



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Foreign Financial Services Providers – Funds Management Financial Services) Instrument 2020/199

This is the Explanatory Statement for *ASIC Corporations (Foreign Financial Services Providers – Funds Management Financial Services) Instrument 2020/199*.

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

Summary

- 1 ASIC is making *ASIC Corporations (Foreign Financial Services Providers – Funds Management Financial Services) Instrument 2020/199* (**Funds management relief instrument**) to give relief to foreign financial services providers (*FFSPs*) from the requirement to hold an Australian Financial Services Licence (*AFS licence*) if the FFSP is only carrying on a financial services business in Australia because it engages in conduct that induces or is likely to induce (**inducing conduct**) certain types of professional investors in Australia to use the funds management financial services that the FFSP provides (see section 911D of the *Corporations Act 2001 (Act)*).

Purpose of the instrument

- 2 The purpose of this instrument is to facilitate the provision of funds management financial services by FFSPs to certain types of professional investors (eligible Australian users) in Australia, subject to conditions that apply to the operation of the relief. It provides licensing relief in relation to the operation of section 911D for the provision of funds management financial services only. Under the relief, FFSPs may engage in inducing conduct in relation to funds management financial services without being required to hold an AFS licence.
- 3 The instrument will replace *ASIC Corporations (Foreign Financial Services Providers—Limited Connection) 2017/182* (**Limited connection instrument**) when the limited connection instrument expires on 31 March 2022. ASIC considers that the limited connection relief no longer strikes the appropriate balance between cross-border investment facilitation, market integrity and investor protection. ASIC is providing a two-year transition period for the limited connection relief.

Consultation

- 4 The funds management relief instrument was developed in response to the strong feedback from industry against our proposal in Consultation Paper 301 *Foreign financial services providers (CP 301)* (June 2018) to repeal the limited connection relief and require all FFSPs to apply for and hold either a standard AFS licence or a foreign AFS licence for any inducing conduct.
- 5 We received 36 submissions in response to CP 301. Industry submitted that the limited connection relief was useful for offshore fund managers to test the Australian market, establish relationships with Australian clients and facilitate client visits.
- 6 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 provide funds management financial services relief to FFSPs, subject to a cap on the scale on the FFSP's activities in Australia and conditions that apply to the relief, to provide ASIC with tools to monitor and supervise the conduct of FFSPs in Australia.
- 7 Submissions to CP 315 closed on 9 August 2019. We received 24 submissions in response to CP 315. Industry feedback emphasised the complexity of administering the proposed cap, and the limited types of Australian clients that FFSPs may be able to engage under this relief.
- 8 In response to industry feedback, ASIC has:
 - (i) amended the scope of the funds management relief to apply to 'a person' rather than 'a foreign company' to cover a wider range of business structures and arrangements e.g. to include partnerships;
 - (ii) not imposed a revenue cap in the funds management relief as the scope of the funds management relief (i.e. to provide relief to inducing only under section 911D of the Act) and the conditions that we are imposing on the relief will adequately limit the scale of activities undertaken in Australia by FFSPs relying on the relief and allow ASIC to adequately monitor and supervise those activities;
 - (iii) limited the types of Australian clients that FFSPs may be able to engage under this relief because these types of clients may need access to offshore funds management financial services, may have greater sophistication and expertise when engaging with FFSPs and are subject to other relevant regulation which may provide an additional level of protection for the end clients of these sophisticated Australian clients.

Operation of the instrument

- 9 This instrument commences on 1 April 2022.

Definitions

- 10 The instrument provides a licensing exemption for FFSPs that engage in inducing conduct in relation to the ‘funds management financial services’ it provides. There are two limbs to the definition of funds management financial services.
- (i) The first limb aims to facilitate eligible Australian users’ access to financial products from offshore funds and recognises that these Australian clients may wish to utilise foreign expertise in relation to assets that are located offshore, particularly managed funds located outside Australia.
 - (ii) The second limb recognises that eligible Australian users may wish to engage foreign fund managers to manage portfolios which may involve both Australian and offshore financial products.
- 11 The second limb of the definition introduces the term ‘portfolio management services’. Portfolio management services is a commonly used term in the funds management sector. It can be understood to mean the provision of services under an agreement or arrangement to general financial returns or manage financial risks according to the client’s investment objectives.
- 12 The definition of ‘offshore fund’ is intended to capture a broad range of structures that carry on a business of investment, beyond the managed investment scheme structure that is defined in the Act, for example body corporate partnerships.
- 13 The funds management relief is only available for inducing conduct for the provision of funds management financial services to certain types of professional investors, called ‘eligible Australian users’.
- 14 ASIC has limited the scope of eligible Australian users to ensure that FFSPs can only rely on the relief to be dealing with a subset of professional investors that:
- (i) are most likely to require funds management financial services;
 - (ii) are subject to certain requirements (e.g. regulation by Australian Prudential Regulatory Authority, AFS licensing obligations or a best interests duty under s52(2)(c) of the *Superannuation Industry Supervision Act 1993*) which will provide an additional level of protection for the end client of the eligible Australian user.

Part 2—Exemption

- 15 Section 5 provides that a person that is carrying on a financial services business in this jurisdiction only because of the operation of section 911D of the Act in relation to funds management financial services provided by the person does not have to comply with subsection 911A(1) of the Act., i.e. the obligation to hold an Australian financial services licence.
- 16 Broader licensing relief is not necessary for FFSPs relying on the relief when:
- (i) the FFSP provides funds management financial services to eligible Australian users outside Australia; or
 - (ii) to the extent the funds management financial services are provided in Australia, the totality of the FFSP’s activities do not constitute carrying on a financial services business in Australia.
- 17 To be able to rely on the instrument, the FFSP must provide ASIC with a written confirmation about various matters relevant to their provision of funds management financial services, including that the FFSP does not have a place of business in this jurisdiction.
- 18 This written confirmation is intended to provide ASIC with sufficient information that the FFSP is entitled to rely on the relief and to provide ASIC with additional mechanisms to monitor and supervise the provision of financial services by FFSPs in Australia. The FFSP must provide ASIC with an updated written confirmation should its circumstances change e.g. change in home jurisdiction.
- 19 In addition, FFSPs are subject to the ongoing condition that it must not fail to have an agent for service for any consecutive period of 10 business days, and it must provide ASIC with written details of a natural person ceasing or commencing to be its agent for service and any change to the name or address of its agent for service within 10 business days of the natural person ceasing or commencing, or of the change to the name or address of the agent for service.

Legislative authority

- 20 The Australian Securities and Investments Commission (*ASIC*) makes *ASIC Corporations (Foreign Financial Services Providers – Funds Management Financial Services) Instrument 2020/199* under subsection 926A(2) of the Act.
- 21 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) or declare that Part 7.6 of the Act (other than Division 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.

Statement of Compatibility with Human Rights

- 22 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*. A Statement of Compatibility with Human Rights is in the Attachment.

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

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Overview

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199Assessment of human rights implications

- 2 This instrument does not engage any of the applicable rights or freedoms.

Conclusion

- 3 This instrument 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*.