

EXPLANATORY STATEMENT for ASIC Corporations (Amendment) Instrument 2019/902

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (*ASIC*) makes ASIC Corporations (Amendment) Instrument 2019/902 (*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.

Licensing relief for foreign financial services providers (*FFSPs*) providing financial services to wholesale clients in Australia is currently available under the following legislative instruments:

- (a) ASIC Corporations (Repeal and Transitional) Instrument 2016/396 and ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109 (together, the *Sufficient Equivalence relief*); and
- (b) ASIC Corporations (Foreign Financial Services Providers—Limited Connection) Instrument 2017/182 (the *Limited Connection relief*).

Sufficient equivalence relief

Regulatory Guide 176 *Foreign financial services providers (RG 176)* sets out ASIC's policy about relief ASIC may give to conditionally exempt FFSPs from the requirement to hold an AFS licence when providing specified financial services in Australia 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 FFSP 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.

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.

On 20 September 2018, ASIC made ASIC Corporations (Amendment) Instrument 2018/807, which extended the sufficient equivalence relief to 30 September 2019 to allow ASIC to consult on further proposals about the regulation of FFSPs.

Limited connection relief

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 Sufficient Equivalence relief. ASIC Corporations (Amendment) Instrument 2018/807 further extended the Limited Connection relief to 30 September 2019 to allow ASIC to consult on further proposals about the regulation of FFSPs.

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

On 1 June 2018, ASIC published Consultation Paper 301: *Foreign financial services providers (CP 301)*. CP 301 sought feedback on proposals to repeal both the Sufficient Equivalence relief and the Limited Connection relief and implement a modified AFS licensing regime for FFSPs (*Foreign AFS licensing regime*). Submissions to CP 301 closed on 31 July 2018.

On 3 July 2019, ASIC published Consultation Paper 315: *Foreign financial services providers: Further consultation (CP 315)*. CP 315 sought feedback on further proposals to:

- (a) grant relief to enable FFSPs to provide certain funds management financial services to professional investors in Australia without an AFS licence, subject to a cap on the scale of activities provided; and
- (b) not grant relief to enable FFSPs to provide financial services without an AFS licence to professional investors in Australia that make the initial application or inquiry for the financial services from the FFSP (‘reverse solicitation’ relief).

CP 315 indicated that ASIC would extend both the Sufficient Equivalence and Limited Connection relief to 31 March 2020 to maintain the status quo pending:

- the outcome of consultation on the further proposals outlined in CP 315; and
- the proposed commencement of the foreign AFS licensing regime on 1 April 2020, with a 24-month transition period from that date for FFSPs currently relying on the Sufficient Equivalence relief.

Submissions to CP 315 closed on 9 August 2019.

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 31 March 2020.

3. Operation of the instrument

The Amendment Instrument amends:

- Schedule 2 to ASIC Corporations (Repeal and Transitional) Instrument 2016/396 by substituting “30 September 2019” in subitem 1(3) with “31 March 2020”;
- Part 1 of ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109 by substituting “30 September 2019” in section 3 with “31 March 2020”; and
- Part 1 of ASIC Corporations (Foreign Financial Services Providers—Limited Connection) Instrument 2017/182 by substituting “30 September 2019” in section 3 with “31 March 2020”.

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 review of the regulation of FFSPs.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Amendment) Instrument 2019/902

ASIC Corporations (Amendment) Instrument 2019/902 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 2019/902 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 31 March 2020 pending the outcome of ASIC's review of the regulation of foreign financial services providers.

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 (AFS) 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 AFS licence where the provider 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.