



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Amendment) Instrument 2023/588

This is the Explanatory Statement for *ASIC Corporations (Amendment) Instrument 2023/588*.

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

Summary

- 1 The *ASIC Corporations (Amendment) Instrument 2023/588* (**Amendment Instrument**) amends *ASIC Corporations (Repeal and Transitional) Instrument 2016/396*, *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109* *ASIC Corporations (Foreign Financial Services Providers—Limited Connection) Instrument 2017/182* and *ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2020/199* (the **Principal Instruments**).

Sufficient equivalence relief

- 2 *ASIC Corporations (Repeal and Transitional) Instrument 2016/396* and *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109* (together, the **sufficient equivalence relief**) conditionally exempt foreign financial services providers (**FFSPs**) from the requirement to hold an Australian financial services (**AFS**) licence when providing specified financial services in Australia where:
 - (i) the financial services are provided to wholesale clients only;
 - (ii) the financial services are regulated by an overseas regulatory authority;
 - (iii) the regulatory regime overseen by the overseas regulatory authority is sufficiently equivalent to the Australian regulatory regime;
 - (iv) there are effective cooperation arrangements between the overseas regulatory authority and ASIC; and
 - (v) the FFSP meets all the relevant conditions of the relief.
- 3 In September 2016, ASIC made *ASIC Corporations (Repeal and Transitional) Instrument 2016/396* to repeal seven legislative instruments that provided licensing relief to seven jurisdictions assessed as sufficiently equivalent to the Australian regulatory regime by ASIC and provide transitional relief to

preserve the effect of these legislative instruments for a period of two years from the commencement of the instrument to enable ASIC to conduct a review of the policy settings underlying the relief. These legislative instruments are:

- (i) ASIC Class Order [CO 03/1099] UK FCA regulated financial service providers
- (ii) ASIC Class Order [CO 03/1100] US SEC regulated financial service providers
- (iii) ASIC Class Order [CO 03/1101] US Federal Reserve and OCC regulated financial service providers
- (iv) ASIC Class Order [CO 03/1102] Singapore MAS regulated financial service providers
- (v) ASIC Class Order [CO 03/1103] Hong Kong SFC regulated financial service providers
- (vi) ASIC Class Order [CO 04/829] US CFTC regulated financial services providers
- (vii) ASIC Class Order [CO 04/1313] German BaFin regulated financial service providers.

- 4 In November 2016, ASIC made *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109* based on the policy set out in RG 176 and on similar terms to [CO 03/1099]. The instrument was issued for a fixed period to be consistent with the expiry of the relief contained in *ASIC Corporations (Repeal and Transitional) Instrument 2016/396*.
- 5 ASIC extended the sufficient equivalence relief in 2018 and 2019 to allow ASIC to consult on further proposals about the regulation of FFSPs.
- 6 In 2020, *ASIC Corporations (Repeal and Transitional) Instrument 2016/396* was amended to provide an extension of the sufficient equivalent relief for 2 years until 31 March 2022. This extension was granted to allow time for industry to comply with the new requirements that apply to FFSPs under ASIC's updated policy on FFSPs in *Regulatory Guide 176 Foreign Financial Service Providers* which was issued in March 2020.
- 7 In 2021, *ASIC Corporations (Repeal and Transitional) Instrument 2016/396* was again amended to provide a further extension of the sufficient equivalent relief for 12 months until 31 March 2023. This extension was granted pending the outcome of the Australian Government's consultation about the regulation of FFSPs as announced on 11 May 2021.
- 8 In 2022, *ASIC Corporations (Repeal and Transitional) Instrument 2016/396* was again amended to provide a further extension of the sufficient equivalent relief for 12 months until 31 March 2024. This extension was granted to provide certainty for industry given the lapsing of the *Treasury Laws*

Amendment (Streamlining and Improving Economic Outcomes for Australians) Bill 2022 following the dissolution of the House of Representatives on 11 April 2022.

Limited connection relief

- 9 In September 2003, ASIC made ASIC Class Order [CO 03/824] *Licensing relief for foreign entities with limited connection to Australian wholesale clients (limited connection relief)* to provide relief from the requirement to hold an AFS licence where the person providing the financial services is:
 - (i) not in this jurisdiction;
 - (ii) dealing only with wholesale clients; and
 - (iii) carrying on a financial services business by engaging in conduct that is intended to induce people in this jurisdiction to use the financial services the person provides, or is likely to have that effect: see s911D(1) (**‘inducing conduct’**).
- 10 The relief granted by [CO 03/824] was to ensure that infrequent, arms-length transactions by a FFSP with Australian wholesale clients would not require a licence where there is a limited connection between the FFSP and Australia. It was largely made due to concerns that overseas counterparties to derivatives and foreign exchange transactions may be caught engaging in ‘inducing’ activities under section 911D of the Act, requiring an AFS licence, when issuing financial products to Australian wholesale clients. This would require those overseas counterparties to be licensed to enter into derivatives and foreign exchange contracts on an ad hoc basis with Australian wholesale clients.
- 11 In March 2017, ASIC made *ASIC Corporations (Foreign Financial Services Providers—Limited Connection) Instrument 2017/182*, which gave relief on similar terms to [CO 03/824] until 27 September 2018, to align it with the expiry of the sufficient equivalence relief. ASIC extended the limited connection relief in 2018 and 2019 to allow ASIC to consult on further proposals about the regulation of FFSPs.
- 12 The *ASIC Corporations (Foreign Financial Services Providers—Limited Connection) Instrument 2017/182* was amended in 2020 to provide an extension of the limited connection relief for 2 years until 31 March 2022. This extension was granted to allow time for industry to comply with the new requirements that apply to FFSPs under ASIC’s updated policy on FFSPs in Regulatory Guide 176 *Foreign Financial Service Providers* which was issued in March 2020.
- 13 The *ASIC Corporations (Foreign Financial Services Providers—Limited Connection) Instrument 2017/182* was again amended in 2021 to provide a further extension of the limited connection relief for 12 months until 31 March 2023. This extension was granted pending the outcome of the former

Government's consultation about the regulation of FFSPs as announced on 11 May 2021.

- 14 The *ASIC Corporations (Foreign Financial Services Providers—Limited Connection) Instrument 2017/182* was again amended in 2022 to provide a further extension of the limited connection relief for 12 months until 31 March 2024. This extension was granted to provide certainty for industry given the lapsing of the *Treasury Laws Amendment (Streamlining and Improving Economic Outcomes for Australians) Bill 2022* following the dissolution of the House of Representatives on 11 April 2022.

Funds management relief

- 15 In March 2020, ASIC issued *ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2020/199* (**funds management relief**), which provides licensing relief to providers of funds management financial services to some categories of Australian professional investors with a commencement date of 1 April 2022.
- 16 In 2021, this commencement date was delayed until 1 April 2023 also pending the outcome of the former Government's consultation about the regulation of FFSPs as announced on 11 May 2021.
- 17 In 2022, the commencement date was again delayed until 1 April 2024 to provide certainty for industry given the lapsing of the *Treasury Laws Amendment (Streamlining and Improving Economic Outcomes for Australians) Bill 2022* following the dissolution of the House of Representatives on 11 April 2022.

Treasury Laws Amendment (Streamlining and Improving Economic Outcomes for Australians) Bill 2022

- 18 In May 2021, the former Government announced it would consult on options for regulatory relief for FFSPs who are licensed and regulated in jurisdictions with comparable financial services rules and obligations.
- 19 Following consultation in February 2022, the *Treasury Laws Amendment (Streamlining and Improving Economic Outcomes for Australians) Bill 2022* (**Bill**) was introduced. With the dissolution of the House of Representatives, the Bill lapsed on 11 April 2022.
- 20 Following the election of the new Government in May 2022, the Government is considering options for the regulation of FFSPs.

Purpose of the instrument

- 21 The purpose of this instrument is to preserve the effect of the relief in *ASIC Corporations (Repeal and Transitional) Instrument 2016/396*, *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109* and *ASIC Corporations (Foreign Financial Services Providers—Limited Connection) Instrument 2017/182* until 31 March 2025.

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- 22 This instrument also delays the commencement date of *ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2020/199* until 1 April 2025.
- 23 The instrument will provide certainty for industry pending the outcome of the Government’s consideration of options for the regulation of FFSPs.

Consultation

- 24 ASIC did not undertake consultation about the Amendment Instrument because it is minor and machinery in nature and temporarily extends the relief in the Principal Instruments.

Operation of the instrument

- 25 The Amendment Instrument amends:
- (i) the *ASIC Corporations (Repeal and Transitional) Instrument 2016/396* by preserving the effect of the ASIC Class Orders until 31 March 2025, but an FFSP would only be able to rely on this instrument if it was able to rely on the instrument as at 31 March 2020;
 - (ii) the *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109* by preserving the effect of the instrument until 31 March 2025, but an FFSP would only be able to rely on this instrument if it was able to rely on the instrument as at 31 March 2020;
 - (iii) the *ASIC Corporations (Foreign Financial Services Providers—Limited Connection) Instrument 2017/182* by preserving the effect of the instrument until 31 March 2025; and
 - (iv) the *ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2020/199* by delaying the commencement of the instrument until 1 April 2025.
- 26 This Amendment Instrument commences on the later of:
- (i) the date of its gazettal; and
 - (ii) the day after it is registered on the Federal Register of Legislation.

Legislative authority

- 27 ASIC makes *ASIC Corporations (Amendment) Instrument 2021/510* under paragraph 911A(2)(l) of the Act and subsection 916A(2) of the Act.
- 28 Paragraph 911A(2)(l) of the Act provides that ASIC may exempt a person from the requirement to hold an Australian financial services (*AFS*) licence for a financial service they provide in circumstances where the provision of the

service is covered by an exemption specified by ASIC in writing and published in the *Gazette*.

- 29 Subsection 926A(2) of the Act provides that ASIC may exempt a class of persons from all or specified provisions of Part 7.6 of the Act, other than Divisions 4 and 8 of Part 7.6.
- 30 Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of the *Corporations Act 2001*), where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Statement of Compatibility with Human Rights

- 31 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 2023/588

Overview

- 1 *ASIC Corporations (Amendment) Instrument 2023/588* amends *ASIC Corporations (Repeal and Transitional) Instrument 2016/396*, *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109* and *ASIC Corporations (Foreign Financial Services Providers—Limited Connection) Instrument 2017/182* so that the Australian financial services licensing relief provided under those instruments is extended by 12 months until 31 March 2025.
- 2 *ASIC Corporations (Amendment) Instrument 2022/623* also amends *ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2020/199* to delay the commencement date until 1 April 2025.

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*.