



**ASIC**  
Australian Securities &  
Investments Commission

## Explanatory Statement

### *ASIC Corporations (Financial Requirements for Corporate Directors of Retail CCIVs) Instrument 2022/449*

This is the Explanatory Statement for *ASIC Corporations (Financial Requirements for Corporate Directors of Retail CCIVs) Instrument 2022/449* (**the Instrument**).

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

#### Summary

1. ASIC makes this Instrument under paragraph 926A(2)(c) of the *Corporations Act 2001* (the **Corporations Act**). That paragraph provides that ASIC may declare provisions to which section 926A applies (ie Part 7.6, other than Divisions 4 and 8) in relation to a person or financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.
2. The Instrument inserts a new section 912AL of the Corporations Act that applies to Australian financial services (**AFS**) licensees that are authorised to operate a retail corporate collective investment vehicle (**CCIV**). In the context of retail CCIVs, the AFS licensee is the corporate director of the retail CCIV.
3. The new section 912AL broadly mirrors the requirements for an AFS licensee that is a responsible entity of a registered scheme under ASIC Class Order [CO 13/760]. There are four requirements: the cash needs requirement (see subsection 912AL(3)), the net tangible assets (**NTA**) requirement (see subsection 912AL(4)), the liquidity requirement (see subsection 912AL(8)) and the audit opinion requirement (see subsections 912AL(9) and (10)). Satisfaction of these requirements by the corporate director as an AFS licensee is intended to ensure that it will have adequate financial resources for the purposes of paragraph 912A(1)(d) of the Corporations Act and an adequate risk management system for the purposes of paragraph 912A(1)(h) of the Corporations Act.
4. The requirements in this Instrument are reflected in Appendix 10 (Corporate directors of retail CCIVs) of Regulatory Guide 166 *AFS licensing: Financial requirements*.

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## Purpose of the instrument

5. The *Corporate Collective Investment Vehicle Framework and Other Measures Act 2022* amended the Corporations Act to establish a regulatory framework for CCIVs. The Corporations Act provides that a CCIV must have as its sole director a public company that holds an AFS license that authorises it to operate the business and conduct the affairs of the CCIV: see paragraph 1222(c) and sections 1224F and 1241F. Financial services provided by a CCIV are covered by the corporate director's AFS license. The CCIV itself is always exempt from the requirement to hold an AFS license.
6. Section 912A of the Corporations Act sets out the general obligations of an AFS licensee. These include the requirement that a licensee must:
  - have available adequate resources to provide the financial services covered by the licence (subject to particular exceptions): see paragraph 912A(1)(d); and
  - have adequate risk management systems: see paragraph 912A(1)(h).
7. Section 912AL inserted by the Instrument will assist AFS licensees that are corporate directors with ensuring that they have the financial resources and risk management systems to satisfy the above requirements.
8. The purpose of the Instrument is to impose requirements on licensees that are corporate directors, broadly equivalent to the requirements imposed on licensees that are responsible entities under ASIC Class Order [CO 13/760], to ensure:
  - there are arrangements to meet operating costs of the retail CCIV (e.g. costs of ensuring compliance with the Corporations Act) throughout the life of the sub-funds of the retail CCIV, including through robust cash flow forecasting, adequate levels of capital and liquidity, and capital levels reflecting the operational risk of a corporate director;
  - there is some level of assurance that, if the corporate director fails, there is money available for the orderly transition to a new corporate director;
  - there is alignment of the interests of corporate directors and investors in retail CCIVs by imposing adequate minimum capital requirements so that corporate directors are entities of some substance with sufficient capital at risk to provide corporate directors with a real financial incentive to successfully manage retail CCIV assets.

## Consultation

9. ASIC issued Consultation Paper 360 *Corporate collective investment vehicles: Preparing for the commencement of the new regime (CP 360)* in March 2022. CP 360 set out ASIC's proposals for updating ASIC's Regulatory Guide 166 *AFS licensing: Financial requirements* to include a cash needs requirement, audit requirement, NTA requirement and liquidity requirement similar to that

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imposed on responsible entities of registered schemes by ASIC Class Order [CO 13/760]. ASIC received six submissions in response to CP 360. Report 728 *Response to submissions on CP 360 Corporate collective investment vehicles: Preparing for the commencement of the new regime* summarises the key issues from the submissions and ASIC's responses: [REP 728](#).

10. ASIC also consulted with representatives of the Financial Services Council to clarify certain aspects of the proposed policy.
11. The Office of Best Practice Regulation confirmed that ASIC is not required to prepare a Regulatory Impact Statement for this Instrument.

### **Operation of the Instrument**

12. Section 5 of the Instrument inserts a new section 912AL of the Corporations Act which, under subsection 912AL(1), applies to AFS licensees that are corporate directors of retail CCIVs, other than a corporate director that is:
  - a body regulated by the Australian Prudential Regulation Authority (**APRA**) that is not required to comply with paragraph 912A(1)(d) of the Corporations Act; or
  - a market participant; or
  - a clearing participant.

This is because other requirements apply to these AFS licensees under ASIC or APRA policy.

13. Subsection 912AL(2) specifies that a licensee to which section 912AL applies is taken to have complied with the conditions (if any) of its AFS license that relate to cash needs, NTA and audit opinion requirements.

### ***Cash needs requirements***

14. Subsection 912AL(3) requires a corporate director of a retail CCIV to prepare a cash flow projection covering at the least the next 12 months based on what is reasonably likely to occur. The cash flow projection must be approved by directors of the corporate director as satisfying the cash needs requirement. The corporate director must document the calculations and assumptions used in preparing the projection and describe why those assumptions are appropriate. The cash flow projection must be updated in certain circumstances.

### ***NTA requirement***

15. Subsections 912AL(5), (6) and (7) set out certain requirements in relation to the custody of the assets of the retail CCIV, including in relation to assets of the retail CCIV held by a custodian or a sub-custodian appointed by that custodian. Where a corporate director satisfies relevant requirements in subsection

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912AL(5), the corporate director of the retail CCIV may hold a lower NTA requirement.

16. Where subsection 912AL(5) applies, paragraph 912AL(4)(a) requires the corporate director to hold the amount that is the greatest of:
  - \$150,000;
  - 0.5% of the “average value of CCIV assets, scheme property and IDPS property” of the retail CCIVs, registered schemes and IDPSs operated by the licensee, up to \$5 million NTA; or
  - 10% of the “average corporate director, RE and IDPS revenue” of the licensee.
17. If subsection 912AL(5) does not apply, paragraph 912AL(4)(b) requires the corporate director to hold the amount the greater of:
  - \$10 million; or
  - 10% of “average corporate director, RE and IDPS revenue” of the licensee.
18. Subsection 912AL(4) takes into account a licensee’s scheme and IDPS property (as well as their retail CCIV assets) for the purposes of determining their minimum NTA requirement.

*Average value of CCIV assets, scheme property and IDPS property*

19. The “average value of the CCIV assets, scheme property and IDPS property” is defined in subsection 912AL(11). In summary, the definition refers to an amount which is the greater of the current value of the CCIV assets, scheme property and IDPS property and an amount derived from averaging the actual value of the CCIV assets, scheme property and IDPS property for up to the last two preceding financial years (starting from when the corporate director was first authorised to operate a retail CCIV or, if earlier, from the date the corporate director was authorised to operate a registered scheme or IDPS, if applicable) and a forecast value of the CCIV assets, scheme property and IDPS property for the remainder of that financial year. This averaging is to ensure that a licensee’s NTA requirement is not reduced because of a drop in the value of the CCIV assets, scheme property and IDPS property which might itself indicate the potential for the licensee’s financial resources to be strained.

*Average corporate director, RE and IDPS revenue*

20. The “average corporate director, RE and IDPS revenue” is defined in subsection 912AL(11). In summary, the definition refers to an amount based on the average of the licensee’s corporate director, RE and IDPS revenue for up to the last two preceding financial years (starting from when the corporate director was first authorised to operate a retail CCIV or, if earlier, from the date the

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corporate director was authorised to operate a registered scheme or IDPS, if applicable) and an estimate of the forecast corporate director, RE and IDPS revenue for the remainder of the financial year.

### ***Liquidity requirement***

21. There are two components under the liquidity requirement in subsection 912AL(8):
  - paragraph 912AL(8)(a) requires the corporate director to hold the greater of \$150,000 or 50% of the NTA requirement that would be required to be held under paragraph 912AL(4) as cash or cash equivalents. “Cash or cash equivalents” is defined in subsection 912AL(11).
  - paragraph 912AL(8)(b) requires the corporate director to hold liquid assets in an amount that is at least 100% of the required NTA. “Liquid assets” is defined in subsection 912AL(11).
22. A primary objective of the liquidity requirement is to ensure that the corporate director’s NTA is in a form that can be called upon when required. The liquidity requirement necessitates that a portion of a corporate director’s NTA be held as cash or cash equivalents to meet any immediate and unexpected expenses.

### ***Audit opinion***

23. Subsections 912AL(9) and (10) set out the requirements for the contents and lodging of an opinion of a registered company auditor (**audit opinion**) covering the period during which the corporate director was authorised to operate a retail CCIV. The auditor is required to provide an audit opinion on a ‘positive assurance’ basis on the matters specified in paragraph 912AL(9)(a) and an opinion on a ‘negative assurance’ basis on the matters specified in paragraph 912AL(9)(b).

### ***Definitions***

24. Definitions are set out in subsection 912AL(11) of the Instrument. The definitions generally reflect the definitions in CO 13/760 with appropriate amendments for the CCIV context.

### **Documents incorporated by reference**

25. The following documents are incorporated by reference in the Instrument:
  - ASIC Class Order [CO 13/761] – sets out minimum standards for custodial or depository service providers to have available adequate financial resources to provide the financial services covered by their AFS licence.
  - ASIC Class Order [CO 13/763] – modifies the Act as it applies to a person operating or involved in the operation or promotion of investor

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directed portfolio services (**IDPS**), and to a person offering or issuing accessible securities through an IDPS.

- *ASIC Market Integrity Rules (Capital) 2021* – sets out rules that apply to market participants in relation to, among other things, the activities and conduct of the domestic licensed financial markets in Australia operated by the ASX Limited, Cboe Australia Pty Limited, FEX Global Pty Limited, National Stock Exchange of Australia Limited, Australian Securities Exchange Limited and Sydney Stock Exchange Limited.

### **Legislative authority**

26. The source of power to make the instrument is paragraph 926A(2)(c) of the Corporations Act.
27. The instrument is a disallowable legislative instrument.

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

28. 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 (Financial Requirements for Corporate Directors of Retail CCIVs) Instrument 2022/449 (the Instrument)*.

### Overview

1. The Instrument outlines the minimum financial requirements that an Australian financial services (AFS) licensee who is authorised to operate a retail CCIV as a corporate director must meet. It requires a corporate director as AFS licensee to meet cash needs, net tangible assets, liquidity and audit opinion requirements. The content of these requirements may vary depending on whether the assets of the retail CCIV are held by the corporate director or another asset holder. The requirements are designed to replicate the requirements for responsible entities of registered schemes in ASIC Class Order [CO 13/760].

### Assessment of human rights implications

2. The Instrument does engage any of the applicable rights or freedoms.

### Conclusion

3. The 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*.