



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Amendment) Instrument 2019/45

This is the Explanatory Statement for the *ASIC Corporations (Amendment) Instrument 2019/45* (the **amending instrument**).

The Explanatory Statement is approved by the Australian Securities and Investments Commission (**ASIC**).

Summary

1. The amending instrument expands the operation of the transfer provisions in Part 7.11 of the *Corporations Act 2001* (the **Act**) to cover interests in registered managed investment schemes that are quoted on the financial market operated by Chi-X Australia Pty Ltd (**Chi-X**).

Purpose of the instrument

2. Chi-X is proposing to expand its secondary trading services to include interests in registered schemes that have been admitted to quotation on the financial market operated by Chi-X.
3. The purpose of the amending instrument is to expand the operation of the transfer provisions in Division 3 and 4 of Part 7.11 of the Act to cover interests in registered schemes that are quoted on the financial market operated by Chi-X.
4. The amending instrument seeks to promote regulatory neutrality between Chi-X and ASX in relation to interests in registered schemes by treating interests in registered schemes that are respectively quoted on the financial markets respectively operated by Chi-X and ASX as being equivalent for the purposes of the transfer provisions in the Act.
5. Division 3 of Part 7.11 of the Act deals with the transfer of certain securities (**Division 3 securities**) effected otherwise than through a prescribed clearing and settlement facility. Division 4 of Part 7.11 of the Act deals with the transfer of certain financial products (**Division 4 financial products**) effected through a prescribed clearing and settlement facility.
6. ASX Settlement Pty Limited (**ASX Settlement**) operates the only clearing and settlement facility that has been prescribed in the regulations:

see regulation 7.1.03. ASX Settlement was previously known as ASX Settlement and Transfer Corporation Pty Limited (*ASTC*).

7. A Division 4 financial product generally includes a Division 3 security: see paragraph 7.11.03(1)(a) of the *Corporations Regulations 2001* (the *Regulations*). However, interests in registered schemes are only Division 3 securities under paragraph 1073A(1)(c) of the Regulations if they are covered by regulations made for the purposes of that paragraph: see regulation 7.11.08.
8. The only interests that are currently covered by that regulation are interests in registered schemes that are quoted on the financial market operated by ASX. Such interests are Division 3 securities and Division 4 financial products for the purposes of Divisions 3 and 4 of Part 7.11 respectively.
9. Interests in registered schemes that are quoted on the financial market operated by Chi-X are not Division 3 securities and Division 4 financial products for the purposes of Divisions 3 and 4 of Part 7.11 respectively.

Consultation

10. Before making this amending instrument, ASIC consulted with Chi-X, the ASX Group, the Securities Exchanges Guarantee Corporation and the Reserve Bank of Australia.
11. In making this amending instrument, ASIC considered the feedback provided by these bodies. ASIC also considered the effects that the making of the instrument will have on competition in the financial system.
12. The Office of Best Practice Regulation has assessed that a Regulatory Impact Statement is not required in relation to the making of the amending instrument.

Operation of the instrument

13. The amending instrument notionally modifies regulation 7.11.08 so that interests in registered schemes that are quoted on the financial market operated by Chi-X are:
 - (a) Division 3 securities for the purposes of Division 3 of Part 7.11 (transfers of certain securities effected otherwise than through ASX Settlement); and
 - (b) Division 4 financial products for the purposes of Division 4 of Part 7.11 (transfers of certain securities effected through ASX Settlement).
14. The amending instrument will not have any impact on claims that may be made against the National Guarantee Fund (the *NGF*) under Division 4 of Part 7.5 of the Act until Chi-X becomes a member of the Securities Exchanges Guarantee Corporation Limited (the *SEGC*).

-
15. The amending instrument does not affect the current treatment of interests in registered schemes that are quoted on the financial market operated by ASX. The amending instrument updates the name of ASX. ASX Limited was previously known as the Australian Stock Exchange Limited. This update to the name of ASX does not change the legal effect of regulation 7.11.08 in relation to its application to interests in registered schemes that are quoted on ASX.
 16. The amending instrument makes these changes by amending *ASIC Corporations (Division 4 Financial Products) Instrument 2015/1030* (the **principal instrument**). This principal instrument was chosen because it deals with similar subject matter to the subject matter of the amending instrument. The name of the principal instrument has been changed to recognise that it deals with both Division 3 securities and Division 4 financial products.
 17. The amending instrument commences on the day after the instrument is registered on the Federal Register of Legislation.

Legislative authority

18. The amending instrument amends the principal instrument. Where an Act confers a power to make an instrument, the power is to be construed as including a power exercisable in the like manner and subject to the like conditions to amend the instrument: see 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).
19. ASIC makes this amending instrument under subsection 1075A(1) of the Act. Subsection 1075A(1) of the Act provides that ASIC may, among other things, declare that Part 7.11 of the Act applies to a specified class of financial products as if specified provisions were modified or varied as specified in the declaration. The specified class of financial products to which the amending instrument relates are interests in a registered scheme.
20. ASIC may make a declaration under subsection 1075A(1) in relation to a class of financial products only if ASIC is satisfied that if the declaration was made, the interests of the holders of financial products in that class would continue to have adequate protection; and the making of the declaration would make the transfer of financial products in that class more efficient.
21. ASIC is satisfied that, if the declaration were made, the interests of the holders of interests in a registered scheme that are quoted on Chi-X would continue to have adequate protection, due to the legal certainty of the effectiveness of the transfer. For example:
 - (a) for Division 4 financial products—a transfer effected through ASX Settlement in accordance with its operating rules is valid and effective for the purposes of any law or instrument governing or relating to the way in which the financial product may be transferred (see section 1074D of the Act); and

-
- (b) for Division 3 securities—a document meeting the requirements specified in the regulations may be used as a proper instrument of transfer for the security (see subsections 1073D(3) and 1071B(2) of the Act).
22. ASIC is satisfied that the making of the declaration would make the transfer of interests in registered scheme that are quoted on Chi-X more efficient due to the various warranties, indemnities and obligations applying in relation to the transfer. For example:
- (a) for Division 4 financial products—a participant effecting a transfer warrants to have the authority and be legally entitled to transfer the interest in the registered scheme (see regulation 7.11.29 of the Regulations); and
- (b) for Division 3 securities—provided the transfer document meets certain requirements that are set out in the Regulations, the market licensee is taken to have warranted that the transferor is the registered holder or entitled to be registered as the holder of the Division 3 security, and is legally entitled or authorised to sell or dispose of the securities (see regulation 7.11.18 of the Regulations).
23. The amending instrument is a disallowable legislative instrument.

Statement of compatibility with human rights

24. The Explanatory Statement for a disallowable legislative instrument must contain a statement of compatibility with human rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.
25. *ASIC Corporations (Amendment) Instrument 2019/45* is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act.

Assessment of human rights implications

26. The instrument expands the operation of the transfer provisions in Divisions 3 and 4 of Part 7.11 of the *Corporations Act 2001* to promote regulatory neutrality between Chi-X Australia Pty Ltd (*Chi-X*) and the ASX Ltd (*ASX*) in relation to quoted interests in registered schemes.
27. The instrument does not engage any of the applicable rights or freedoms listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.
28. The legislative instrument is compatible with human rights as it does not raise any human rights issues.