



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Record-Keeping Requirements for Australian Financial Services Licensees when Giving Personal Advice) Instrument 2024/508 and ASIC Corporations and Credit (Repeal) Instrument 2024/507

This is the Explanatory Statement for *ASIC Corporations (Record-Keeping Requirements for Australian Financial Services Licensees when Giving Personal Advice) Instrument 2024/508* (the **Instrument**) and *ASIC Corporations and Credit (Repeal) Instrument 2024/507* (the **Repeal Instrument**).

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

Summary

1. The Instrument modifies Division 3 of Part 7.6 of the *Corporations Act 2001 (Act)*, as it applies to all Australia financial services (**AFS**) licensees, to insert a new notional section 912G that imposes specific record-keeping requirements for AFS licensees when the licensee or their representative (including an advice provider) give personal advice to retail clients.
2. Under section 912G, licensees must ensure that, in relation to the provision of personal advice, certain records are kept that demonstrate compliance with the best interests duty and related obligations under Division 2 of Pt 7.7A of the Act.
3. The Instrument preserves the effect of requirements formerly provided for in Class Order [CO 14/923] (**ICO 14/923**), which expired or ‘sunset’ on 1 October 2024 with minimal changes. [CO 14/923] has been repealed by the Repeal Instrument.
4. Following consultation on a proposal to remake [CO 14/923], ASIC considered that its requirements continued to form a necessary and useful part of the legislative framework. As a result, under the Instrument, ASIC extends the requirements for a five-year period to the start of 1 October 2029.
5. As the Instrument preserves the effect of [CO 14/923] with no significant changes, this Explanatory Statement should be read in conjunction with the Explanatory Statements for CO 14/923 and *ASIC Corporations (Amendment) Instrument 2016/1006*.

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6. The Repeal Instrument repeals [CO 14/923] and also repeals *ASIC Corporations and Credit (Breach Reporting—Reportable Situations) Instrument 2021/716 (LI 2021/716)* and *ASIC Credit (Breach Reporting—Prescribed Commonwealth Legislation) Instrument 2021/801 (LI 2021/801)*. LI 2021/801 and LI 2021/716 were to expire on 5 October 2024 and 1 October 2024 respectively. The relief and requirements in LI 2021/716 and LI 2021/801 has been remade in *ASIC Corporations and Credit (Breach Reporting—Reportable situations) Instrument 2024/620*.

Purpose of the instrument

7. The purpose of the Instrument is to continue the requirements in [CO 14/923] in substantially the same form.
8. The Instrument is made because [CO 14/923] was due to sunset under the *Legislation Act 2003 (Legislation Act)* on 1 October 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.
9. 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. Following consultation, ASIC formed the view that [CO 14/923] was broadly operating effectively and efficiently and continued to form a necessary and useful part of the legislative framework. Therefore, the Instrument was remade using ASIC's current style and format, while preserving the current effect of the instrument.
10. It is important for AFS licensees to keep and have access to records of personal advice provided to clients by the licensee or its representatives because having good record-keeping systems in place will support the ongoing provision of quality advice to clients.
11. Keeping and having access to records will also help licensees to supervise their representatives, including advice providers, when they provide advice to clients. The ongoing supervision by a licensee of their representatives is critical to ensure that they continue to comply with the requirements in the law.
12. In addition, keeping records will help consumers to hold the licensee or advice provider accountable for the quality of advice they receive. It would also be difficult for external dispute resolution bodies, such as the Australian Financial Complaints Authority, to consider and resolve any disputes between clients and the licensee or their representatives without reviewing records kept by the licensee.

Consultation

13. Before making the Instrument, ASIC consulted publicly (in *CS 10 Proposed extension of breach reporting and record-keeping legislative instruments*) on the proposal to remake [CO 14/923] using ASIC's current style and format, while preserving the current effect of the instrument. Two submissions were

received which considered that [CO 14/923] should be incorporated into the law in some form and requested substantive changes.

14. ASIC determined to remake [CO 14/923] using ASIC's current style and format, while preserving its requirements. While acknowledging requests for change in feedback, ASIC did not consider there were grounds for the changes suggested, having regard to the objectives for the record keeping requirements in [CO 14/923].

Operation of the instrument

Instrument

15. Section 1 of the Instrument specifies the title of the legislative instrument.
16. Section 2 of the Instrument specifies that the instrument commences on the day after it is registered on the Federal Register of Legislation. The Instrument does not have retrospective application.
17. Section 3 of the Instrument specifies the modification power in paragraph 926A(2)(c) of the Act under which ASIC makes this instrument.
18. Section 4 of the Instrument specifies that 'Act' means the *Corporations Act 2001*.
19. Section 5 of the Instrument declares that Part 7.6 of the Act (except Divisions 4 and 8) apply in relation to all financial services licensees (and former financial service licensees) and authorised representatives (and former authorised representatives) as if Division 3 of that Part has been modified or varied by inserting a new section 912G that imposes record-keeping requirements for AFS licensees in relation to personal advice.
20. Subsection 912G(1) states that the record-keeping requirements imposed under the section apply in relation to personal advice given to retail clients by the AFS licensee or a representative of the AFS licensee. A representative of the AFS licensee includes an authorised representative of the licensee or an advice provider employed by the licensee.
21. Subsection 912G(2) specifies the records that AFS licensees must ensure are kept in relation to the provision of personal advice given to retail clients by the licensee or their representatives. Under this section, licensees must ensure that records of the following matters are kept:
 - (a) the information relied on and the action taken by the provider that indicates the provider has, in accordance with subsection 961B(1), acted in the best interests (the *best interests duty*) of the client in relation to the advice;
 - (b) if the 'safe harbour' steps in subsection 961B(2) of the Act are relied upon to demonstrate that the best interests duty has been satisfied—the information relied on and the action taken by the provider that satisfies the steps in subsection 961B(2);

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- (c) the advice given, including the reasons why, under section 961G, it would be reasonable to conclude that the advice is appropriate to the client, had the provider has satisfied the best interests duty under section 961B; and
 - (d) where the provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the interests of any person mentioned in subsection 961J(1)—the information relied on and the action taken by the provider to indicate that the provider has given priority to the client’s interests when giving the advice.
22. For the purposes of this subsection, the keeping of records that satisfy the record-keeping obligation in paragraph 912G(2)(b) will satisfy the record-keeping obligation in paragraph 912G(2)(a).
23. Subsection 912G(3) specifies that records should be kept for a period of at least seven years after the day the personal advice is provided to the client, and an AFS licensee must ensure that the records are accessible by the licensee at all times during that period in a way that enables the licensee to produce the records. The obligation continues to apply even if the AFS licensee ceases to be an AFS licensee during the period that the records are required to be kept and accessible.
24. Subsection 912G(4) provides that an authorised representative who provides personal advice must:
- (a) give the advice records to the AFS licensee if the licensee requests the records, provided the request is made:
 - (i) in connection with the obligations imposed on the licensee under Chapter 7 of the Act;
 - (ii) within seven years after the day on which the personal advice was provided to the client; and
 - (b) keep records for a period of at least seven years after the day personal advice was provided to the client, unless the records have been given by the authorised representative to the licensee.
25. The obligation continues to apply even if the authorised representative ceases to be an authorised representative of the AFS licensee during the period that the records are required to be given or kept.
26. The effect of subsection 912G(5) is that the record-keeping obligations imposed on authorised representatives are in addition to the record-keeping obligations imposed on licensees.
27. Subsection 912G(6) provides that the record-keeping obligations do not apply to the provision of personal advice where the modified best interests duty applies.
28. Subsection 912G(7) specifies that the record-keeping obligations in section 912G (other than paragraph (2)(d) and subsection (3) as it relates to that paragraph) do not apply in the following circumstances:

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- (a) the provision of personal advice for which a Statement of Advice is not required to be given to the client; or
 - (b) the provision of personal advice for which a record of the advice is kept in accordance with subsection 946B(3A) of the Act.
29. Section 6 of the Instrument specifies that the Instrument is repealed at the start of 1 October 2029.

Repeal Instrument

30. Section 1 of the Repeal Instrument specifies the title of the legislative instrument.
31. Section 2 of the Repeal Instrument specifies that the instrument commences on the day after it is registered on the Federal Register of Legislation. The Instrument does not have retrospective application.
32. Section 3 of the Repeal Instrument specifies that it is made under subsection 926A(2) of the Act and subsection 109(3) of the *National Consumer Credit Protection Act 2009 (Credit Act)*.
33. Section 4 of the Repeal Instrument provides that any instrument specified to be repealed in a Schedule to the Repeal Instrument is repealed as set out in the Schedule.
34. Clause 1 of Schedule 1 of the Repeal Instrument repeals [CO 14/923], which was otherwise scheduled to sunset on 1 October 2024. Clause 2 of Schedule 1 repeals LI 2021/716 which was to be repealed on 5 October 2024 and Clause 3 of Schedule 1 repeals LI 2021/801 which was to be repealed on 1 October 2024.

Legislative instrument and primary legislation

35. The subject matter and policy implemented by the Instrument is more appropriate for a legislative instrument rather than primary legislation because:
- (a) the matters contained in the Instrument are a specific amendment designed to ensure the application of primary legislation applies in a way that is consistent with the intended policy and the enabling provision in the primary legislation; and
 - (b) the Instrument preserves the effect of [CO 14/923], which was otherwise due to sunset on 1 October 2024.
36. It will be a matter for the Government and for Parliament if primary legislation or regulations may be amended in future to include the requirements in the Instrument.

Duration of the instrument

37. The duration of the Instrument is five years.

Legislative authority

38. The Instrument is made under paragraph 926A(2)(c) of the Act and the Repeal Instrument is made under subsection 926A(2) of the Act and subsection 109(3) of the Credit Act.
39. Subsections 926A(2) and 109(3) provide that, among other powers, ASIC may declare that relevant provisions of the Act and the Credit Act, respectively, apply as if specified provisions were omitted, modified or varied as specified in the declaration.
40. Under subsection 33(3) of the *Acts Interpretation Act 1901*, 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, amend, or vary any such instrument.
41. The Instrument and Repeal Instrument are disallowable legislative instruments.

Statement of Compatibility with Human Rights

42. 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 (Record-Keeping Requirements for Australian Financial Services Licensees when Giving Personal Advice) Instrument 2024/508 and ***ASIC Corporations and Credit (Repeal) Instrument 2024/507***.

Overview

1. *ASIC Corporations (Record-Keeping Requirements for Australian Financial Services Licensees when Giving Personal Advice) Instrument 2024/508 (Instrument)* preserves the effect of requirements formerly provided under Class Order [CO 14/923] *Records-keeping obligations for Australian financial services licensees when giving personal advice ([CO 14/923])*.
2. *ASIC Corporations and Credit (Repeal) Instrument 2024/507 (Repeal Instrument)* repealed [CO 14/923], which expired or ‘sunset’ on 1 October 2024. The Repeal Instrument also repealed *ASIC Corporations and Credit (Breach Reporting—Reportable Situations) Instrument 2021/716 (LI 2021/716)* (**LI 2021/716**) and *ASIC Credit (Breach Reporting—Prescribed Commonwealth Legislation) Instrument 2021/801 (LI 2021/801)* which expired on 5 and 1 October 2024 respectively. The relief and requirements in LI 2021/716 and LI 2021/801 has been remade in *ASIC Corporations and Credit (Breach Reporting—Reportable Situations) Instrument 2024/620*.
3. Following consultation, ASIC considered that [CO 14/923] was broadly operating effectively and efficiently to achieve its objectives and continued to form a necessary and useful part of the legislative framework. As a result, through the Instrument, we have extended the requirements formerly in [CO 14/923] for a five-year period to 1 October 2029.
4. The Instrument modifies Division 3 of Part 7.6 of the *Corporations Act 2001* (the *Act*), as it applies to all Australian Financial Services (*AFS*) licensees, to insert a new notional section 912G that imposes record-keeping requirements for AFS licensees when the licensee or their representative (including an advice provider) give personal advice to retail clients. Under section 912G, AFS licensees must ensure that, in relation to the provision of personal advice, certain records are kept that demonstrate compliance with the best interests duty and related obligations under Division 2 of Pt 7.7A of the Act.

Assessment of human rights implications

5. The Instrument engages the right to privacy and reputation in Article 17 of the International Covenant on Civil and Political Rights (*ICCPR*) (*Article 17*). Article 17 prohibits unlawful or arbitrary interferences with a person’s privacy,

family, home (which the UN Human Rights Committee has interpreted as including a person's workplace) and correspondence. It provides that persons have the right to the protection of the law against such interference. The UN Human Rights Committee has not defined 'privacy'.

6. A record of personal advice may contain 'personal information' as defined in the *Privacy Act 1988*, being information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an identified individual or an individual who is reasonably identifiable.
7. The right in Article 17 is engaged by the Instrument by reason that it involves the use and disclosure of personal information.
8. The Instrument is compatible with the rights recognised in Article 17 by reason that any interference with a person's privacy resulting from compliance with the Instrument will be lawful and not arbitrary. In particular:
 - (a) The Instrument is made in accordance with ASIC's power to declare that the provisions in Part 7.6 (other than Divisions 4 and 8) of the Act apply in relation to a class of persons (i.e. AFS licensees and authorised representatives, and former licensees and authorised representatives) as if the specified provisions were omitted, modified or varied as specified in the declaration (see subsection 926A(2) of the Act);
 - (b) The Instrument will enable AFS licensees to comply with their AFS licensee obligations. Under paragraph 912A(1)(ca) of the Act, a licensee must take reasonable steps to ensure that its representatives comply with financial services laws. In order to satisfy this obligation, a licensee must have full knowledge of the activities of its representatives. Having access to its representatives' records in relation to the advice they give to clients is essential for licensees to be able to properly monitor and supervise representatives and to compensate clients who suffer loss because of the actions of a representative.
 - (c) The Instrument will further the objects of Chapter 7 of the Act, including promoting confident and informed decision making by consumers of financial products and services (see paragraph 760A(a) of the Act). Consumers will have confidence that authorised representatives will comply with the financial services laws because they will be monitored and supervised by their authorising licensees. Consumers will also have confidence that, because licensees will be able to access advice records, they can be compensated where they suffer loss because of the actions of authorised representatives. Ensuring the ability of licensees to properly monitor and supervise representatives will also promote fairness, honesty and professionalism by those who provide financial services (see paragraph 760A(b) of the Act).
 - (d) An authorised representative who is an adviser is under an obligation through the Financial Services Guide requirement to tell the client, before

providing financial services to them, that the adviser is acting on behalf of the licensee. As such, the client would reasonably expect the adviser to use or disclose the personal information to the authorising licensee if the authorising licensee asks for it for the purposes of assessing whether the advice given on the licensee's behalf complies with the law.

- (e) The obligation on authorised representatives who are advisers to give advice records to the licensee if the licensee requests the records is subject to a number of safeguards, including:
 - (i) It is limited to situations where the licensee seeks access in connection with the obligations imposed on the licensee under Chapter 7 of the Act; and
 - (ii) Licensees are required to maintain the confidentiality of the information contained in the advice records in accordance with the common law principles of confidentiality and Principle 6(2)(b) of the Australian Privacy Principles.
- 9. If the Instrument was considered to limit the right in Article 17, ASIC considers that the Instrument is nevertheless compatible with that right. The right in Article 17 is not absolute. As noted, the right has implied limitations ('unlawful' and 'arbitrary') and may be subject to a permissible limitation where that limitation aims to achieve a legitimate objective, there is a rational connection between the limitation and the objective and the limitation is reasonable, necessary and proportionate. Any limitation imposed on the right by the Instrument has a clear legal basis, in that it:
 - (a) *Aims to achieve a legitimate objective* – The Instrument will enable licensees to comply with their AFS licensee obligations under s912A(1)(ca) of the Act to monitor and supervise representatives to ensure that they comply with the financial services laws. It will also further the statutory objects of Chapter 7 of the Act by promoting confident and informed decision making by consumers of financial products and services, and promoting fairness, honesty and professionalism by those who provide financial services.
 - (b) *Has a rational connection with the objective* – By ensuring that licensees can have access to client advice records, the Instrument will allow licensees to comply with their AFS licensee obligations of properly monitoring and supervising representatives. This will promote confident and informed decision making by consumers of financial products and services, and fairness, honesty and professionalism by those who provide financial services.
 - (c) *Is reasonable, necessary and proportionate* – The Instrument is necessary to achieve the legitimate objectives described above because it gives licensees confidence that they will be able to have access to advice records, and gives consumers confidence that licensees can properly monitor and supervise their representatives. The Instrument contains

adequate safeguards in that the obligation on authorised representatives to give advice records to the licensee is limited to situations where the licensee seeks access in connection with the obligations imposed on the licensee under Chapter 7 of the Act. Further, AFS licensees are required to maintain the confidentiality of the information contained in the advice records in accordance with the common law principles of confidentiality and the Australian Privacy Principles.

Conclusion

10. This Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of ‘human rights’ in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.