



ASIC
Australian Securities &
Investments Commission

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

I, Anthony Graham, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Date 10 March 2020

Anthony Graham

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Part 1—Preliminary

1 Name of legislative instrument

This is the *ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2020/199*.

2 Commencement

This instrument commences on 1 April 2022.

Note: The register may be accessed at www.legislation.gov.au.

3 Authority

This instrument is made under subsection 926A(2) of the *Corporations Act 2001*.

4 Definitions

In this instrument:

Act means the *Corporations Act 2001*.

agent for service of a person (*first person*) means a person:

- (a) who is a natural person ordinarily resident in Australia or a company;
- (b) whose name and address have been provided to ASIC in writing for the purposes of this instrument; and
- (c) who is authorised to accept on the first person's behalf, service of process from ASIC and, in relation to proceedings relating to a financial services law, from any person referred to in subsection 659B(1) of the Act.

eligible Australian user means any of the following persons in this jurisdiction:

- (a) a responsible entity of a registered scheme;
- (b) a trustee of any of the following:
 - (i) a superannuation fund;
 - (ii) an approved deposit fund;
 - (iii) a pooled superannuation trust;

(iv) a public sector superannuation scheme;

within the meaning of the *Superannuation Industry (Supervision) Act 1993* where the fund, trust or scheme has net assets of at least \$10 million;

- (c) a trustee of a wholesale trust who holds an Australian financial services licence or would be required to hold an Australian financial services licence but for *ASIC Corporations (Wholesale Equity Scheme Trustees) Instrument 2017/849*;
- (d) a body regulated by APRA other than a trustee of any of the following (within the meaning of the *Superannuation Industry (Supervision) Act 1993*):
- (i) a superannuation fund;
 - (ii) an approved deposit fund;
 - (iii) a pooled superannuation trust;
 - (iv) a public sector superannuation scheme;
- (e) an exempt public authority other than a local council.

foreign government or legislative body means a government or legislative body of a foreign country or a region, province, territory or state of a foreign country.

funds management financial service: a person provides a ***funds management financial service*** if they provide any of the following financial services:

- (a) any of the following financial services to an eligible Australian user:
- (i) dealing in offshore fund financial products;
 - (ii) providing financial product advice in relation to offshore fund financial products;
 - (iii) making a market for offshore fund financial products as a result of redeeming or buying back those financial products;

Note: A person will not make a market for offshore fund financial products as a result of redeeming or buying back those financial products if the exception in subsection 766D(2) of the Act applies.

- (iv) providing a custodial or depositary service in relation to offshore fund financial products;
- (b) any of the following financial services to an eligible Australian user under an agreement or arrangement (***portfolio management services***

mandate) with the eligible Australian user to provide portfolio management services to the eligible Australian user:

- (i) dealing in financial products;
- (ii) providing financial product advice in relation to financial products;
- (iii) making a market for financial products in or issued by a managed investment scheme as a result of redeeming or buying back those financial products;

Note: A person will not make a market for financial products as a result of redeeming or buying back those financial products if the exception in subsection 766D(2) of the Act applies.

- (c) a custodial or depository service to an eligible Australian user under, or in relation to, a portfolio management services mandate.

Note: It is possible that different persons may provide the financial services referred to in paragraph (b) and the custodial or depository service referred to in paragraph (c).

home jurisdiction of a person that provides funds management financial services means:

- (a) the jurisdiction which the person has its principal place of business (if any) in relation to the provision of those services; and
- (b) otherwise—the jurisdiction in which the person was incorporated or formed.

interest in an offshore fund includes an interest in a partnership that is an offshore fund.

offer: a reference to offering securities or interests for issue includes a reference to inviting applications for the issue of the securities or interests.

offshore fund means a managed investment scheme or person in relation to which the following are satisfied:

- (a) in the case of a managed investment scheme, the scheme was established outside this jurisdiction and is not operated in this jurisdiction; and
- (b) in the case of a person that is not a managed investment scheme, the person:
 - (i) is not an Australian financial services licensee; and
 - (ii) carries on a business of investment in securities, interests in land, interests in, or securities issued by, other offshore funds or other investments; and

- (iii) for the purposes referred to in subparagraph (ii), invests funds (directly or indirectly) following an offer of securities of, or interests in, the person for issue, the terms of which provided for the funds subscribed to be invested for those purposes.

offshore fund financial product means:

- (a) a security of, or interest in, an offshore fund; or
- (b) a financial product in relation to an offshore fund that is issued by or with the authority of the offshore fund or the operator of the offshore fund.

overseas regulator of a person in their home jurisdiction means a foreign regulatory authority which:

- (a) regulates financial services provided by the person in their home jurisdiction; and
- (b) is established by or for the purposes of a foreign government or legislative body for the home jurisdiction.

wholesale trust means a trust that is operated under a managed investment scheme, where:

- (a) no interests in the scheme have been issued to a person as a retail client; and
- (b) the scheme is not registered.

Part 2—Exemption

5 Licensing

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.

6 Where the exemption applies

(1) The exemption in section 5 only applies to a person that is carrying on a financial services business in this jurisdiction of providing funds management financial services if:

- (a) subject to subsection (2), the person has given ASIC written confirmation that:
 - (i) the person intends to rely on the exemption in section 5 in relation to the provision of funds management financial services; and
 - (ii) identifies the home jurisdiction of the person and confirms that the person would not contravene any laws of its home jurisdiction relating to the provision of financial services if the person were to provide those funds management financial services in its home jurisdiction; and

Note: If the home jurisdiction of the person changes, the person must provide a new written confirmation in relation to its new home jurisdiction within 30 days: see subsection (2).

- (iii) there is an overseas regulator of the person in its home jurisdiction and that the overseas regulator is a signatory to the International Organisation of Securities Commissions' Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information; and
- (iv) on the written request of ASIC or the overseas regulator in its home jurisdiction, the person will give or vary written consent and take all other practicable steps to enable and assist the overseas regulator to disclose to ASIC and ASIC to disclose to the overseas regulator any information or document that the overseas regulator or ASIC has that relates to the person; and
- (v) if ASIC gives the person a written notice directing the person to give to ASIC, within the time specified in the notice, a written statement containing specific information in relation to the

financial services business carried on by the person in this jurisdiction, the person will comply with the notice; and

(vi) the person will give such assistance to ASIC, or a person authorised by ASIC, as ASIC or the authorised person reasonably requests in relation to whether the person is complying with the financial services laws, and in relation to the performance of ASIC's other functions; and

(vii) the person has an agent for service appointed and that includes the name and address of the agent for service that is current as at the day the written confirmation is given; and

(b) the person does not have a place of business in this jurisdiction.

(2) If a person has given a written confirmation under subsection (1) and their home jurisdiction changes, the requirement to give a new written confirmation under subsection (1) in relation to their new home jurisdiction only applies on and from 30 days after the day the home jurisdiction of the person changes.

7 Condition

A person that relies on the exemption in section 5 must:

- (a) not fail to have an agent for service for any consecutive period of 10 business days; and
- (b) provide ASIC with written details of:
 - (i) a natural person ceasing or commencing to be its agent for service; and
 - (ii) any change to the name or address of its agent for service;within 10 business days of the natural person so ceasing or commencing or of the change to the name or address.