2016/1151* (***the principal instrument***). The principal instrument was made under subsection 926A(2)(c) of the Act. Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force 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 such an instrument.

**1. Background**

The principal instrument modified regulation 7.1.29(4) of the *Corporations Regulations 2001* (***the Regulations***) as it applies to limited Australian financial services (*AFS*) licensees and their authorised representatives so that a limited AFS licensee (***limited licensee***), or the authorised representative of a limited licensee, can provide exempt advice to retail clients on the tax implications of financial products not covered by an authorisation in their licence.

Regulation 7.1.29(4) enables a person to provide advice on taxation issues (including advice in relation to the tax implications of financial products) without a licence. If the tax advice is also financial product advice to a retail client, this exemption is only available if it is accompanied by a written statement which states that:

- (a) the person providing the advice is not licensed to provide financial product advice under the Act; and
- (b) taxation is only one of the matters that must be considered when making a decision on a financial product; and

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- (c) the client should consider taking advice from the holder of an AFS licence before making a decision on a financial product: sub-paragraph 7.1.29(4)(c)(ii).

The introduction of the limited AFS licence regime under the *Corporations Amendment Regulation 2013 (No 3)* created a regulatory anomaly with regulation 7.1.29(4). Limited licensees cannot comply with the requirement to provide a written statement stating that they are not licensed. Therefore, they could not rely on the exemption to provide advice to retail clients on the tax implications of financial products which were not covered by an authorisation in their licence, nor could they provide the advice under their licence where their authorisations did not cover the financial product which is the subject of the advice.

The principal instrument addressed this regulatory anomaly by enabling limited licensees and authorised representatives of limited licensees to provide a modified warning in order to provide exempt advice on the tax implications of financial products that are not covered by their licence. Instead of providing a written statement which states, among other things, that the person providing the advice is not licensed under the Act, a limited licensee or the authorised representative of a limited licensee was required under the principal instrument to provide a written statement that:

- (a) the person providing the advice is a limited licensee or an authorised representative of a limited licensee who is authorised to provide one or more limited financial services; and
- (b) taxation is only one of the matters that must be considered when making a decision on a financial product; and
- (c) the client should consider taking advice from the holder of an AFS licence before making a decision on the financial product.

Since the principal instrument was made, we have identified that full AFS licensees (or authorised representatives of full AFS licensees) with limited authorisations also encounter the problem described above. They cannot provide the written statement required by sub-paragraph 7.1.29(4)(c)(ii). Therefore, without the amendment instrument, they cannot provide exempt tax advice under regulation 7.1.29(4) to retail clients on financial products not covered by their authorisation, nor can they provide the advice under their licence where their authorisations do not cover the financial product which is the subject of the advice.

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

The purpose of the amendment instrument is to allow full AFS licensees (and authorised representatives of full AFS licensees) with limited authorisations to provide exempt advice under regulation 7.1.29(4) to retail clients on the tax implications of financial products which are not covered by an authorisation in their licence.

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

The amendment instrument extends the application of the principal instrument to include full AFS licensees (and authorised representatives of full AFS licensees) with limited authorisations. The principal instrument and amendment instrument together modify regulation 7.1.29(4) so that an AFS licensee (whether full or limited) or the authorised representative of an AFS licensee can provide exempt advice to a retail client on the tax implications of financial products not covered by an authorisation in their licence. Instead of providing a written statement which must state, among other things, that the person providing the advice is not licensed under the Act, an AFS licensee (whether full or limited) or authorised representative must provide a written statement that:

- (a) the person providing the exempt advice does not have the authorisation to provide this advice either as an AFS licensee (whether full or limited) or the authorised representative of an AFS licensee; and
- (b) taxation is only one of the matters that must be considered when making a decision on a financial product; and
- (c) the client should consider taking advice from the holder of an AFS licence with the appropriate authorisation before making a decision on the financial product.

### **4. Consultation**

The amendment instrument is of a minor or machinery nature and, therefore, consultation is unnecessary. Nevertheless, on 23 March 2017, ASIC wrote to the following key stakeholders seeking comments on the proposed amendments: CPA Australia (*CPA*), Chartered Accountants Australia and New Zealand (*ICAAANZ*), the Institute of Public Accountants, the Tax Practitioners Board (*TPB*), the Financial Ombudsman Service and the SMSF Association. The three stakeholders who responded (CPA, ICAANZ and TPB) supported the making of the amending instrument.

## Statement of Compatibility with Human Rights

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

### ASIC Corporations (Amendment) Instrument 2017/464

*ASIC Corporations (Amendment) Instrument 2017/464* 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 (Recognised Accountants: Exempt Services) Instrument 2016/1151 (the principal instrument)* modified regulation 7.1.29(4) of the *Corporations Regulations 2001* as it applies to limited AFS licensees (**limited licensees**) and their authorised representatives.

Limited licensees were unable to provide advice to retail clients on the tax implications of financial products which were not covered by an authorisation in their licence in circumstances contemplated by regulation 7.1.29(4), nor could they provide the advice under their licence where their authorisations did not cover the financial product which is the subject of the advice. This is because they cannot comply with the requirement in sub-paragraph 7.1.29(4)(c)(ii) to provide a written statement which states, among other things, that they are not licensed to provide financial advice.

To address this regulatory anomaly, the principal instrument modified regulation 7.1.29(4)(c)(ii) as it applies to limited AFS licensees and their authorised representatives so that they can provide a modified version of the statement.

Since the principal regulation was made, it has become clear that full AFS licensees (and authorised representatives of full AFS licensees) with limited authorisations encounter the same problem.

Therefore, *ASIC Corporations (Amendment) Instrument 2017/464* extends the application of the principal instrument so that full AFS licensees (and authorised representatives of full AFS licensees) can also give a modified statement in order to provide exempt advice to retail clients on the tax implications of financial products not covered by an authorisation in their licence in circumstances contemplated by regulation 7.1.29(4).

#### 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.

**Grant Moodie, Special Counsel**