

## EXPLANATORY STATEMENT

Issued by authority of the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

*Migration Regulations 1994*

### ***Migration (Complying Investments) Amendment Instrument (LIN 21/041) 2021***

- 1 The instrument, Departmental reference LIN 21/041, is made under subregulation 5.19C(6) of the *Migration Regulations 1994* (the Regulations).
- 2 The instrument amends *Migration (IMMI 15/100: Complying Investments) Instrument 2015* (IMMI 15/100) (F2015L01012) made under regulations 5.19C and 5.19D of the Regulations, in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*. The effect of that subsection is to include a power in the Regulations to make, amend or repeal an instrument made under the Regulations.
- 3 The instrument commences on the later of:
  - (a) 1 July 2021; and
  - (b) the day after registration on the Federal Register of Legislation.
- 4 The instrument is a legislative instrument for the *Legislation Act 2003* (the Legislation Act).

#### ***Purpose***

- 5 IMMI 15/100 specifies the investments permitted for certain streams for Subclass 188 (Business Innovation and Investment (Provisional)) visa and Subclass 888 (Business Innovation and Investment (Permanent)) visa under Australia's Business Innovation and Investment Program (BIIP). One of the primary criteria for these streams was that an applicant has made a complying investment of a minimum total amount. IMMI 15/100 currently sets out the requirements for complying investments under the streams, known as *complying significant investments* (see regulation 5.19C of the Regulations) and *complying premium investments* (see regulation 5.19D of the Regulations).
- 6 On 1 July 2021, the Regulations were amended by the *Home Affairs Legislation Amendment (2021 Measures No. 1) Regulations 2021*. The BIIP component of the migration program aims to bring to Australia migrants with business, investment and entrepreneurial skills that will benefit the Australian economy. The amendments will streamline and improve the BIIP to ensure that it is well-placed to support Australia's post-COVID-19 economic recovery by maximising the impact of high value investors, business owners and entrepreneurs.
- 7 The amended Regulations will change the current *designated investment* requirement for the Investor stream (based on passive investment in State and Territory government security) to a requirement to make a *complying significant investment* which will be overhauled to direct investments into areas where there is a greater need and greater impact on Australia's economic growth by directly helping emerging and start-up companies. Subclass 188 and related provisions will be amended to increase the investment required for the Investor stream from at least \$1,500,000 to at least \$2,500,000.
- 8 Furthermore, amendments will also be made to close three underperforming streams, including the Premium Investor stream (amendments to Subclass 188). As a result of the amendments, the reference

to *complying premium investment* (regulation 5.19D of the Regulations) will no longer be relevant in Subclass 188 when the Premium Investor stream is closed from 1 July 2021 (see amendments to item 1202B of Schedule 1 to the Regulations). However, the term *complying premium investment* and regulation 5.19D of the Regulations will continue to be relevant to applicants for a Subclass 888 visa who hold a Subclass 188 visa in the Premium Investor stream that was granted or applied for before 1 July 2021.

- 9 Subregulation 5.19C(1) of the Regulations provides that an investment by a person (the investor) is a *complying significant investment* if all of the requirements in the Regulations are met. Subregulation 5.19C(6) of the Regulations provides that the Minister may, by legislative instrument, specify requirements for subregulation 5.19C(5), namely to define the scope of a *complying significant investment*.
- 10 The purpose of the instrument is to amend IMMI 15/100 to specify the scope and requirements of complying significant investments that are required as a result of the amendments made to the Regulations.
- 11 The instrument also addresses feedback identified in a review conducted by the Department of Home Affairs in consultation with the Australian Trade and Investment Commission (Austrade). The items the instrument address include several technical issues considered in the review regarding exchange traded funds and the use of derivatives for risk management purposes. The instrument also clarifies the eligibility of venture capital investments via fund of fund structures.

### ***Consultation***

- 12 In preparing the instrument, a range of relevant agencies were consulted including the Australian Trade and Investment Commission, the Australian Securities and Investment Commission, the Department of Foreign Affairs and Trade, the Department of Industry, Science, Energy and Resources, the AusIndustry, and the Treasury. Austrade agreed with the components of complying significant investment being specified in the instrument.
- 13 The Office of Best Practice Regulation (OBPR) was also consulted and considered that the instrument dealt with matters of a minor nature and no regulatory impact statement was required. The OBPR reference number is 25905.

### ***Details of the instrument***

- 14 Section 1 sets out the name of the instrument.
- 15 Section 2 sets out the commencement date of the instrument.
- 16 Section 3 provides that IMMI 15/100 (F2015L01012) is amended as set out in Schedule 1 to the instrument. Details on the amendments in Schedule 1 are set out in **Attachment A**

### ***Parliamentary scrutiny etc.***

- 17 The instrument is exempt from disallowance under section 42 of the Legislation Act. This is because it is an instrument made under Part 5 of the Migration Regulations, which is exempt from disallowance under paragraph (b) of item 20 in section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

- 18 The instrument was made by the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, in accordance with subregulation 5.19C(6) of the Regulations.

**Details of Schedule 1 to *Migration (Complying Investments) Amendment Instrument (LIN 21/041) 2021***

**Item 1 Amendments to the heading of Part 1**

Item 1 removes the heading of Part 1. Specifically, it removes the heading words ‘Part 1 – Preliminary’.

**Item 2 Amendments to section 3**

Item 2 omits the current contents of section 3 relating to the legislative authority and substitutes new text. The effect will be to remove the reference to regulation 5.19D of the Migration Regulations and only refer to regulation 5.19C. This is to reflect that regulation 5.19D is no longer a head of power to make the instrument.

**Items 3–7 Amendments to section 4**

Items 3-7 amend section 4 of IMMI 15/100, which is the definitions section.

Item 3 amends the note at the beginning of the definitions provision to remove the reference to *complying premium investment*.

Item 4 inserts the definition of *fund of funds*, which will mean a managed investment fund that invests in other funds. This term was referred to in the general requirements under section 11 of IMMI 15/100, but it was not defined previously.

Item 5 removes a reference to regulation 5.19D of the Regulations, which is no longer required.

Item 6 omits the reference to *Premium Investor Stream* in the definition of *visa* and substitutes *Investor Stream*.

**Item 7 Amendments to the heading of Part 2**

Item 7 removes the heading of Part 2. Specifically, it removes the words ‘Part 2—Complying significant investments’.

**Item 8 After section 4**

Item 8 inserts section 4A, which contains savings and transitional provisions.

New subsection 4A(1) provides that the amendments made by this instrument to IMMI 15/100 only apply to:

- applicants for a Subclass 188 visa who are invited to apply for a Subclass 188 visa after 30 June 2021; and
- applicants for a Subclass 888 visa who were invited to apply for a Subclass 188 visa after 30 June 2021.

New subsection 4A(2) provides that Part 3 (which related to complying premium investments) continues to apply in relation to an application for a Subclass 888 visa where the applicant holds a Subclass 188 visa in the Premium Investor stream that was granted or applied for before 1 July 2021.

## **Items 9-10                      Amendments to section 5**

Item 9 removes all references to a 'Part' in section 5, as the amended instrument does not have Parts. A reference to the instrument will be substituted in its place.

Item 10 inserts a new note in section 5 explaining requirements for the Investor stream.

## **Item 11                      Amendments to section 6**

Item 11 amends section 6 of IMMI 15/100 to set out the requirements for an investment. The amendments will set out proportions of the investment that must be made in each of the various types set out in sections 8-10 of the instrument. This will replace the previous approach, which set out absolute amounts that had to be applied to each type.

The amendments to section 6 will specify the required allocations for an eligible investment, which will be:

- at least 20% of the total investment in 1 or more venture capital funds in accordance with section 8; and
- at least 30% of the total investment in emerging companies investments in accordance with section 9.

Any remaining portion of the investment must be invested in any of the following:

- 1 or more venture capital funds in accordance with section 8;
- emerging companies investments in accordance with section 9; or
- 1 or more balancing investments in accordance with section 10.

## **Item 12                      Amendments to subsection 8(2) and 8(3)**

Item 12 replaces the references to absolute dollar amounts (AUD 500 000) for an investment with references to a requirement for at least 20% of the investment in the specified matter in subsections 8(2) and 8(3).

## **Item 13                      Amendments to subsection 8(2)**

Item 13 amends subsection 8(2) to reduce the time from 12 months after the visa is granted to the investor to 6 months, during which the investor must enter into an agreement with the general partner of each of one or more venture capital funds.

## **Item 14                      Amendments to subsection 9(5)**

Item 14 amends subsection 9(5) to insert a new paragraph 9(5)(c) to clarify that an emerging company investment must not be made in securities that otherwise meet the requirements of section 9 but where the issuer of those securities invests the proceeds of the issue of those securities in securities that do not meet the market capitalisation requirements under subsection 9(6). For example, a small exchange traded fund which invests in the securities of large capitalised companies is excluded under new paragraph 9(5)(c).

Paragraphs 9(5)(a)-(b) will continue to provide that an emerging company investment must not be made in:

- securities issued or proposed to be issued by a government; or
- debentures.

#### **Items 15-16 New subsections 9(12) and 10(4)**

New subsections 9(12) (item 15) and 10(4) (item 16) require each fund managed offering products for the *emerging companies investments* and/or the *balancing investments* components of the Complying Investment Framework to be audited annually beginning financial year 2021-22.

#### **Item 17 Amendments to subsection 11(9)**

Item 17 amends subsection 11(9) to include qualifying provisions, ensuring that derivatives cannot be used to materially reduce an investor or significant investor's exposure to the market price of emerging companies' securities.

#### **Item 18 Amendments to subsection 11(11)**

Item 18 amends subsection 11(11) to clarify that investment of the venture capital component may be made through a fund of funds structure.

#### **Item 19 Amendments to Part 3**

Item 19 removes Part 3. This is to remove the provisions relating to *complying premium investments*. This is because the reference to *complying premium investment* (regulation 5.19D of the Regulations) will no longer be relevant in Subclass 188 visas when the Premium Investor stream is closed from 1 July 2021.

However, under new subsection 4A(2), Part 3 will continue to apply to applicants for a Subclass 888 (Business Innovation and Investment (Permanent)) visa who hold a Subclass 188 visa in the Premium Investor stream that was granted or applied for before 1 July 2021.