



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Approval of Variation of March 2020 Banking Code of Practice) Instrument 2021/11

This is the Explanatory Statement for *ASIC Corporations (Approval of Variation of March 2020 Banking Code of Practice) Instrument 2021/11* (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 Banking Code Compliance Committee (BCCC). 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, following an independent review of the earlier Code of Banking Practice and subsequent rewrite of the Code, the ABA applied to ASIC for approval of its new Code (2018 Code) under the then section 1101A of the *Corporations Act 2001* (Corporations Act). ASIC approved the 2018 Code by issuing *ASIC Corporations (Banking Code of Practice) Instrument 2018/700*. In 2019, the ABA proposed a number of updates in a revised version of 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*. In May 2020, in anticipation of potential effects of the COVID-19 pandemic on Code-subscribing banks' internal resources and capacity and the types of problems confronting their customers, the ABA sought ASIC's approval for the insertion into the March 2020 Code of a 'Special Note' (COVID-19 Special Note), outlining temporary changes to timing requirements for specified obligations in the Code. ASIC approved this by way of *ASIC Corporations (Approval of Variation of March 2020 Banking Code of Practice) Instrument 2020/602*.

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3. The ABA has applied for ASIC's approval, under the new subsection 1101AA(1) of the Corporations Act, of further variations of the March 2020 Code. The variations are designed to:
 - (a) extend the operation of the COVID-19 Special Note for six months to September 2021;
 - (b) address an anomaly in the Code's definition of 'banking service', which previously had the unintended effect of carving out certain types of businesses that would otherwise, but for a technicality caused by the interaction with the definition in the Code and provisions in Chapter 7 of the Corporations Act, have Code protection;
 - (c) make refinements to the Code's definition of 'small business';
 - (d) in clause 163, set out circumstances where a bank may decline, in financial hardship scenarios, to deal with a customer's appointed representative, and instead resume dealing directly with the customer;
 - (e) insert a definition of 'financial counsellor' for the purposes of clause 163; and
 - (f) align the timeframes banks have to respond to complaints under the Code, with the timeframes in ASIC's new Regulatory Guide 271 *Internal dispute resolution*, which is due to commence on 5 October 2021.

Purpose of the instrument

4. The purpose of the Approval Instrument is to give ASIC's approval of the ABA's variations to the March 2020 Code, as described above, the wording of which is contained in the Schedules to the Approval Instrument.
5. ASIC has assessed the variations to the March 2020 Code and is satisfied, as at the date of issuing the Approval Instrument, and based on the legislation in operation on the date of the Approval Instrument, that the March 2020 Code, as proposed to be varied, meets the requirements of new subsections 1101A(3) and 1101AA(1) of the Corporations Act. In particular:
 - (a) to the extent that the Code (as proposed to be varied) is inconsistent with the Corporations Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities – the Code imposes obligations on subscribing banks that are more onerous than those imposed by the Corporations Act or the other laws (in particular, ASIC considers the variations to the March 2020 Code are beneficial, and not detrimental, to consumers and small businesses covered by the Code);
 - (b) there are no enforceable code provisions in the March 2020 Code (as proposed to be varied) that have been agreed with the ABA; and

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- (c) it is appropriate to approve the variations to the Code, having regard to the following:
- (i) the obligations of subscribing banks are capable of being enforced (e.g. the Code obligations form contractual promises between the bank and its customer or guarantor, and customers and guarantors may take breaches of the Code through a bank’s internal dispute resolution process and, then, to the Australian Financial Complaints Authority for external dispute resolution);
 - (ii) the BCCC has effective administrative systems for monitoring compliance with the Code and making information obtained as a result of monitoring publicly available; and
 - (iii) the ABA has effective administrative systems for maintaining, and making publicly available, an accurate list of subscribers to the Code.
6. The Approval Instrument does not identify any ‘enforceable code provisions’ under subsection 1101A(2). The ABA has not identified any provisions in the Code as enforceable code provisions at this time, and ASIC is satisfied that it is appropriate that no provisions in the March 2020 Code (as varied by the Approval Instrument) be identified as such at this time. ASIC observes that the March 2020 Code (in its form as approved by ASIC in December 2019) is taken by section 1672 of the Act to retain its ASIC approval from commencement on 1 January 2021 of the *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020*. The variations being approved in the Approval Instrument are relatively minor modifications to the Code ASIC approved in December 2019. Further, ASIC notes that the ABA proposed in the second half of 2021 to commence its triennial whole-of-Code review, at which time the topic of enforceable code provisions will be considered in detail.
7. Given section 1672 of the Act, and ASIC’s view that the effect is to render the approval in *ASIC Corporations (Approval of Variation of March 2020 Banking Code of Practice) Instrument 2020/602* (Instrument 2020/602) ineffective from 1 January 2021, a purpose of this instrument is also to reapply ASIC’s approval of the COVID-19 Special Note, but with a new expiry date of 1 September 2021 (instead of 1 March 2021).

Consultation

8. ASIC engaged with a targeted range of stakeholders to invite their feedback on the proposed variations (other than the proposed variations to the timeframes banks have to respond to complaints under the Code.)
9. Stakeholders with whom ASIC consulted in relation to the proposed variations included small business representatives, consumer representatives and the BCCC.

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10. The changes to the ‘small business’ definition follow recommendations made by Pottinger, who in October 2020 completed an independent review of the definition. The review included public and industry and consultation.
 11. ASIC did not consult on the proposed changes to the variations to the timeframes banks have to respond to complaints under the Code because ASIC considered that such consultation was unnecessary given the minor and technical nature of the proposed variation.

Operation of the instrument

12. 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.
13. Section 5 of the Approval Instrument provides:
 - (a) the approval of variations, as set out in Schedule 1, of the March 2020 Code;
 - (b) the approval applies:
 - (i) in relation to item 1 in the Schedule to the Approval Instrument—on and from the day this instrument commences; and
 - (ii) in relation to items 2 to 5 in the Schedule to the Approval Instrument—on and from 1 March 2021; and
 - (iii) in relation to item 6 in the Schedule to the Approval Instrument—on and from 5 October 2021.
14. Item 1 in the Schedule to the Approval Instrument inserts the COVID-19 Special Note with a cessation date of 1 September 2021.
15. Item 2 in the Schedule to the Approval Instrument replaces the definition of “Banking service” in Chapter 1 of the Code with a new definition.
16. Item 3 in the Schedule to the Approval Instrument replaces the definition of “Small business” in Chapter 1 of the Code with a new definition.
17. Item 4 in the Schedule to the Approval Instrument replaces paragraph 163 of the Code with a new paragraph 163.
18. Item 5 in the Schedule to the Approval Instrument inserts a definition of “Financial Counsellor” into the Definitions section of the Code.
19. Item 6 in the Schedule to the Approval Instrument omits paragraphs 204 to 206 of the Code and inserts new paragraphs 204 and 206.

Incorporation by reference

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20. The Approval Instrument incorporates by reference the March 2020 Code (in its form as approved by ASIC in December 2019).
 21. The March 2020 Code is available at <https://www.ausbanking.org.au/>
 22. The Approval Instrument complies with section 14 of the *Legislation Act 2003*.

Legislative instrument and primary legislation

23. 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. Further, subsection 1101AA(1) provides that any ASIC approval is by legislative instrument.

Legislative authority

24. Subsection 1101AA(1) of the Corporations Act provides that ASIC may, on application, approve a variation of an approved code of conduct by legislative instrument. The March 2020 Code, published on 12 December 2019 by the ABA, is taken to be approved under section 1101A of the Act by operation of section 1672 of the Act.
25. Subsection 1101AA(2) of the Corporations Act provides that subsections 1101A(2) and (3) apply in relation to an application under subsection 1101AA(1) as if it were an application to approve a code of conduct under subsection 1101A(1).
26. Subsection 1101A(2) of the Corporations Act provides that in the approval of a code of conduct, ASIC may identify a provision of the code as an enforceable code provision in certain circumstances.
27. Subsection 1101A(3) of the Corporations Act provides that ASIC must not approve a code of conduct unless it is satisfied that:
 - (a) to the extent that the code is inconsistent with the Corporations Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities – the code imposes an obligation on a subscriber that is more onerous than that imposed by the Corporations Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities; and
 - (b) each enforceable code provision has:
 - (i) been agreed with the applicant; and

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- (ii) is legally effective; and:
 - (c) it is appropriate to approve the code, having regard to the following matters:
 - (i) whether the obligations of subscribers to the code are capable of being enforced;
 - (ii) whether the applicant has effective administrative systems for monitoring compliance with the code and making information obtained as a result of monitoring publicly available;
 - (iii) whether the applicant has effective administrative systems for maintaining, and making publicly available, an accurate list of subscribers to the code.
28. Instruments made under subsection 1101AA(1) are disallowable legislative instruments.

Statement of Compatibility with Human Rights

29. 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 (Approval of Variation of March 2020 Banking Code of Practice) Instrument 2021/11.

Overview

1. *ASIC Corporations (Approval of Variation of March 2020 Banking Code of Practice) Instrument 2021/11* approves variations of the March 2020 version of the Banking Code of Practice (Code) (ASIC previously approved the Code in December 2019 by way of *ASIC Corporations (Approval of March 2020 Banking Code of Practice) Instrument 2019/1255*).
2. The variations do the following:
 - (a) insert a ‘COVID-19 Special Note’, which outlines temporary changes (until September 2021) to timing requirements for specified obligations in the Code, in anticipation of continued potential effects of the COVID-19 pandemic on Code-subscribing banks’ internal resources and capacity and the types of problems confronting their customers;
 - (b) address an anomaly in the Code’s definition of ‘banking service’, which previously had the unintended effect of carving out certain types of businesses that would otherwise, but for a technicality caused by the interaction with the definition in the Code and provisions in Chapter 7 of the Corporations Act, have Code protection;
 - (c) make refinements to the Code’s definition of ‘small business’;
 - (d) in clause 163, set out circumstances where a bank may decline, in financial hardship scenarios, to deal with a customer’s appointed representative, and instead resume dealing directly with the customer;
 - (e) insert a definition of ‘financial counsellor’ for the purposes of clause 163; and
 - (f) align the timeframes banks have to respond to complaints under the Code, with the timeframes in ASIC’s new Regulatory Guide 271 *Internal dispute resolution*, which is due to commence on 5 October 2021.

Assessment 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*.