



**ASIC**  
Australian Securities &  
Investments Commission

## Explanatory Statement

### ***ASIC Corporations (Financial Services Guide Given in a Time Critical Situation) Instrument 2022/498***

This is the Explanatory Statement for *ASIC Corporations (Financial Services Guide Given in a Time Critical Situation) Instrument 2022/498* (**Instrument**).

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

#### **Summary**

1. The Instrument continues relief that was previously provided under ASIC Class Order [CO 12/417] *Information in a Financial Services Guide given in a time-critical situation* in a new instrument with minimal changes. The Instrument will provide, until 1 October 2027, relief in a time critical situation from the requirement under section 941E of the *Corporations Act 2001* (**Act**) that a Financial Services Guide (**FSG**) be “up to date” at the time it is given to the client.

#### **Purpose of the Instrument**

2. The FSG is a key disclosure document under the Act that sets out the terms and basis on which an Australian financial services (**AFS**) licensee or an authorised representative of an AFS licensee will provide a financial service. The FSG is provided to retail clients to assist them to make an informed decision on whether to acquire a financial service from the AFS licensee or authorised representative.
3. In a time critical situation, such as during the provision of a financial service over the telephone, it may not be reasonably practicable to provide an FSG before the financial service is provided. Instead, section 941D of the Act permits a statement of certain key information to be given at the time, with the FSG given to the retail client within five days, or sooner if practicable, after the financial service is provided.
4. However, as section 941E of the Act requires an FSG to be “up to date” at the time it is given to the client, the information in the FSG provided later may contain different information to an FSG than would be given in normal circumstances. This may mean that an FSG needs to contain tailored

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information that is known after the financial service is provided, resulting in an increased compliance burden in having to provide customised information in the FSG.

5. [CO 12/417] previously provided that information in an FSG given in a time critical situation need only be up to date as at the time the earlier statement of key information was given to a retail client. In other words, an FSG given after the provision of a financial service in a time critical case will be the same as an FSG that is given before the provision of a financial service in normal cases.
6. The purpose of the Instrument is to continue, with minimal changes, the relief in [CO 12/417] that was due to expire, or to ‘sunset’, under the *Legislation Act 2003* on 1 October 2022.
7. ASIC concluded that the relief has operated effectively and the policy principles underpinning [CO 12/417] continue to apply. The relief reduces the potential for a significantly increased compliance burden for AFS licensees and authorised representatives in having to provide customised information in an FSG in a time critical situation, without reducing the level of information provided to retail clients to assist them to decide whether to acquire a financial service.

## **Consultation**

8. On 15 February 2022, ASIC released CP 358 *Remaking ASIC relief on PDSs, superannuation dashboards and FSGs (CP 358)* seeking feedback on proposals to remake legislative instruments relating to specific financial services disclosure requirements. This included proposals to remake as a new instrument, without significant changes, the relief in [CO 12/417].
9. The consultation period closed on 12 April 2022.
10. We received six submissions in response to CP 358. No respondent opposed our proposal to remake the relief without significant changes in a new instrument.
11. The submissions to CP 358 are publicly available on ASIC’s website at [www.asic.gov.au](http://www.asic.gov.au).

## **Operation of the instrument**

### **Part 1 – Preliminary**

12. Section 1 provides the name of the Instrument.
13. Section 2 provides that the Instrument commences at the same time that the *ASIC Corporations (Repeal) Instrument 2022/499* commences.
14. Section 3 provides that the Instrument is made under paragraph 951B(1)(c) of the Act.
15. Section 4 provides a definition of ‘Act’ for the purposes of the Instrument.

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## **Part 2 – Declaration**

16. Section 5 inserts notional section 941E into the Act. Notional section 941E has the effect that information in an FSG given to a client in a time critical situation need only be up to date as at the time the earlier statement of key information was given to a retail client in accordance with subsection 941D(2). In other words, an FSG given after the provision of a financial service in a time critical case will be the same as an FSG that is given before the provision of a financial service in normal cases.
17. Section 6 provides for repeal of the Instrument on 1 October 2027.

### **Legislative instrument and legislative authority**

18. The Instrument relieves AFS licensees and authorised representatives from a significant compliance burden that would otherwise apply if they had to provide an up to date FSG in accordance with section 951E of the Act in time critical situations. Feedback to CP 358 supported the continuation of this longstanding relief, reasoning that there was minimal detriment if clients were provided an FSG up to date at the time the relevant financial service was provided rather than at the time the FSG was provided because of the limited time delay.
19. The Instrument utilises powers given by Parliament to ASIC that allow ASIC to modify or affect the operation of the Act to provide a tailored and flexible regulatory environment that is fit for purpose for certain financial products. The matters contained in the Instrument are specific amendments designed to ensure that application of the Act remains flexible and applies in a way consistent with the intended policy and the enabling provisions in the Act.
20. The Instrument is made under paragraph 951B(1)(c) of the Act. Paragraph 951B(1)(c) allows ASIC to declare that Part 7.7 of the Act applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions of the Part were omitted, modified or varied as specified in the declaration.
21. The Instrument is a disallowable legislative instrument.
22. It will be a matter for the Government and for Parliament as to whether the Act or Regulations may be amended in future to include the relief in the Instrument.

### **Appropriate duration of the Instrument**

23. The effect of the Instrument is that, with minimal changes, the relief previously provided in [CO 12/417] will be extended to 1 October 2027.
24. ASIC considers that a five year duration for the Instrument is appropriate due to the business uncertainty and costs that would result if there was a shorter period. If the relief ceased or was changed, AFS licensees and authorised representatives would have to amend systems and incur compliance costs

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associated with providing customised information in an FSG in a time critical situation.

25. ASIC considered a shorter duration for the Instrument but determined this would impose unnecessary uncertainty and costs to those affected by the relief. Feedback received to CP 358 actually sought a longer extension of the relief previously provided in [CO 12/417] on the basis that the obligations in the Act in respect of FSGs and time critical situations were an ongoing issue.
26. If the Act or Regulations are amended to include the relief, ASIC will repeal the Instrument.

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

27. A Statement of Compatibility with Human Rights consistent with subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* 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 (Financial Services Guide Given in a Time Critical Situation) Instrument 2022/498***

#### Overview

1. The *ASIC Corporations (Financial Services Guide Given in a Time Critical Situation) Instrument 2022/498* continues, with minimal changes, relief previously provided in ASIC Class Order [CO 12/417] in a new legislative instrument until 1 October 2027. This means that ASIC will continue to provide relief in a time critical situation from the requirement under section 941E of the *Corporations Act 2001* that a Financial Services Guide be “up to date” at the time it is given to the client.

#### 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*.