

## **EXPLANATORY STATEMENT for ASIC Corporations (Amendment) Instrument 2018/807**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (*ASIC*) makes *ASIC Corporations (Amendment) Instrument 2018/807 (Amendment Instrument)* under paragraph 911A(2)(1) and subsection 926A(2) of the *Corporations Act 2001 (Act)*.

Paragraph 911A(2)(1) of the Act provides that ASIC may exempt a person from the requirement to hold an Australian financial services (*AFS*) licence for a financial service they provide in circumstances where the provision of the service is covered by an exemption specified by ASIC in writing and published in the *Gazette*.

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

The Amendment Instrument amends *ASIC Corporations (Repeal and Transitional) Instrument 2016/396*, *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109* and *ASIC Corporations (Foreign Financial Services Providers—Limited Connection) Instrument 2017/182* (the **Principal Instruments**).

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**

Subsection 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.

### ***Sufficient equivalence relief for foreign financial services providers***

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

- (a) the financial services are provided to wholesale clients only;
- (b) the 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 the relief.

In 2003 and 2004, ASIC made the following legislative instruments based on the policy set out in RG 176:

- ASIC Class Order [CO 03/1099] *UK FCA regulated financial service providers*
- ASIC Class Order [CO 03/1100] *US SEC regulated financial service providers*
- ASIC Class Order [CO 03/1101] *US Federal Reserve and OCC regulated financial service providers*
- ASIC Class Order [CO 03/1102] *Singapore MAS regulated financial service providers*
- ASIC Class Order [CO 03/1103] *Hong Kong SFC regulated financial service providers*
- ASIC Class Order [CO 04/829] *US CFTC regulated financial services providers*
- ASIC Class Order [CO 04/1313] *German BaFin regulated financial service providers*

(together, the ***Class Orders***).

In September 2016, ASIC made *ASIC Corporations (Repeal and Transitional) Instrument 2016/396*, which repealed the Class Orders and provided transitional relief to preserve their effect for a period of two years from commencement of the instrument to enable ASIC to conduct a review of the policy settings underlying the relief. This Amendment Instrument preserves this relief for a further 12 months, to 30 September 2019.

In November 2016, ASIC made *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109* based on the policy set out in RG 176 and on similar terms to [CO 03/1099]. The instrument was issued for a fixed period to be consistent with the expiry of the relief contained in *ASIC Corporations (Repeal and Transitional) Instrument 2016/396*. This Amendment Instrument preserves the operation of *ASIC Corporations (CSSF-Regulated*

*Financial Services Providers) Instrument 2016/1109* also for a further 12 months to 30 September 2019

***Limited connection relief for foreign financial services providers***

In September 2003, ASIC made ASIC Class Order [CO 03/824] *Licensing relief for foreign entities with limited connection to Australian wholesale clients* 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 s911D(1).

The relief granted by [CO 03/824] was to ensure that infrequent, arms-length transactions by a FFSP with Australian wholesale clients would not require a licence where there is a limited connection between the FFSP 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 s911D of the Act, requiring an AFS licence, when issuing financial products to Australian wholesale clients. This would require those overseas counterparties to be licensed to enter into derivatives and foreign exchange contracts on an ad hoc basis with Australian wholesale clients.

In September 2016, ASIC released Consultation Paper 268 *Licensing relief for foreign financial services providers with a limited connection to Australia (CP 268)* seeking feedback on a proposal to repeal [CO 03/824] on the basis that its substantive effect was covered by s911A(2E) of the Act, which provides licensing relief for the provision of financial services relating to derivatives, foreign exchange and some types of carbon units. Respondents to CP 268 strongly supported the continuation of [CO 03/824] because s911A(2E) is not a complete replacement for [CO 03/824] due to the limited scope of the subsection.

ASIC recognised the feedback received and the relationship between the relief in [CO 03/324] and the Class Orders and so it made *ASIC Corporations (Foreign Financial Services Providers—Limited Connection) Instrument 2017/182* in March 2017, which extended the operation of [CO 03/824] to 27 September 2018 to align it with the expiry of the licensing relief contained in *ASIC Corporations (Repeal and Transitional) Instrument 2016/396* and *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109*.

***ASIC’s review of the relief for foreign financial services providers***

The Principal Instruments are all due to expire in September 2018. They were issued for a fixed period to allow ASIC to comprehensively review and consult on the policy settings underlying our relief for FFSPs.

On 1 June 2018, ASIC published Consultation Paper 301 *Foreign financial services providers (CP 301)* to:

- provide an update on the results of its review of the relief contained in the Principal Instruments; and
- seek feedback on its proposals to repeal the Principal Instruments and implement a modified AFS licensing regime for FFSPs.

In publishing CP 301, ASIC communicated that it would extend the relief contained in the Principal Instruments for a further 12 months to 30 September 2019 while it consulted with stakeholders on the proposals in that paper. ASIC has received to date 36 submissions on the proposals in CP 301 which it is currently considering.

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

The purpose of the Amendment Instrument is to preserve the effect of the relief in each of the Principal Instruments until 30 September 2019.

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

The Amendment Instrument amends:

- Schedule 2 to *ASIC Corporations (Repeal and Transitional) Instrument 2016/396* by substituting “a period of 2 years commencing on the day this instrument commences” in subsection 1(3) with “the period commencing on the day this instrument commences and ending on 30 September 2019”;
- Part 1 of *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109* by substituting “28 September 2018” in section 3 with “30 September 2019”; and
- Part 1 of *ASIC Corporations (Foreign Financial Services Providers—Limited Connection) Instrument 2017/182* by substituting “27 September 2018” in section 3 with “30 September 2019”.

## **4. Consultation**

ASIC did not undertake consultation in relation to the Amendment Instrument because it is minor and machinery in nature, does not substantially alter existing arrangements and only temporarily extends the relief in the Principal Instruments pending the outcome of ASIC’s consultation on the proposals set out in CP 301.

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

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

### **ASIC Corporations (Amendment) Instrument 2018/807**

*ASIC Corporations (Amendment) Instrument 2018/807 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 (Amendment) Instrument 2018/807 extends the relief in ASIC Corporations (Repeal and Transitional) Instrument 2016/396, ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109 and ASIC Corporations (Foreign Financial Service Providers—Limited Connection) Instrument 2017/182 until 30 September 2019 to allow ASIC to undertake consultation in relation to proposals to repeal that relief.*

*ASIC Corporations (Repeal and Transitional) Instrument 2016/396 and ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109 conditionally exempt certain foreign financial services providers from the requirement to hold an Australian Financial Services licence when providing specified financial services to Australian wholesale clients where they are already subject to a regulatory regime in their home jurisdiction that is sufficiently equivalent to the regulatory regime in Australia.*

*ASIC Corporations (Foreign Financial Services Providers—Limited Connection) Instrument 2017/182 exempts foreign financial services providers from the requirement to hold an Australian Financial Services licence where the person is carrying on a financial services business in this jurisdiction only because of section 911D of the Corporations Act 2001 (which relates to 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) in relation to the provision of a financial service to a wholesale client.*

#### **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.