



**ASIC**  
Australian Securities &  
Investments Commission

## Explanatory Statement

### ***ASIC Corporations (Relief to Facilitate Admission of Exchange Traded Funds) Instrument 2024/147 and ASIC Corporations (Repeal) Instrument 2024/148***

This is the Explanatory Statement for *ASIC Corporations (Relief to Facilitate Admission of Exchange Traded Funds) Instrument 2024/147* (the **Instrument**) and *ASIC Corporations (Repeal) Instrument 2024/148* (the **Repeal Instrument**).

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

#### **Summary**

1. *ASIC Corporations (Relief to Facilitate Admission of Exchange Traded Funds) Instrument 2024/147* (the **Instrument**) maintains the relief previously given under ASIC Class Order [\[CO 13/721\]](#) - *Relief to facilitate quotation of exchange traded funds on the AQUA Market* (**[CO 13/721]**) and has been extended to apply to a broader range of ETFs quoted on a financial market operated by ASX Limited ACN 008 624 691 (**ASX**) or Cboe Australia Pty Ltd ACN 129 584 667 (**Cboe**). The Instrument sets out the circumstances where responsible entities of registered schemes and corporate directors of retail corporate collective investment vehicles (**CCIVs**) may be exempt from equal treatment requirements, on-going disclosure requirements, relevant interest, substantial holding and beneficial tracing provisions in the *Corporations Act 2001* (the **Corporations Act**) to facilitate quotation of certain exchange traded funds, as defined in the Instrument (**ETFs**).
2. [\[CO 13/721\]](#) was due to sunset on 1 April 2024. ASIC considered that [\[CO 13/721\]](#) was generally operating effectively and efficiently and continued to form a necessary and useful part of the legislative framework. As a result, [\[CO 13/721\]](#) has been remade, with some minor amendments, in a new legislative instrument. The Instrument has been subject to drafting changes to reflect ASIC's current style and format, update the terms of the relief to reflect innovations in the ETF market, including extending the relief to a broader range of ETFs and not limiting it to those that are passively managed and track an index. To understand the original intent of [\[CO 13/721\]](#), this Explanatory Statement should be read in conjunction with the [Explanatory Statement for \[CO 13/721\]](#).

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3. The Repeal Instrument repeals [CO 13/721] as this instrument is superseded by the Instrument upon its commencement. The Repeal Instrument repeals [CO 13/721] ahead of its automatic repeal on 1 April 2024.
  4. ASIC makes the Instrument under subsections 601QA(1), 655A(1), 673(1), 1020F(1) and 1243(2) of the Corporations Act. Under subsection 601QA(1), ASIC may declare a provision modified or exempt a person from complying with a provision of Chapter 5C of the Corporations Act. Under subsection 655A(1), ASIC may declare a provision modified or exempt a person from complying with a provision of Chapter 6 of the Corporations Act. Under subsection 673(1), ASIC may declare a provision modified or exempt a person from complying with a provision of Chapter 6C of the Corporations Act. Under subsection 1020F(1), ASIC may declare a provision modified or exempt a person from complying with a provision of Part 7.9 of the Corporations Act in relation to financial product disclosure. Under subparagraph 1243(2) of the Corporations Act, ASIC may declare a provision modified or exempt a specified class of CCIVs, CCIV sub-funds or entities in relation to a specified class of CCIVs or CCIV sub-funds from complying with certain parts of Chapter 8B of the Corporations Act.
  5. ASIC makes the Repeal Instrument under subsections 601QA(1), 655A(1), 673(1), 1020F(1) and 1243(2).

#### **Purpose of the instrument**

6. The purpose of the relief set out in the Instrument is to facilitate the quotation of ETFs on ASX or Cboe. The Instrument allows responsible entities and corporate directors of ETFs quoted on those licensed exchanges to:
  - (a) restrict ETF withdrawals to authorised participants only, and to provide index or portfolio information to authorised participants before the information is provided to other members (equal treatment relief);
  - (b) provide continuous disclosure to the market, rather than providing individual notifications to each retail investor (ongoing disclosure relief);
  - (c) ensure that the ability to request redemptions under the ETF's acquisition and withdrawal facility does not give the authorised participants a relevant interest in the securities held by the ETF;
  - (d) ensure members can determine their substantial holding disclosure requirements with reference to the securities held by the ETF as disclosed most recently by the responsible entity or CCIV.
7. The Instrument was issued because [CO 13/721] was due to sunset under the *Legislation Act 2003* (the **Legislation Act**) on 1 April 2024. Under the Legislation Act, legislative instruments (such as class orders) cease automatically or sunset, after 10 years, unless action is taken to preserve them.
8. The purpose of sunseting is to ensure that instruments are kept up to date and only remain in force while they are fit for purpose, necessary and relevant.

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Based on discussions with Treasury and industry stakeholders, ASIC formed the view that [CO 13/721] was broadly operating effectively and efficiently and continued to form a necessary and useful part of the legislative framework. Therefore, this legislative instrument was remade with some minor amendments using ASIC's current style and format, while preserving the current effect of the instrument.

9. The purpose of the Repeal Instrument is to repeal [CO 13/721] as this instrument is superseded by the Instrument upon its commencement.

## **Consultation**

10. In November 2023, ASIC consulted on re-making [CO 13/721] in Consultation Paper CP 374 *Remaking ASIC class order on exchange traded funds: [CO 13/721] (CP 374)*. ASIC proposed to remake [CO 13/721] for a period of five years and extend the relief under [CO 13/721] to a broader class of ETFs, and not limit it to those that have as their investment objective the tracking of an index.
11. ASIC received four submissions in response to CP 374. The feedback generally supported our proposals to remake [CO 13/721], including the amendment to extend relief to a broader range of quoted ETFs.
12. ASIC has self-certified that it is not required to prepare an Impact Analysis for the Instrument. This is because, following a formal consultation process with affected stakeholders, ASIC has assessed that [CO 13/721] is operating effectively and efficiently.
13. The Office of Impact Analysis confirmed that ASIC is not required to prepare an Impact Analysis for the Instrument.

## **Operation of the instrument**

### ***Background***

14. Subsection 601QA(1) of the Corporations Act provides that ASIC may declare a provision modified or exempt a person from a provision of Chapter 5C of the Act.
15. Subsection 655A(1) of the Corporations Act provides that ASIC may declare a provision modified or exempt a person from a provision of Chapter 6 of the Act.
16. Subsection 673(1) of the Corporations Act provides that ASIC may declare a provision modified or exempt a person from a provision of Chapter 6C of the Act.
- 17.. Subsection 1020F(1) of the Corporations Act provides that ASIC may declare a provision modified or exempt a person from all or specified provisions of Part 7.9 of the Act.

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18. Subsection 1243(2) of the Corporations Act provides that ASIC may declare certain provisions modified or exempt a specified class of CCIVs, CCIV sub-funds, or entities in relation to a specified class of CCIVs or CCIV sub-funds, from complying with certain parts of Chapter 8B of the Corporations Act.

***Provisions of the Instrument***

19. Under paragraph 601FC(1)(d) of the Corporations Act, a responsible entity for a registered scheme is required to treat members who hold interests of the same class equally, and members who hold interests of different classes fairly. This requirement applies to the responsible entity of an ETF. Section 5 of the Instrument exempts a responsible entity of a registered scheme from the requirements in paragraph 601FC(1)(d) of the Corporations Act to the extent that it prevents the responsible entity from permitting only authorised participants to withdraw from the ETF. Section 6 of the Instrument exempts a responsible entity of a registered scheme from the requirements in paragraph 601FC(1)(d) of the Corporations Act to the extent that it would prevent the responsible entity from providing certain information to authorised participants before other members.
20. Under paragraph 1224D(2)(b) of the Corporations Act, a corporate director of a retail CCIV is required to treat members who hold shares of the same class equally. This requirement applies to the corporate director of an ETF. Section 5 of the Instrument exempts a corporate director of a retail CCIV from the requirements in paragraph 1224D(2)(b) of the Corporations Act to the extent that it prevents the corporate director from permitting only authorised participants to withdraw from the ETF. Section 6 of the Instrument exempts a corporate director of a retail CCIV from the requirements in paragraph 1224D(2)(b) of the Corporations Act to the extent that it would prevent the corporate director from providing certain information to authorised participants before other members.
21. Under section 1017B of the Corporations Act, when a financial product is acquired by a retail investor, an issuer of the financial product must notify the holder of the product of any of material changes and significant events as described under subsection 1017B(1A) of the Corporations Act, which provides for ongoing obligations in relation to the disclosure of material changes and significant events. This requirement applies to the responsible entity of a registered scheme and to a CCIV. Section 7 of the Instrument exempts the responsible entity of an ETF that is a registered scheme from the requirements in 1017B to allow it to provide continuous disclosure to the market, rather than providing individual notifications to each retail investor. Section 7 of the Instrument also provides the same exemption to a CCIV where a sub-fund of the CCIV is an ETF.
22. Under subsection 606(1) of the Corporations Act, the acquisition of a relevant interest in issued voting shares in a listed company, an unlisted company with more than 50 members or a listed managed investment scheme is prohibited unless acquired under one of the exceptions in s611 of the Corporations Act. This prohibition extends to the relevant interests in the underlying securities of

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an ETF acquired by reason of acquiring an interest or shares in the ETF. Section 609 of the Corporations Act outlines the situations not giving rise to a relevant interest. Section 8 of the Instrument modifies section 609 by declaring that there is no relevant interest as follows:

- (a) a member of a registered scheme who is an authorised participant in relation to the scheme does not have a relevant interest in securities that form part of scheme property of the scheme merely because the scheme has an acquisition and withdrawal facility;
  - (b) a member of a sub-fund of a CCIV who is an authorised participant in relation to the sub-fund does not have a relevant interest in securities that form part of the assets of the sub-fund merely because the sub-fund has an acquisition and withdrawal facility.
23. Section 671B of the Corporations Act requires a person to provide information to a responsible entity or a listed scheme or to a listed company in relation to substantial holdings of interests or shares in the scheme or company. Under section 672B of the Corporations Act, a person is required to give a direction under section 672A of the Corporations Act (a “beneficial tracing notice”) to disclose certain details connected with relevant interests. Under section 672DA of the Corporations Act, listed companies and responsible entities of listed registered schemes are required to keep a register of information relating to (among other things) relevant interests held in shares in the company or interests in the scheme. This requirement applies to both the responsible entity and corporate director of an ETF. Section 9 of the Instrument modifies the substantial holding and beneficial tracing provisions in Chapter 6C of the Corporations Act and among other things, sets out how a members’ relevant interest in securities held by the ETF is determined for the purposes of those provisions.
24. The Instrument will commence on the day after it is registered.

### **Retrospective application**

25. The Instrument and Repeal Instrument do not have retrospective application.

### **Legislative instrument and primary legislation**

26. The subject matter and policy implemented by the Instrument are more appropriate for a legislative instrument rather than primary legislation because:
- (a) the modifications made by the Instrument are highly specific amendments designed to ensure the application of primary legislation is consistent with the intended policy and the enabling provisions in the primary legislation. The Instrument operates to provide a more comprehensive regulatory framework that sits alongside the primary law;
  - (b) ASIC considers that [CO 13/721] is operating effectively and efficiently and continues to form a necessary and useful part of the legislative framework;

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- (c) the Instrument preserves the effect of [CO 13/721], which was otherwise due to sunset on 1 April 2024 and has also been extended to apply to a wider class of ETFs; and
  - (d) ASIC understands that the Government will consider whether to make future amendments to the Corporations Act to incorporate the Instrument into primary law or regulations. Therefore, the Instrument has been made for a term of five years to allow sufficient time for this to occur.

### **Duration of the instrument**

- 27. ASIC considers that five years is the appropriate duration for the Instrument, after which the Instrument will sunset unless action is taken to remake the Instrument. Section 10 of the Instrument repeals the Instrument at the start of 1 April 2029.
- 28. ASIC considers the duration of five years is appropriate to ensure the efficient operation of ETFs and to provide certainty to ETF operators. The relief overcomes practical difficulties which would otherwise require issuers to apply for individual relief when seeking to quote ETFs on ASX or Cboe.

### **Legislative authority**

- 29. The source of power to make the Instrument is subsections 601QA(1), 655A(1), 673(1), 1020F(1) and 1243(2) of the Corporations Act. The sources of power to make the Repeal Instrument are subsections 601QA(1), 655A(1), 673(1), 1020F(1) and 1243(2) of the Corporations Act.
- 30. The Instrument and Repeal Instrument are disallowable legislative 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 (Relief to facilitate quotation of exchange traded products) Instrument 2024/147 (the Instrument) and ASIC Corporations (Repeal) Instrument 2024/ 148 (the Repeal Instrument).***

### Overview

1. The Instrument provides relief to:
  - (a) exempt responsible entities and corporate directors from the equal treatment duty for withdrawals from the ETF and for providing information to authorised participants;
  - (b) exempt ETF issuers from ongoing disclosure requirements to allow continuous disclosure to the market rather than individual notification to retail investors;
  - (c) modify the relevant interest provisions to ensure that the ability to request withdrawals under an ETF's acquisition and withdrawal facility does not give a member a relevant interest; and
  - (d) modify the substantial holding and beneficial tracing provisions to assist members to assess their relevant interest in the underlying securities of the ETF for the purposes of those provisions.
2. The Repeal Instrument repeals [CO 13/721] as this instrument is superseded by the Instrument upon its commencement. The Repeal Instrument repeals [CO 13/721] ahead of its automatic repeal on 1 April 2024.

### Assessment of human rights implications

3. The Instrument and the Repeal Instrument do not engage any of the applicable rights or freedoms.

### Conclusion

4. The Instrument and the Repeal Instrument are 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*.