



**ASIC**  
Australian Securities &  
Investments Commission

# Explanatory Statement

## *ASIC Corporations (Amendment) Instrument 2021/299*

This is the Explanatory Statement for *ASIC Corporations (Amendment) Instrument 2021/299* (the **amending instrument**). The Explanatory Statement is approved by the Australian Securities and Investments Commission (**ASIC**).

### Summary

1. ASIC Class Order [CO 13/721] (the **class order**) provides regulatory relief from some parts of the *Corporations Act 2001* (the **Act**) in relation to exchange traded funds (ETFs). Authorised participants perform a market-making function in the ETF market. The amending instrument removes a regulatory barrier to entry for offshore market-making entities seeking to participate in the Australian ETF market by removing the requirement in the class order that an authorised participant must be an Australian resident for tax purposes.

### Purpose of the instrument

2. Authorised participants perform an essential function in the ETF market. The ETF market is reliant on ‘equal treatment relief’ provided to responsible entities of ETFs by the class order so that they can engage authorised participants to perform their market making functions. In particular, the class order modifies provisions of the Act as they affect responsible entities who are issuers of ETFs quoted on the financial market operated by ASX Limited or Chi-X Australia Pty Ltd to allow those responsible entities to restrict withdrawals from the funds to authorised participants only, and to allow responsible entities to provide index or portfolio information to authorised participants before it is provided to other members.
3. A condition of the equal treatment relief in the class order is that the authorised participant engaged by the responsible entity must be an Australian resident for tax purposes. The terms ‘authorised participant’ and ‘Australian resident for tax purposes’ are defined terms in the class order.
4. Following an ASIC review of the local authorised participant requirement, ASIC determined that the class order should be amended by removing that requirement so that the equal treatment relief in the class order is extended to apply, irrespective of whether the authorised participant is an Australian tax resident for tax purposes.

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5. ASIC's review found that restricting the equal treatment relief to circumstances where an authorised participant is an Australian resident for tax purposes may limit competition in the ETF market making sector. This may lead to suboptimal outcomes for retail investors trading on the secondary market, particularly due to buy-sell spreads offered being wider than could be expected if competition in the market were greater.
  6. The removal of the local authorised participant requirement removes a regulatory barrier to entry for offshore market making entities seeking to participate in the Australian ETF market. The removal of this requirement may encourage offshore entities to operate in the Australian ETF market, bringing with them valuable expertise as market makers and authorised participants. This will promote competition and market efficiency between participants in the ETF market making sector by addressing, to an extent, what is considered to be a concentration of market makers currently operating in the ETF market in Australia.
  7. Increased competition in the ETF market making sector, together with enhanced market efficiencies resulting from competition, is expected to produce benefits to retail investors trading on the secondary market through pressures to narrow buy-sell spreads in order to compete for market share and lower transaction costs for retail investors.
  8. ASIC considers that retail investors trading on the secondary market will benefit from the removal of the local authorised participant requirement as a result of new entrants to the ETF market making sector, increased competition between these participants and improved market efficiencies. ASIC formed the view that limiting authorised participants to entities who are Australian residents for tax purposes was not necessary for consumer protection or market integrity reasons.
  9. The amending instrument also amends the relevant interest and substantial holding relief and beneficial tracing provisions in the class order so that it will also operate in circumstances where an authorised participant is not an Australian resident for taxation purposes.

## **Consultation**

10. ASIC consulted a number of responsible entities of ETFs in regard to the proposed removal of the local authorised participant requirement in the class order by inviting those responsible entities to provide written submissions. Submissions received from the responsible entities unanimously and unequivocally supported ASIC's proposal.
11. ASIC also consulted a number of market makers currently operating in the ETF market as authorised participants and invited those market makers to provide written submissions. ASIC did not receive any written submissions.
12. ASIC also consulted the Australian Taxation Office. Advice received from the Australian Taxation Office supports the view that the local authorised participant requirement is not necessary for consumer protection reasons.

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## Operation of the instrument

13. The class order provides relief to responsible entities of ETFs from the equal treatment obligation under paragraph 601FC(1)(d) of the Act with respect to:
  - (a) withdrawals from an ETF, so that a responsible entity of an ETF is permitted to treat retail investors and authorised participants who hold interests in the same class unequally by allowing only the authorised participants to apply for and redeem their interests;
  - (b) the provision of information to authorised participants, so that a responsible entity of an ETF is permitted to treat retail investors and authorised participants who hold interests of the same class unequally by providing index or portfolio information disclosure to authorised participants before other members.
14. The class order also modifies the relevant interest, substantial holding and beneficial tracing provisions in Chapters 6 and 6C of the Act as they apply to the relevant interests in the underlying securities of an ETF acquired by reason of acquiring an interest in the ETF.
15. The equal treatment relief in the class order is restricted to circumstances where an authorised participant is an Australian resident for tax purposes. Similarly, the ancillary relevant interest and substantial holding relief in the class order is restricted to circumstances where an authorised participant is an Australian resident for tax purposes.
16. The amending instrument amends the class order by amending the definition of ‘authorised participant’. The definition is amended by removal of the limb requiring the authorised participant to be an Australian resident for tax purposes. The amending instrument, by consequential amendment, also omits the definition of ‘Australian resident for tax purposes’.
17. The effect of the amending instrument is that the relief in the class order will apply irrespective of whether an authorised participant is an Australian resident for tax purposes.
18. The amending instrument commences on the day after it is registered on the Federal Register of Legislation.

## Legislative instrument and primary legislation

19. The subject matter and policy implemented by this amending instrument is more appropriate for a legislative instrument rather than primary legislation because it amends an existing class order which itself is a legislative instrument and which will sunset on 1 April 2024. As the class order will sunset on 1 April 2024, the amendments made by the amending instrument will also expire on that date. The subject matter of the class order relates to relief from the strict operation of the Corporations Act to allow authorised participants to perform their market making function in the ETF sector. It sets out detailed technical conditions on the application of the relief and as such it is more appropriate for the matter to

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be addressed in delegated legislation rather than through the Corporations Act. In the lead up to when the class order is due to sunset in 2024, ASIC will review the class order and consult on options for amending, remaking or revoking it.

### **Legislative authority**

20. The amending instrument is made under subsections 601QA(1), 655A(1) and 673(1) of the Act.
21. Subsection 601QA(1) provides that ASIC may exempt a person from a provision of Chapter 5C (which deals with managed investment schemes), or declare that that Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.
22. Subsections 655A(1) and 673(1) respectively provide that ASIC may exempt a person from a provision of Chapters 6 and 6C (which deal with relevant interests, substantial holdings and beneficial tracing) or declare that those Chapters apply to a person as if specified provisions were omitted, modified or varied as specified in the declaration.
23. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make an instrument, the power is to be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to amend the instrument.
24. The amending instrument is a disallowable legislative instrument.

### **Statement of Compatibility with Human Rights**

25. 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 2021/299***

#### Overview

1. ASIC Class Order [CO 13/721] provides regulatory relief from some parts of the *Corporations Act 2001* in relation to exchange traded funds (ETFs).  
Authorised participants perform a market-making function in the ETF market.
2. *ASIC Corporations (Amendment) Instrument 2021/299* removes a regulatory barrier to entry for offshore market-making entities seeking to participate in the Australian ETF market by removing the requirement in the class order that an authorised participant must be an Australian resident for tax purposes.

#### Assessment of human rights implications

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

#### Conclusion

4. 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*.