



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Approval of Variation of March 2020 Banking Code of Practice) Instrument 2020/602

This is the Explanatory Statement for *ASIC Corporations (Approval of Variation of March 2020 Banking Code of Practice) Instrument 2020/602* (Approval Instrument).

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

Summary

1. The Banking Code of Practice (Code) is a self-regulatory document created by the banking industry, as represented by the Australian Banking Association (ABA) and is administered by an independent Code monitoring body. The Code sets out standards of practice and service in the Australian banking industry for individual and small business customers, and their guarantors. ASIC does not administer the Code.
2. On 19 December 2017, the ABA applied to ASIC for approval of its Banking Code of Practice (2018 Banking Code) under section 1101A of the *Corporations Act 2001* (Corporations Act). ASIC approved the 2018 Banking Code by issuing *ASIC Corporations (Banking Code of Practice) Instrument 2018/700*. After ASIC issued the 2018 Approval Instrument, the ABA proposed a number of updates to the Code (June 2019 Code). ASIC approved the June 2019 Code by way of *ASIC Corporations (Approval of Banking Code of Practice) 2019/663*. In December 2019, the ABA proposed further updates to the Code for commencement from 1 March 2020 (March 2020 Code). ASIC approved the March 2020 Code by way of *ASIC Corporations (Approval of March 2020 Banking Code of Practice) Instrument 2019/1255* (December 2019 Approval Instrument).
3. The ABA has requested that ASIC approve a variation of the March 2020 Code. The variation comprises the insertion of a 'Special Note' (COVID-19 Special Note), the wording of which is contained in the Schedule to the Approval Instrument, immediately before the Table of Contents of the March 2020 Code. The COVID-19 Special Note is stated to commence on 1 July 2020 and will apply until 1 March 2021. The COVID-19 Special Note applies to banking services and guarantees during that period and has the following effects:

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- (a) While the COVID-19 Special Note applies, where a Code-subscribing bank does not meet, but has made good faith efforts to meet, the Code's timing requirements in paragraphs 101(b) and (c), 102, 148, 164, 205 and 206, this will not amount to a breach of the Code. The substantive obligations in those paragraphs, along with all other requirements in other parts of the Code, continue to apply as usual. (Timing Requirement Wording)
 - (b) Clarification that the effects of COVID-19 may be relevant to Code subscribing banks' obligations when considering providing new or increased loans to a small business borrower. Noting the potential inherent difficulties, due to COVID-19, in making predictions for matters such as the pace of economic recovery and in assessing a small business borrower's ability to service such loans, the banks' obligation to engage with the small business borrower in a fair, reasonable and ethical manner and to exercise the care and skill of a diligent and prudent banker will necessarily be informed by these matters and the effects of COVID-19 generally. (Small Business Lending Wording)
 4. In relation to the Timing Requirement Wording, and specifically in relation to paragraphs 205 and 206 of the Code, the COVID-19 Special Note also requires that Code-subscribing banks must:
 - (a) at the time of acknowledging a person's complaint about a banking service or guarantee, advise the person of the possibility of delays to the usual required notifications during the complaints process; and
 - (b) despite anything in the COVID-19 Special Note, inform the person, within 45 days of the person's complaint (or such other time as specified for the relevant dispute in ASIC Regulatory Guide 165 *Licensing: Internal and external dispute resolution*), of the person's rights to apply for external dispute resolution if the bank has not resolved the person's complaint.
 5. Also in relation to the Timing Requirement Wording, Code-subscribing banks have made a commitment to ASIC that they will track instances that would, but for the COVID-19 Special Note, have constituted breaches of the relevant timing requirements and provide information about these to the Banking Code Compliance Committee (BCCC) upon request. This commitment is intended to enable the BCCC, as the Code's monitoring body, to maintain oversight over banks' performance under the Code during the period of the COVID-19 Special Note.
 6. The Small Business Lending Wording does not, and is not intended to, change any of the relevant Code obligations in substance. The Small Business Lending Wording simply provides Code-subscribing banks with confirmation of the already-existing position that the bank's Code obligations to engage with a small business borrower in a fair, reasonable and ethical manner and to exercise the care and skill of a diligent and prudent banker will necessarily be informed by various relevant matters, including the present economic environment such as that caused by COVID-19. The confirmation offered by

the Small Business Lending Wording is intended to give Code-subscribing banks the confidence to engage in small business loan decision-making in this extraordinary external environment.

Purpose of the instrument

7. The purpose of the Approval Instrument is to give ASIC's approval of the ABA's variation, comprising a the COVID-19 Special Note, the wording of which is contained in the Schedule to the Approval Instrument, immediately before the Table of Contents of the March 2020 Code.
8. ASIC has assessed the variation to the March 2020 Code and is satisfied, as at the date of issuing the Approval Instrument, that the March 2020 Code, as proposed to be varied, meets the requirements of subsection 1101A(3) of the Corporations Act. In particular:
 - (a) ASIC has assessed that the March 2020 Code, as proposed to be varied, is not inconsistent with the Corporations Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities;
 - (b) ASIC is satisfied that there are arrangements in place to ensure compliance with the March 2020 Code, as proposed to be varied, (e.g. it forms contractual promises between the bank and its customer, its monitoring body is well-equipped to monitor compliance and take appropriate measures in response to non-compliance and customers may take breaches to the Australian Financial Complaints Authority for external dispute resolution);
 - (c) ASIC is comfortable that the March 2020 Code, as proposed to be varied, applies to an appropriate range of entities (i.e. ABA member banks) and that it does not substantially duplicate provisions in other codes of conduct relating to ABA members; and
 - (d) ASIC considers the March 2020 Code, as proposed to be varied, includes significant commitments beyond what the law requires.

Consultation

9. ASIC engaged with a targeted range of stakeholders to invite their feedback on the content of the proposed variation (as well as the content of the earlier 2018 Code, June 2019 Code and March 2020 Code).
10. Stakeholders with whom ASIC consulted in relation to the proposed variation included small business representatives, consumer representatives and the BCCC. ASIC's earlier consultations on the 2018 Code, the June 2019 Code and the March 2020 Code contributed to ASIC's assessment of the proposed variation. This is because the March 2020 Code, as proposed to be varied, is based largely on the 2018 Code, the June 2019 Code and the original March 2020 Code (with respective updates).

Operation of the instrument

11. Section 2 of the Approval Instrument provides that the Approval Instrument commences on the day after it is registered on the Federal Register of Legislation. Section 5 provides that the variation of the March 2020 Code is approved.

Incorporation by reference

12. The Approval Instrument incorporates by reference the March 2020 Code.
13. The March 2020 Code is available at <http://www.ausbanking.org.au>.

Legislative instrument and primary legislation

14. The subject matter and policy implemented by the Approval Instrument are more appropriate for a legislative instrument rather than primary legislation. This is because the instrument utilises a specific power given by Parliament to ASIC that allows ASIC to approve a variation of an ASIC-approved code of conduct relating to activities in relation to which ASIC has regulatory responsibility. The Approval Instrument is specific to the Code and the specific member banks that subscribe to the Code, which means a legislative instrument is more appropriate for dealing with this matter than primary legislation.

Legislative authority

15. Subsection 1101A(2) of the Corporations Act provides that ASIC may, on application, approve a variation of an approved code of conduct. The approval must be in writing. ASIC approved the March 2020 Code in December 2019 by way of *ASIC Corporations (Approval of March 2020 Banking Code of Practice) Instrument 2019/1255*.
16. Subsection 1101A(3) of the Corporations Act provides that ASIC must not approve a variation of a code of conduct unless it is satisfied that:
 - (a) the code as proposed to be varied is not inconsistent with the Corporations Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities; and
 - (b) it is appropriate to approve the code, having regard to the following matters, and to any other matters that ASIC considers are relevant:
 - (i) the ability of the applicant to ensure that persons who hold out that they comply with the code will comply with the code as in force from time to time; and
 - (ii) the desirability of codes of conduct being harmonised to the greatest extent possible.
17. Instruments made under subsection 1101A(2) are disallowable legislative instruments.

Statement of Compatibility with Human Rights

18. 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.

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 (Approval of variation of March 2020 Banking Code of Practice) Instrument 2020/602

Overview

1. *ASIC Corporations (Approval of Variation of March 2020 Banking Code of Practice) Instrument 2020/602* (Approval Instrument) approves a variation of the March 2020 version of the Banking Code of Practice (Code) (which ASIC previously approved in December 2019 by way of *ASIC Corporations (Approval of March 2020 Banking Code of Practice) Instrument 2019/1255*). The variation comprises the insertion, immediately before the Table of Contents of the March 2020 version of the Code, of a 'COVID-19 Special Note', the wording of which is contained in the Schedule to the Approval Instrument.

Assessment of human rights implications

2. The Approval Instrument does not engage any of the applicable rights or freedoms.

Conclusion

3. The Approval 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*.