



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Amendment) Instrument 2020/200

This is the Explanatory Statement for *ASIC Corporations (Amendment) Instrument 2020/200*.

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

Summary

- 1 The *ASIC Corporations (Amendment) Instrument 2020/200* (**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**).

Purpose of the instrument

- 2 The purpose of this instrument is to preserve the effect of the relief in each of the Principal Instruments until 31 March 2022.

Sufficient equivalence relief

- 3 The sufficient equivalence relief contained in *ASIC Corporations (Repeal and Transitional) Instrument 2016/396* and *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109* conditionally exempts foreign financial services providers (**FFSPs**) from the requirement to hold an Australian financial services (**AFS**) licence when providing specified financial services in Australia where:
 - (i) the financial services are provided to wholesale clients only;
 - (ii) the financial services are regulated by an overseas regulatory authority;
 - (iii) the regulatory regime overseen by the overseas regulatory authority is sufficiently equivalent to the Australian regulatory regime;
 - (iv) there are effective cooperation arrangements between the overseas regulatory authority and ASIC; and
 - (v) the FFSP meets all the relevant conditions of the relief.

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- 4 In September 2016, ASIC made *ASIC Corporations (Repeal and Transitional) Instrument 2016/396* to repeal seven legislative instruments that provided licensing relief to seven jurisdictions assessed as sufficiently equivalent to the Australian regulatory regime by ASIC and provide transitional relief to preserve the effect of these legislative instruments for a period of two years from the commencement of the instrument to enable ASIC to conduct a review of the policy settings underlying the relief. These legislative instruments are:
- (i) ASIC Class Order [CO 03/1099] UK FCA regulated financial service providers
 - (ii) ASIC Class Order [CO 03/1100] US SEC regulated financial service providers
 - (iii) ASIC Class Order [CO 03/1101] US Federal Reserve and OCC regulated financial service providers
 - (iv) ASIC Class Order [CO 03/1102] Singapore MAS regulated financial service providers
 - (v) ASIC Class Order [CO 03/1103] Hong Kong SFC regulated financial service providers
 - (vi) ASIC Class Order [CO 04/829] US CFTC regulated financial services providers
 - (vii) ASIC Class Order [CO 04/1313] German BaFin regulated financial service providers.
- 5 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*.
- 6 In 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.
- 7 In September 2019, ASIC made *ASIC Corporations (Amendment) Instrument 2019/902*, which extended the sufficient equivalence relief to 31 March 2020 to allow ASIC to consult on further proposals about the regulation of FFSPs.
- 8 The sufficient equivalence relief will be replaced by a modified Australian Financial Services (AFS) licensing regime (***foreign AFS licence***) eligible to FFSPs that:
- (i) hold a relevant authorisation in a sufficiently equivalent overseas regulatory regime to provide financial services to wholesale clients; and

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- (ii) wish to provide those financial services to wholesale clients in Australia.
- 9 Foreign AFS licensees are exempt from certain provisions in Chapter 7 of the Act on the basis that it is subject to sufficiently equivalent overseas regulatory requirements that would achieve similar regulatory outcomes to the exempted provisions and that it is subject to supervision and enforcement action (when required) by the overseas regulatory authority for those requirements.
- 10 The instrument that gives effect to the exemptions from certain provisions in Chapter 7 of the Act is the *ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees) Instrument 2020/198*.

Limited connection relief

- 11 In September 2003, ASIC made ASIC Class Order [CO 03/824] *Licensing relief for foreign entities with limited connection to Australian wholesale clients (limited connection relief)* to provide relief from the requirement to hold an AFS licence where the person providing the financial services is:
- (i) not in this jurisdiction;
 - (ii) dealing only with wholesale clients; and
 - (iii) 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) (**‘inducing conduct’**).
- 12 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 section 911D 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.
- 13 In March 2017, ASIC made *ASIC Corporations (Foreign Financial Services Providers—Limited Connection) Instrument 2018/172*, 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.
- 14 In September 2019, ASIC made *ASIC Corporations (Amendment) Instrument 2019/902*, which extended the limited connection relief to 31 March 2020 to allow ASIC to consult on further proposals about the regulation of FFSPs.

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- 15 The limited connection relief will be replaced by *ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2020/199*, which provides a new type of licensing relief for FFSPs that engage in inducing conduct in relation to funds management financial services it provides or can provide to certain types of professional investors. This is due to concerns ASIC has had about the limited connection relief being broadly interpreted by FFSPs to carry on a financial services business in Australia and ASIC’s lack of supervisory tools to effectively monitor the conduct of FFSPs in Australia.

Consultation

- 16 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 section 911A(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 section 911A(2E) is not a complete replacement for [CO 03/824] due to the limited scope of the subsection.
- 17 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 *ASIC Corporations (Repeal and Transitional) Instrument 2016/396*.
- 18 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.
- 19 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:
- (i) 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
 - (ii) 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).

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- 20 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:
- (i) the outcome of consultation on the further proposals outlined in CP 315; and
 - (ii) 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.
- 21 Submissions to CP 315 closed on 9 August 2019.
- 22 Following the consideration of three public rounds of consultation, we have made three instruments:
- (i) *ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees) Instrument 2020/198* to implement a modified AFS licensing regime available to FFSPs regulated by a sufficiently equivalent overseas regulatory authority;
 - (ii) *ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2020/199* to give licensing relief to FFSPs from the requirement to hold an 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 certain types of professional investors in Australia to use the funds management financial services that the FFSP providers (see section 911D of the Act); and
 - (iii) This instrument, *ASIC Corporations (Amendment) Instrument 2020/200*.

Operation of the instrument

- 23 The Amendment Instrument amends:
- (i) the *ASIC Corporations (Repeal and Transitional) Instrument 2016/396* by preserving the effect of the ASIC Class Orders until 31 March 2022, but an FFSP would only be able to rely on this instrument after 31 March 2020 if it was able to rely on the instrument as at 31 March 2020;
 - (ii) the *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109* by preserving the effect of the instrument until 31 March 2022, but an FFSP would only be able to rely on this instrument after 31 March 2020 if it was able to rely on the instrument as at 31 March 2020; and

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- (iii) the *ASIC Corporations (Foreign Financial Services Providers—Limited Connection) Instrument 2017/182* by preserving the effect of the instrument until 31 March 2022.

24 This Amendment Instrument commences on the later of:

- (i) the date of its gazettal; and
- (ii) the day after it is registered on the Federal Register of Legislation.

Schedule 1—Amendments

25 Section 1, which amends subitem 1(1) of Schedule 2 of the *ASIC Corporations (Repeal and Transitional) Instrument 2016/396* preserves the effect of the ASIC Class Orders on their existing terms, other than in relation to circumstances or conditions that require a person to have provided ASIC with evidence of a matter that ASIC has stated in writing. Those circumstances and conditions will be taken to be satisfied if the person has provided ASIC with evidence of the relevant matter, without the need for ASIC to state in writing that the evidence is adequate.

26 For example, paragraph 2(a) of Schedule B to ASIC Class Order [CO 03/1100] requires that in order for a body to rely on the exemption in that Class Order, the body must have provided ASIC with evidence that ASIC has stated in writing is adequate that the body is either a certain type of registered broker dealer or a registered investment adviser. The effect of the provision is that the requirement in paragraph 2(a) of Schedule B will be satisfied if the body has provided ASIC with evidence that it is the relevant type of registered broker dealer or a registered investment dealer. It will not be necessary for ASIC also to state in writing that the evidence provided is adequate.

27 Sections 2 and 3 which amend subitems 1(2) and (3) of Schedule 2 of the *ASIC Corporations (Repeal and Transitional) Instrument 2016/396* also preserves the effect of the relevant ASIC Class Orders.

Legislative authority

28 ASIC makes *ASIC Corporations (Amendment) Instrument 2020/200* under paragraph 911A(2)(l) of the Act and subsection 916A(2) of the Act.

29 Paragraph 911A(2)(l) 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*.

30 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.

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- 31 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 *Corporations Act 2001*), 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.

Statement of Compatibility with Human Rights

- 32 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*.

ASIC Corporations (Amendment) Instrument 2020/200

Overview

- 1 The *ASIC Corporations (Amendment) Instrument 2020/200* preserves the effect of *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* until 31 March 2022.
- 2 The *ASIC Corporations (Repeal and Transitional) Instrument 2016/396* preserves the effect of the ASIC Class Orders that provide licensing relief to foreign financial services providers (**FFSPs**) that are regulated by an overseas regulatory regime that ASIC has assessed as sufficiently equivalent to the Australian regulatory regime. The ASIC Class Orders are:
 - (i) ASIC Class Order [CO 03/1099] UK FCA regulated financial service providers
 - (ii) ASIC Class Order [CO 03/1100] US SEC regulated financial service providers
 - (iii) ASIC Class Order [CO 03/1101] US Federal Reserve and OCC regulated financial service providers
 - (iv) ASIC Class Order [CO 03/1102] Singapore MAS regulated financial service providers
 - (v) ASIC Class Order [CO 03/1103] Hong Kong SFC regulated financial service providers
 - (vi) ASIC Class Order [CO 04/829] US CFTC regulated financial services providers
 - (vii) ASIC Class Order [CO 04/1313] German BaFin regulated financial service providers.
- 3 The *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109* provides licensing relief to FFSPs that are regulated by the Commission de Surveillance du Secteur Financier (**CSSF**) of Luxembourg.
- 4 The *ASIC Corporations (Foreign Financial Services Providers—Limited Connection) Instrument 2017/182* was made to preserve the effect of the relief

in 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:

- (i) not in this jurisdiction;
- (ii) dealing only with wholesale clients; and
- (iii) 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 section 911D(1) of the *Corporations Act 2001*.

Assessment of human rights implications

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

Conclusion

6 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*.