

# Attachment 1 to CP 296: Draft regulatory guide



**ASIC**

Australian Securities & Investments Commission

REGULATORY GUIDE 000

## **Funds management: Establishing and registering a fund**

October 2017

### **About this guide**

This guide is for responsible entities of registered managed investment schemes (registered schemes), corporate directors of corporate collective investment vehicles (CCIVs) and passport fund operators of Australian passport funds, and their advisers.

It covers our requirements for establishing and registering a managed investment scheme or CCIV and subsequently registering as an Australian passport fund. It sets out our guidance on how we apply:

- the requirements in the Corporations Act when deciding whether to register a managed investment scheme or CCIV; and
- the provisions under the Asia Region Funds Passport when deciding whether to register a registered scheme as an Australian passport fund.

Note: This draft guide is based on the exposure drafts of the Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2017 and Corporations Amendment (Asia Region Funds Passport) Bill 2017, released 25 August 2017.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This draft guide was issued in October 2017 and is based on legislation and regulations as at the date of issue.

### Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

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## A Overview

### Key points

This guide provides information on how to establish and register a managed investment scheme or a corporate collective investment vehicle (CCIV).

A managed investment scheme or a CCIV must meet certain requirements to become registered under the *Corporations Act 2001* (Corporations Act).

This guide also provides information on how to register as an Australian passport fund for the purposes of the Asia Region Funds Passport.

### How our guidance applies

RG 000.1 This guide is for:

- (a) responsible entities of registered managed investment schemes (registered schemes);
- (b) corporate directors of CCIVs;
- (c) Australian passport fund operators; and
- (d) their advisers.

RG 000.2 We will apply this guide when assessing applications or notifications lodged with ASIC to:

- (a) register a managed investment scheme or CCIV;
- (b) notify establishment of a sub-fund within an existing registered CCIV; and
- (c) register a registered scheme as an Australian passport fund.

Note: Under the draft legislation, only registered schemes are eligible to be Australian passport funds. If the legislation is changed to also allow retail CCIVs to be Australian passport funds, we will amend our guidance accordingly.

RG 000.3 This guide does not apply to operators of foreign passport funds lodging a notification to enter or operate in Australia as a host economy under the Asia Region Funds Passport.

Note: Draft Regulatory Guide 000 *Foreign passport funds* covers the requirements for foreign passport fund operators lodging a notification to offer interests in Australia, and is available on our website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 296.

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## Registering a managed investment scheme or CCIV

RG 000.4 This section summarises the requirements for registering a managed investment scheme or a CCIV—see our detailed guidance in Section B (for managed investment schemes) and Section C (for CCIVs).

### Registering a managed investment scheme

RG 000.5 To register a managed investment scheme, the responsible entity must:

- (a) be an Australian public company registered under the Corporations Act; and
- (b) hold an Australian financial services (AFS) licence authorising it to operate a registered scheme.

RG 000.6 An application to register a managed investment scheme can be lodged with ASIC in hard copy format or online.

RG 000.7 For a managed investment scheme to be registered, s601EB(1) of the Corporations Act sets out that:

- (a) the application must:
  - (i) state the name of the scheme, the name and address of the responsible entity, and the name and address of the person who has consented to act as auditor of the compliance plan; and
  - (ii) be accompanied by a copy of the constitution, a copy of the compliance plan and a statement signed by the directors (directors' statement) that the constitution meets s601GA and 601GB and the compliance plan meets s601HA (using [Form 5103 Directors' statement relating to application for registration of a managed investment scheme](#)): see s601EA of the Corporations Act;
- (b) the responsible entity must be an Australian public company holding an AFS licence: see s601FA of the Corporations Act;
- (c) the constitution must meet the requirements of s601GA and 601GB of the Corporations Act;
- (d) the compliance plan must set out the adequate measures the responsible entity will apply in operating the managed investment scheme: see s601HA of the Corporations Act;
- (e) a copy of the compliance plan (signed by the directors of the responsible entity) must be lodged with ASIC: see s601HC of the Corporations Act; and
- (f) arrangements that satisfy the requirements of s601HG of the Corporations Act must be in place to audit compliance with the compliance plan.

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- RG 000.8 When an application to register a managed investment scheme is lodged with ASIC, we assess whether it complies with the requirements of the Corporations Act. We must register a managed investment scheme within 14 days of lodgement (14-day registration period), unless it appears to us that an application does not meet one or more legislative requirements under s601EB.
- RG 000.9 When assessing an application to register a managed investment scheme, we may seek clarification about the information in the application or the documents attached to it during the 14-day registration period. We may also ask for amendments to the application form, constitution, compliance plan or directors' statement if they do not appear to comply with our interpretation of the law as set out in our regulatory guides. We may also refuse the application if we are of the opinion there is non-compliance, without asking for amendments.
- RG 000.10 We will refuse to register the managed investment scheme if the responsible entity or its advisers are unwilling or unable to make any requested amendments within the 14-day registration period, and it appears to us that s601EB is not met.
- RG 000.11 When a managed investment scheme is registered, we give it an Australian Registered Scheme Number (ARSN) (see s601EB(2)) and keep a record of it: see s601EB(3).

### **Registering a CCIV**

- RG 000.12 We may only register a CCIV under draft s1137(1) of the Corporations Act if:
- (a) the company is one limited by shares; and
  - (b) the corporate director is an Australian public company that holds an AFS licence authorising it to operate a CCIV.
- RG 000.13 An application to register a CCIV can only be lodged online.
- RG 000.14 The application must be accompanied by a copy of the constitution: see draft s1137A of the Corporations Act.
- RG 000.15 When an application to register a CCIV is lodged with ASIC, we are not required to assess whether it meets the requirements of the Corporations Act: see draft s1137. However, we will refuse an application if the requirements of draft s1137 are not met.
- RG 000.16 While we are not required to assess an application for registration of a CCIV, we may do so if we think appropriate. Our decision whether to conduct an assessment of the application will be influenced by our risk assessment.

RG 000.17 Because risks change, the criteria used for our risk assessment will be driven by a range of factors. These may include operational situations and non-standard events. We will review the criteria on an ongoing basis and adapt it when necessary to ensure it remains appropriate.

RG 000.18 We will refuse to register the CCIV if:

- (a) the company is not limited by shares; or
- (b) the corporate director is not an Australian public company that holds an AFS licence authorising it to operate a CCIV.

### Retail and wholesale CCIVs

RG 000.19 Different requirements apply to retail CCIVs and wholesale CCIVs. This may impact on our assessment. A retail CCIV is subject to the full regulatory framework for CCIVs, while a wholesale CCIV is subject to a reduced set of requirements. These differences are summarised in Table 1 below.

**Table 1: Requirements for retail and wholesale CCIVs**

Requirement	Retail CCIV	Wholesale CCIV
<b>Registration</b>	Yes (see draft s1137)	Yes (see draft s1137)
<b>Corporate director</b>	Yes (certain duties owed under draft s1156)	Yes (no duties owed)
<b>Depositary</b>	Yes (see draft s1163)	No (optional under draft s1163A)
<b>Constitution</b>	Yes (must make adequate provision for content requirements (see draft s1155(1)))	Yes (no prescribed content requirements)
<b>Compliance plan</b>	Yes (must set out adequate measures: see draft s1161A and draft updated Regulatory Guide 132 <i>Investment funds: Compliance and oversight</i> )	No

Note: Requirements apply as above unless an exemption is granted.

RG 000.20 An application to register a retail CCIV must be accompanied by a copy of the compliance plan: see draft s1161 of the Corporations Act.

RG 000.21 The constitution of a retail CCIV must contain certain contents: see draft s1155 of the Corporations Act.

RG 000.22 While we are not required to assess whether the constitution or compliance plan of a retail CCIV meets the requirements of the Corporations Act as part

of registering the retail CCIV, we may choose to do so. We may suggest amendments to be made during the registration period.

Note: We may also review the constitution or compliance plan to assess compliance with the requirements of the Corporations Act at any time after registration of a retail CCIV.

### Asset kind classification

- RG 000.23 When lodging an application, it is necessary to select the asset kinds relevant to the managed investment scheme or CCIV. Where an asset is held as ‘incidental property’ (see [Pro Forma 209 Australian financial services licence conditions \(PF 209\)](#)), this asset kind does not also need to be selected.
- RG 000.24 Each asset kind in the application maps to the broader selections available for the purposes of applying for an AFS licence (see [Regulatory Guide 2 AFS Licensing Kit: Part 2—Preparing your AFS Licence application \(RG 2\)](#), in particular RG 2.84–RG 2.86).
- RG 000.25 It is important for responsible entities and corporate directors to ensure the AFS licence authorisation they hold, or for which they are applying, correlates to the asset kind classifications. It is their responsibility to ensure the AFS licence sought is appropriate to the way in which they intend to operate a registered scheme or CCIV, and remains appropriate given the asset kinds in which they may subsequently invest.

### Registering as an Australian passport fund

- RG 000.26 An application to register a registered scheme as an Australian passport fund must be in the prescribed form, be accompanied by a copy of the Product Disclosure Statement (PDS) (as required before the fund can offer interests to retail clients—see draft s1212(2) of the Corporations Act) and be lodged online: see Table 2.
- RG 000.27 A managed investment scheme must be registered under the Corporations Act before it may become registered as an Australian passport fund. However, it does not need to be registered at the time the application to register as an Australian passport fund is lodged.
- RG 000.28 We must register the registered scheme as an Australian passport fund if we consider that the Australian passport fund operator:
- (a) meets the eligible entity requirements in section 3 of Annex 2 of the [Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport](#) (Memorandum of Cooperation); and
  - (b) is likely to comply with the Corporations Act, including the Australian Passport Rules, and the *Australian Securities and Investments Commission Act 2001* (ASIC Act).



Note: The Australian Passport Rules will be made by the relevant Minister as a legislative instrument under draft s1211(1) and 1211A of the Corporations Act. Under draft s1211(2), the Australian Passport Rules must be substantially the same as the Passport Rules set out in Annex 3 to the Memorandum of Cooperation.

- RG 000.29 There is no prescribed timeframe within which we must conclude our assessment and make a decision about whether to register the registered scheme as an Australian passport fund.
- RG 000.30 In assessing an application to register as an Australian passport fund, we may:
- (a) ask for further information about answers the Australian passport fund operator has given on the application form, particularly if they are unclear or do not appear to be consistent with the law and/or our guidance;
  - (b) give the Australian passport fund operator the opportunity to make amendments to the answers it has given;
  - (c) seek clarification of the contents of the PDS; or
  - (d) give the Australian passport fund operator the opportunity to make amendments to the PDS.
- RG 000.31 We will refuse registration as an Australian passport fund if the Australian passport fund operator or its advisers are unwilling or unable to provide information we need or make amendments that are needed to enable us to register the registered scheme as an Australian passport fund.

## What to include with an application

**Table 2: Application requirements for registering a managed investment scheme, a CCIV or an Australian passport fund**

Application requirements	Managed investment scheme	CCIV	Australian passport fund
<b>Application form</b>	<a href="#">Form 5100</a> <i>Application for registration of a managed investment scheme</i>	An ASIC Form	An ASIC Form
<b>Constitution</b>	Must meet s601GA and s601GB	For a retail CCIV, may be reviewed against draft s1155	Must meet draft s1212 and 1212A, as well as the relevant requirements for registered schemes
<b>Compliance plan</b>	Must meet s601HA	For a retail CCIV, may be reviewed against draft s1161A	Not applicable

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Application requirements	Managed investment scheme	CCIV	Australian passport fund
<b>Directors' statement</b>	<a href="#">Form 5103</a> <i>Directors' statement relating to application for registration of a managed investment scheme</i>	Not applicable	Not applicable
<b>PDS</b>	Not applicable	Not applicable	Must meet Div 2 of Pt 7.9
<b>Fee</b>	Yes—see <a href="#">Information Sheet 30</a> <i>Fees for commonly lodged documents</i> (INFO 30)	Yes	Yes
<b>Additional information</b>	Not applicable	Not applicable	The Australian passport fund operator must supply: <ul style="list-style-type: none"> <li>• an Australian police record check;</li> <li>• a bankruptcy check; or</li> <li>• a statutory declaration that it is of good standing</li> </ul>

Note 1: For a CCIV, we may choose to raise issues on the constitution and compliance plan following a risk assessment.

Note 2: For an Australian passport fund, if a relevant party has resided overseas during the last 10 years, an overseas police check will also be required.

## How we assess an application to register a managed investment scheme, a CCIV or an Australian passport fund

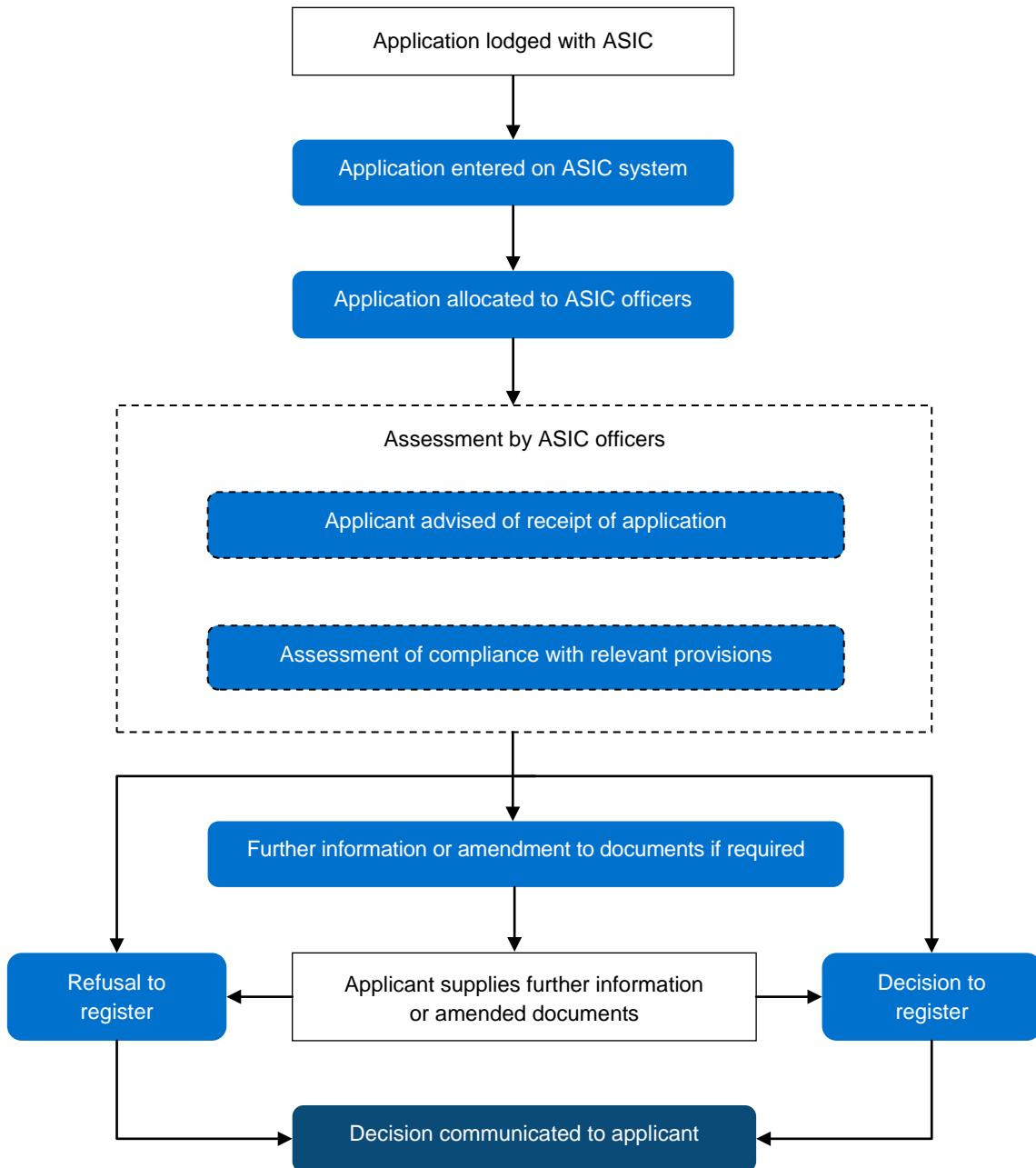
- RG 000.32 Once the application has been lodged with ASIC, we enter it into the ASIC system and allocate it to ASIC officers. The responsible entity, corporate director or Australian passport fund operator will be advised that we have received the application.
- RG 000.33 Depending on the type of application, we will assess its compliance with the provisions relevant to registered schemes, CCIVs or Australian passport funds. We will contact the responsible entity, corporate director or Australian passport fund operator to let them know whether we require more information or amendment to the application or documents, or if we have decided to register or refuse the application.
- RG 000.34 If we request more information or amendments, we will give the responsible entity, corporate director or Australian passport fund operator a reasonable time to supply any further information or make any amendments required before making a decision whether to register or refuse the application. We will communicate our decision to the responsible entity, corporate director or Australian passport fund operator once they supply any further information or make any amendments required.

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Note: If the responsible entity, corporate director or Australian passport fund operator does not supply the information or make the amendments required within a reasonable time, we will refuse the application for registration if we consider it does not meet the requirements to be granted.

RG 000.35 For a visual representation of this process, see Figure 1.

**Figure 1: Application assessment process**



Note 1: The process in this flowchart is set out at RG 000.32–RG 000.34 (accessible version).

Note 2: Applicants may choose to withdraw their application at any stage of the process. However, this does not mean that they will be entitled to a refund of the application fee.

Note 3: Figure 1 does not apply to the process we undertake for lodgement of a notification for the establishment of a sub-fund of a CCIV.

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## B Registering a managed investment scheme

### Key points

To register a managed investment scheme an application must be lodged with ASIC.

The application must be in the approved form and the contents of the application and necessary supporting documentation must meet the requirements of the Corporations Act.

This section explains how we apply those requirements when assessing an application to register a scheme.

### Applying to register a scheme

- RG 000.36 An application to register a managed investment scheme must be lodged with ASIC and meet the requirements in s601EA.
- RG 000.37 After we receive an application, we will undertake a ‘completeness check’ to see whether it is complete and acceptable for assessment. If it does not pass this check, we will reject the application and the responsible entity will have to reapply. We will generally tell the responsible entity which parts are incomplete.

### The responsible entity

- RG 000.38 In order to register a managed investment scheme, the responsible entity must be an Australian public company that has an AFS licence authorising it to operate the registered scheme: see s601FA.

Note: For guidance on how to become licensed as a responsible entity under the AFS licensing regime, see [Regulatory Guides 1–3 AFS Licensing Kit](#).

- RG 000.39 If the responsible entity is not already authorised by its AFS licence to operate the relevant kind of registered scheme, it should only apply to register the managed investment scheme once we have assessed the application for an AFS licence to operate that, or that kind of, managed investment scheme and indicated that an application to register the scheme can be made. If the application to register the scheme is made before we have given this indication, we may refuse the application because there is no responsible entity that meets the requirements of s601FA.

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## Contents of the application

### Application form

RG 000.40 [Form 5100](#) requests details about the responsible entity (see s601EA(2)(a)) and the person who has consented to be the auditor of the compliance plan: see s601EA(2)(b).

Note: The consent of the auditor under s601EA(2)(b) must be attained prior to the application being lodged.

RG 000.41 All relevant fields on the application form must be completed or we will refuse to accept the application for lodgement.

RG 000.42 Where the application form requires some detail about an aspect of the managed investment scheme, this part should be completed with sufficient detail to enable us to properly understand and assess the answer.

### Constitution

RG 000.43 The constitution must meet the requirements in s601GA and 601GB.

RG 000.44 Under s601GA, the constitution must make adequate provision for, or specify, certain prescribed matters. These include:

- (a) the consideration to acquire and dispose of an interest in the registered scheme;
- (b) the powers and rights of the responsible entity, including:
  - (i) powers to make investments of, or borrow or deal with, scheme property; and
  - (ii) rights to be paid fees or be indemnified out of scheme property;
- (c) the method for dealing with complaints about the registered scheme;
- (d) any rights of members to withdraw from the registered scheme; and
- (e) the process for winding up the registered scheme.

RG 000.45 Under s601GB, the constitution of a registered scheme must be a legally enforceable document between the responsible entity and members. It must set out some or all of the rights, duties and liabilities of the responsible entity in its operation of the scheme.

RG 000.46 We will assess whether the constitution meets the requirements in s601GA and 601GB as we consider they apply in in draft updated Regulatory Guide 134 *Investment funds: Constitutions*. This regulatory guide sets out the basis on which we will apply the content requirements for constitutions when an application to register a managed investment scheme is lodged with ASIC, and provides detailed guidance on the requirements in RG 000.44.

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RG 000.47 While there is no prescribed form for the constitution, the application must state which provisions of the constitution address the matters in s601GA and 601GB. We will usually only consider these provisions, and other provisions that appear related, when registering a managed investment scheme.

### **Compliance plan**

RG 000.48 The compliance plan must set out the adequate measures the responsible entity will apply to ensure the registered scheme operates in accordance with the Corporations Act and its constitution: see s601HA.

RG 000.49 A compliance plan must include arrangements for:

- (a) holding scheme property separately and ensuring it is clearly identified as such;
- (b) ensuring the property is valued at appropriate intervals;
- (c) ensuring adequate record keeping;
- (d) ensuring the proper audit of compliance with the plan; and
- (e) where a compliance committee is required, ensuring that it is functioning effectively.

RG 000.50 We will assess whether the compliance plan meets the requirements in s601HA as we consider they apply in draft updated Regulatory Guide 132 *Funds management: Compliance and oversight*.

RG 000.51 Under s601HB(1), the responsible entity may lodge a compliance plan that incorporates by reference specified provisions, as in force at a specified time or from time to time, of the compliance plan of another registered scheme of which it is also the responsible entity.

RG 000.52 Where a compliance plan incorporates parts of another plan, the incorporated plan should be for the same type of scheme. For example, incorporating a compliance plan for one asset type into a compliance plan for a different asset type will not be appropriately tailored to addressing the specific compliance risks of the second scheme.

Note: For additional information, see RG 132.80–RG 132.82 of draft updated Regulatory Guide 132 *Funds management: Compliance and oversight*.

### **Directors' statement**

RG 000.53 The directors of the responsible entity must provide a signed statement to confirm that:

- (a) the contents of the constitution meet the requirements of the Corporations Act;

- (b) the constitution is a legally enforceable document between the members and the responsible entity; and
- (c) the compliance plan complies with s601HA.

Note: The approved form required for the signed statement under s601EA(4)(c) is [Form 5103 Directors' statement relating to application for registration of a managed investment scheme](#).

RG 000.54 Each and every director of the responsible entity at the date of lodgement must have signed the directors' statement. Directors need to take care that their statement is correct. Under s1308 of the Corporations Act, if a director does not take reasonable steps to ensure they do not make a false statement to ASIC, the director may be guilty of an offence.

RG 000.55 We note that agents for the directors cannot sign the directors' statement. However, on occasion, an alternate director may sign the directors' statement. A director can appoint an alternate director with the other directors' approval. The alternate director will act as an alternate to exercise some or all of the director's powers for a specified period. Depending on the terms of appointment, an alternate may be granted the same powers and carry out the same duties as the appointing director. We will check the alternate director has been properly appointed to sign the directors' statement.

## Assessment by ASIC

RG 000.56 When an application to register a managed investment scheme is lodged with ASIC, we will assess whether it complies with s601EB. We must register the managed investment scheme within the 14-day registration period, unless it appears to us that the application does not meet one or more of the requirements: see s601EB.

RG 000.57 During the 14-day registration period, we may ask for:

- (a) in rare instances, an explanation of how the managed investment scheme meets the definition of a 'managed investment scheme' in s9;
- (b) an amendment to the application or further information, particularly where an answer given does not provide sufficient detail to enable us to properly understand and assess the answer;
- (c) a new directors' statement to be signed by all directors and lodged;
- (d) a further explanation of provisions in the constitution;
- (e) amendments to be made to provisions in the constitution to meet s601GA and 601GB as we consider they apply in draft updated Regulatory Guide 134 *Funds management: Constitutions*, and the constitution to be re-executed;

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- (f) a further explanation about the contents of the compliance plan; and
- (g) amendments to be made to the compliance plan to meet s601HA as we consider it applies in draft updated Regulatory Guide 132 *Investment funds: Compliance and oversight*.

- RG 000.58 We will refuse to register the managed investment scheme if the responsible entity or its advisers are unwilling or unable to provide this explanation, further information or amended documentation as required within the 14-day registration period, and it appears to us that one or more of the criteria in s601EB are not met.
- RG 000.59 We may also refuse to register the managed investment scheme, if it appears to us that one or more of the criteria in s601EB are not met, without taking any of the steps in RG 000.57. It is up to the responsible entity to ensure the application is fully compliant when lodged.
- RG 000.60 If we decide not to register the managed investment scheme, we will write to the responsible entity setting out the decision and the reasons why. We will also tell the responsible entity how to apply to the Administrative Appeals Tribunal for a review if it considers the decision is wrong.
- RG 000.61 The responsible entity may choose to withdraw the application. If the responsible entity takes this option, we will not be able to refund the application fee or hold it over if the responsible entity decides to reapply. The fact that the application has been withdrawn will be on the public record.

### **Review prior to lodgement of application**

- RG 000.62 When lodging an application to register the managed investment scheme, the responsible entity or its advisers should state that certain provisions of the constitution have been reviewed before lodgement if that is the case. We may refuse registration if:
- (a) the responsible entity or its advisers have not requested a review of provisions before lodgement;
  - (b) the provisions appear to us to be non-compliant; and
  - (c) we do not have sufficient time to seek information about whether they comply.
- RG 000.63 We will not give priority to or expedite the processing time of an application to register a managed investment scheme on the sole basis that it has been preceded by a review by our staff.
- RG 000.64 A review of the provisions in a constitution before lodgement does not prevent us from raising additional matters when assessing whether the constitution meets the requirements under s601EB.



## C Registering a CCIV

### Key points

Corporate directors must lodge an application in the approved form to establish and register a CCIV with ASIC. The contents of the application and necessary supporting documentation must meet the requirements of the Corporations Act.

This section explains how we apply the requirements when assessing an application to register a CCIV and how those requirements apply to a retail CCIV and a wholesale CCIV.

### Applying to register a CCIV

- RG 000.65 An application to register a CCIV must be lodged with ASIC in the approved form and must include a copy of the constitution: see draft s1137A.
- RG 000.66 Where an application is for a retail CCIV, the application must include:
- (a) a copy of the constitution that meets the requirements of draft s1155 of the Corporations Act;
  - (b) a copy of the compliance plan that meets the requirements of draft s1161A of the Corporations Act and is signed by the directors; and
  - (c) the details of the appointment of a depositary that meets the requirements of draft s1163 of the Corporations Act and is independent of the corporate director: draft s1163C and 1163D of the Corporations Act.
- RG 000.67 After we receive an application, we will undertake a ‘completeness check’ to see whether it is complete and acceptable for assessment. If it does not pass this check, we will reject the application and the corporate director will have to reapply. We will generally tell the corporate director which parts are incomplete.

### Fund structure

- RG 000.68 A CCIV must be structured as an umbrella company with separate sub-funds. A CCIV must have at least one sub-fund, and may have more than one at the point of registration: see draft s1141A of the Corporations Act.
- RG 000.69 Draft s1141 of the Corporations Act provides that a sub-fund is a part of the CCIV that:
- (a) is established as a sub-fund by, in the records of the CCIV:

- (i) assigning a unique name to the sub-fund; and
- (ii) identifying one or more classes of shares that are to be referable to the sub-fund.

Note: A sub-fund does not consist of assets; however, assets and liabilities of the CCIV are allocated to the sub-fund in accordance with draft Ch 7A, Pt 2, Div 3: see draft s1141.

RG 000.70 A sub-fund does not have legal personality, but the assets allocated to a sub-fund must be segregated from those allocated to other sub-funds. The assets of one sub-fund may not be used to meet the liabilities or expenses of another sub-fund of the CCIV: see draft s1142B of the Corporations Act.

## The corporate director

RG 000.71 The CCIV must have a single corporate director that is an Australian public company and holds an AFS licence authorising it to operate a CCIV: see draft s1138 of the Corporations Act. This requirement applies regardless of whether the CCIV is being established as a retail or wholesale fund.

Note: For guidance on how to be licensed as a corporate director under the AFS licensing regime, see [Regulatory Guides 1–3 AFS Licensing Kit](#).

RG 000.72 The corporate director must operate the CCIV and perform the functions conferred upon it by the constitution and the Corporations Act: see draft s1138A of the Corporations Act. In carrying out those powers and undertaking its duties, the corporate director must exercise care and diligence: see draft s1156 of the Corporations Act.

RG 000.73 If the corporate director is not already authorised by its AFS licence to operate CCIVs with the relevant kind of sub-funds, it should only apply to register a CCIV with that kind of sub-fund once we have assessed its application for an AFS licence and indicated that an application to register the CCIV can be made. If the application to register the CCIV is made before we have given this indication, we may refuse the application because there is no corporate director that meets the requirements of draft s1138.

## The depositary

RG 000.74 A retail CCIV is required to have a depositary. Under draft s1163 of the Corporations Act, the depositary must:

- (a) be a company that is an Australian public company registered under the Corporations Act or a foreign company registered under Pt 5B.2 of the Corporations Act;

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- (b) hold an AFS licence authorising it to act as a depositary; and

Note: For guidance on how to be licensed as a depositary under the AFS licensing regime, see [Regulatory Guides 1–3 AFS Licensing Kit](#).

- (c) be independent from the corporate director: see draft s1163C and 1163D of the Corporations Act.

Note: The requirement to appoint a depositary is optional for a wholesale CCIV: see draft s1163A. Where a wholesale CCIV chooses to appoint a depositary, it must give notice to ASIC of its intention: see draft s1163B. In doing so, the provisions for depositaries will apply in their entirety.

RG 000.75 The appointment of the depositary must be carried out before any marketing of the CCIV to investors. However, where a depositary is proposed to be appointed, we will ask for the details of the depositary in the application. Even if the depositary has not been formally appointed at the time the application is lodged, we would expect that the corporate director would be sufficiently advanced in its planning to have commenced the process of appointing the depositary. However, we will not refuse to register the CCIV if a depositary has not been appointed.

## Contents of the application

### Application form

- RG 000.76 The application to register a CCIV must be lodged with ASIC in the approved form.
- RG 000.77 All relevant fields on the application form must be completed for us to accept the application for lodgement.
- RG 000.78 Where the application requires some detail about an aspect of the CCIV, this part should be completed with sufficient detail to enable us to properly understand and assess the answer.

### Constitution

- RG 000.79 A CCIV must have a constitution and the constitution must be lodged with ASIC: see draft s1137A.

### Constitution of a retail CCIV

- RG 000.80 The constitution for a retail CCIV must make adequate provision for, or specify, certain prescribed matters: see draft s1155(1). These include:
- (a) the consideration to acquire a share in the CCIV;
  - (b) the powers of the corporate director to make investments of, or otherwise deal with, assets of the CCIV; and

- (c) the establishment of sub-funds, and classes of shares referable to sub-funds.

RG 000.81 Where the corporate director is to have rights to be paid fees or be indemnified out of the assets of a sub-fund for liabilities incurred in the performance of its duties, those rights must be specified in the constitution and available only in relation to the proper performance of those duties. Any other agreement or arrangement is taken to have no effect to the extent that it purports to confer such a right: see draft s1155(2).

RG 000.82 If the corporate director is to have any powers to borrow or raise money for the purpose of the CCIV, those powers must be stated in the constitution. Any other agreement or arrangement is taken to have no effect to the extent that it purports to confer such a power: see draft s1155(3)(a) and (b).

Note: For detailed requirements, see draft updated Regulatory Guide 134 *Investment funds: Constitutions*.

RG 000.83 If any shares are able to be redeemed, the constitution must also make provision for redemption of shares: see draft s1159 of the Corporations Act.

RG 000.84 We are not required to assess whether the constitution of a retail CCIV makes adequate provision for, specifies or states the matters in draft s1155 in order to register the retail CCIV. However, we may review the constitution at the same time as considering whether to register the CCIV. Where we do this we may:

- (a) request further information about provisions in the constitution; or
- (b) suggest that amendments should be made to meet the requirements of draft s1155 as we apply them in draft updated Regulatory Guide 134 *Investment funds: Constitutions*.

RG 000.85 Given we are not required to assess the constitution for a retail CCIV, our registration is not dependent on the corporate director providing any information requested about, or incorporating suggested changes into, the constitution.

## Compliance plan

RG 000.86 A retail CCIV must have a compliance plan: see draft s1161. A wholesale CCIV is not required to have a compliance plan. However, the corporate director of a wholesale CCIV will still be subject to compliance requirements as part of its AFS licence. As such, it should adopt a compliance management system for the wholesale CCIV to ensure that it complies with its AFS licence obligations, including its obligations to report to ASIC.

Note: For guidance on a compliance management system, see Section B of draft updated Regulatory Guide 132 *Investment funds: Compliance and oversight*.

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- RG 000.87 The compliance plan for a retail CCIV must set out adequate measures that the corporate director is to apply in operating the CCIV to ensure compliance with the Corporations Act and the constitution of the CCIV: see draft s1161. However, the corporate director may lodge a compliance plan that incorporates by reference specified provisions, as in force at a specified time, of the compliance plan of another CCIV of which it is also the corporate director: see draft s1161B of the Corporations Act.
- RG 000.88 All the directors of the corporate director must sign the copy of the compliance plan that is lodged with ASIC: see draft s1161C of the Corporations Act.
- RG 000.89 There is no prescribed content requirement for the compliance plan of a CCIV. However, we have given some guidance about the content of compliance plans in Section C of draft updated Regulatory Guide 132 *Funds management: Compliance and oversight*.
- RG 000.90 We are not required to assess whether the compliance plan meets the requirements of draft s1161A when deciding whether to register a retail CCIV. However, we may review the compliance plan at the same time. Where we do this we may:
- (a) request further information about the arrangements contained in the compliance plan; or
  - (b) suggest that amendments should be made to meet the requirements of draft s1161A as we consider it applies in draft updated Regulatory Guide 132 *Funds management: Compliance and oversight*.
- RG 000.91 Given we are not required to assess the compliance plan for a retail CCIV, our registration is not dependent on the corporate director providing any information requested about, or incorporating any suggested changes into, the compliance plan. However, if the corporate director fails to do this, we may exercise our powers under draft s1161D to 1161F of the Corporations Act.
- RG 000.92 At any time after the CCIV is registered, we can direct:
- (a) the corporate director to give us information about the arrangements contained in the compliance plan: see draft s1161D of the Corporations Act;
  - (b) changes to be made to the compliance plan: see draft s1161E; or
  - (c) a consolidated copy of the compliance plan to be lodged: draft s1161F.

## Assessment by ASIC

- RG 000.93 When an application to register a CCIV is lodged with ASIC, we will assess whether it complies with draft s1137.

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RG 000.94 In assessing an application to register a CCIV, we may ask for an amendment to the application or further information, particularly where an answer given does not provide sufficient detail to enable us to properly understand and assess the answer.

Note: As noted in RG 000.84 and RG 000.90, we may also ask for further information about or suggest amendments be made to the constitution or compliance plan for a retail CCIV.

RG 000.95 We will refuse to register a CCIV if the corporate director or its advisers are unwilling or unable to provide this explanation, further information or amended documentation as required within the registration period, and it appears to us that one or more of the registration criteria cannot be met.

RG 000.96 If we decide not to register the CCIV, we will write to the corporate director setting out the decision and the reasons why. We will also tell it how to apply to the Administrative Appeals Tribunal for a review if it considers the decision is wrong.

RG 000.97 The corporate director may choose to withdraw the application. If it takes this option, we will not be able to refund the application fee or hold it over if the corporate director decides to reapply. The fact that the application has been withdrawn will be on the public record.

## Notifying ASIC of new sub-funds

RG 000.98 As a sub-fund of a CCIV is not a separate legal entity, it is not individually registered with ASIC. If a corporate director decides to establish further sub-funds in an existing CCIV, it is required to provide written notice of this intention to ASIC.

### Submitting the notification

RG 000.99 The notification must be in an approved form and be lodged online before the issue of shares attributed to the sub-fund: see draft s1141D(2) of the Corporations Act. It must reflect:

- (a) the establishment of the sub-fund;
- (b) the day on which the sub-fund was established; and
- (c) such other matters specified in CCIV rules: see draft s1141D(1).

### Processing the notification

RG 000.100 After we receive a notification, we will undertake a ‘completeness check’ to see whether the notification is complete and acceptable for assessment. If it does not pass this check, we will reject the notification and the corporate

director will have to re-submit. We will generally tell the corporate director which parts are incomplete.

- RG 000.101 In assessing a notification, we may ask for an amendment to the notification or further information, particularly where an answer given does not provide sufficient detail to enable us to properly understand and assess the answer.

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## D Registering as an Australian passport fund

### Key points

The Asia Region Funds Passport allows interests in passport funds established and regulated in one participating economy to be sold to investors in another participating economy.

Australian passport fund operators wishing to operate an Australian passport fund under the Asia Region Funds Passport will need to comply with the registration and ongoing requirements under the Passport Rules agreed between participating economies and comply with the law in its home economy (Australia) and host economies.

ASIC and our fellow passport regulators have established arrangements for cooperation and information sharing in administering the Asia Region Funds Passport.

### Applying to register as an Australian passport fund

- RG 000.102 An application to register a registered scheme as an Australian passport fund must be lodged with ASIC in the prescribed form and accompanied by a copy of the PDS: see draft s1212.
- RG 000.103 The requirements for applying to register as an Australian passport fund are in addition to the requirements for registering a managed investment scheme under Ch 5C.
- RG 000.104 In order for ASIC to register a registered scheme as an Australian passport fund, we need to be satisfied that:
- (a) the Australian passport fund operator is an eligible entity within the meaning of section 3 of Annex 2 of the [Memorandum of Cooperation](#); and
  - (b) the registered scheme is likely to be operated in compliance with the Corporations Act, including the Australian Passport Rules, and the ASIC Act.

### Registered scheme

- RG 000.105 Registered schemes registered under the Corporations Act in Australia are deemed to be regulated collective investment schemes for the purposes of the Asia Region Funds Passport under the Memorandum of Cooperation. A registered scheme may apply to become an Australian passport fund by lodging an application in the prescribed form with ASIC: see RG 000.102.

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- RG 000.106 Draft s1212(1) sets out that an application may be made to register as an Australian passport fund where:
- (a) the responsible entity or person acting on its behalf lodges the application for a registered scheme; or
  - (b) the proposed responsible entity or person acting on its behalf lodges the application for a managed investment scheme that has also applied to be a registered scheme under s601EB.
- RG 000.107 Where an application for registration of a managed investment scheme is lodged at the same time as an application to register as an Australian passport fund, we may:
- (a) begin our assessment of both applications on receiving them; and
  - (b) ask for further information or amendments at the same time.
- RG 000.108 Because an Australian passport fund must be a registered scheme, we will refuse the application to register as an Australian passport fund if we also refuse the application to register the managed investment scheme.
- RG 000.109 We will be unlikely to make a decision to register the Australian passport fund at the same as making a decision to register the managed investment scheme. This is because generally an application to register as an Australian passport fund is more complex and will take more time for us to assess.

## Contents of the application

### Application form

- RG 000.110 The prescribed form must be submitted to ASIC online. The form is made up of yes/no, multiple choice and open-ended questions that take into account the purpose of each provision in the Australian Passport Rules.
- RG 000.111 Where we have asked for specific representations to be given about compliance with the Australian Passport Rules, we will usually rely on the answer that is given to form an opinion about the likelihood of compliance.
- RG 000.112 Australian passport fund operators need to take care that their representations are correct. Under s1308, if an Australian passport fund operator does not take reasonable steps to ensure it does not make a false statement to ASIC, it may be guilty of an offence.
- RG 000.113 The number of questions that an Australian passport fund operator will need to answer depends on a range of factors, including the type of assets held, whether any portfolio limits have been exceeded and whether any functions are delegated.

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RG 000.114 Under the Australian Passport Rules, delegated functions remain the responsibility of the Australian passport fund operator. This requires it to have ‘suitable processes’ in place to ensure appropriate standards of care are applied by the delegate or sub-delegate in performing functions and that their activities are monitored, controlled and evaluated: see section 11(1) of the Australian Passport Rules.

Note: The Australian Passport Rules will be made by the relevant Minister as a legislative instrument under draft s1211(1) and 1211A of the Corporations Act. Under draft s1211(2), the Australian Passport Rules must be substantially the same as the Passport Rules set out in Annex 3 to the Memorandum of Cooperation.

RG 000.115 We consider ‘suitable processes’ may include an established process for delegations that incorporates set accountabilities, reporting obligations and performance appraisals of delegates, along with appropriate oversight and knowledge of any sub-delegations and sub-delegates. We will generally check this information as part of the application.

RG 000.116 Where, under section 11(3) of the Australian Passport Rules, an operator delegates the investment management function in respect of more than 20% of the Australian passport fund’s assets, every qualifying delegate must be regulated in:

- (a) a participating economy; or
- (b) an economy that has, in respect of investment management functions of collective investment schemes that may be offered to the general public, a regulatory framework ‘broadly similar in effectiveness’ to that in Australia: see section 11(3) of the Australian Passport Rules.

RG 000.117 We consider that regulatory frameworks are broadly similar in effectiveness to the Australian framework for the purpose of section 11(3) of the Australian Passport Rules in the following economies:

- (a) Hong Kong;
- (b) Jersey;
- (c) the United States of America;
- (d) Singapore;
- (e) member states of the European Union;
- (f) the United Kingdom;
- (g) the Isle of Man; and
- (h) Guernsey.

RG 000.118 Our assessment is based on an examination of the criteria that we use to assess whether a foreign regulatory regime is ‘sufficiently equivalent’ for the purposes of providing relief under [Regulatory Guide 178](#) *Foreign collective investment schemes* (RG 178): see the criteria in RG 178.16–RG 178.28.

Note: If an Australian passport fund operator wants a further economy recognised, it should follow the procedure to apply for relief in RG 178 where no class order exists. In particular, it should answer the questions about the relevant foreign regulatory regime in Appendix 2 of RG 178.

- RG 000.119 The more complex the arrangements, the greater the likelihood more questions will need to be answered and, generally, the longer the assessment period.
- RG 000.120 If the Australian Passport Rules impose a requirement that is mandatory and has no exceptions, and we have not given an exemption to the Australian passport fund operator or made a modification to the requirement, it will not be able to submit the application if it answers that it is unable to meet the requirement.

### Meeting the eligible entity requirements

- RG 000.121 An Australian passport fund operator must meet certain requirements in the Australian Passport Rules to be an eligible entity. These requirements apply at the time of application of each registered scheme to be registered as an Australian passport fund, unless there is an exemption or modification. They are summarised in Table 3 and discussed in further detail at RG 000.125–RG 000.155.

**Table 3: Summary of eligible entity requirements for Australian passport fund operators**

Requirement	Guidance
<p><b>Assets under management test</b></p> <p>The Australian passport fund operator or its related parties must have assets under management with a total value of at least US\$500 million.</p>	RG 000.125– RG 000.129
<p><b>Relevant qualifications test</b></p> <p>The Australian passport fund operator must have officers with the relevant qualifications set out in section 6 of the Australian Passport Rules.</p>	RG 000.130– RG 000.135
<p><b>Financial resources test</b></p> <p>The Australian passport fund operator must have financial resources of at least US\$1 million, plus the additional capital amount: see section 7 of the Australian Passport Rules.</p>	RG 000.136– RG 000.140
<p><b>Organisational arrangements test</b></p> <p>The Australian passport fund operator must have in place processes and procedures to ensure it meets the organisational arrangements test in section 8 of the Australian Passport Rules.</p>	RG 000.141– RG 000.143

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Requirement	Guidance
<p><b>Track record test</b></p> <p>The Australian passport fund operator or a related party must meet the track record test in section 9 of the Australian Passport Rules.</p>	RG 000.144– RG 000.149
<p><b>Good standing test</b></p> <p>The Australian passport fund operator must meet the good standing test in section 10 of the Australian Passport Rules.</p>	RG 000.150– RG 000.154
<p><b>Home economy and home regulator test</b></p> <p>The Australian passport fund operator must:</p> <ul style="list-style-type: none"> <li>• have its principal place of business in Australia; and</li> <li>• be regulated by ASIC as responsible entity of a registered scheme.</li> </ul>	RG 000.155

RG 000.122 When we assess the application to register as an Australian passport fund, we may ask for additional information or documents that will demonstrate the Australian passport fund operator’s ability to meet the eligibility requirements. If the Australian passport fund operator does not provide the information and evidence we require, we may consider that it has not demonstrated that it can meet the eligibility requirements.

Note: The eligible entity requirements applicable to the operator of an Australian passport fund are distinct from, and additional to, the AFS licensing requirements for a responsible entity.

RG 000.123 One of the key objectives of the Asia Region Funds Passport is to provide a high degree of investor protection. The eligibility requirements in the Australian Passport Rules aim to ensure high standards, as embodied in the arrangements for the operation and offer of passport funds, are met and in particular that Australian passport fund operators are well established, competent, adequately resourced and adequately set up to manage retail collective investment schemes.

RG 000.124 We will refuse to register a registered scheme as an Australian passport fund if, regarding any of these eligible entity requirements:

- (a) the Australian passport fund operator or its advisers are unwilling or unable to provide further information or documentation as required within a reasonable time, and we are unable to form an opinion that the test in question can be met; or
- (b) in our opinion the Australian passport fund operator cannot meet the relevant test.

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**Assets under management test**

- RG 000.125 The Australian passport fund operator and its related parties must be collectively responsible for operating financial asset collective investment schemes that have total assets of at least US\$500 million (calculated using the method set out in section 3(5)(b) of the Australian Passport Rules), including any amounts in relation to which the Australian passport fund operator or related party has discretionary management powers.
- RG 000.126 We will generally check:
- (a) the percentage by which the test has been exceeded; and
  - (b) whether all assets invested directly or indirectly in other collective investment schemes or discretionary management accounts operated by the Australian passport fund operator or its related parties have been excluded to avoid double counting.
- RG 000.127 We will not allow the Australian passport fund operator to submit the application if the assets under management are less than US\$500 million. We will generally ask for further information or documents where the test has been exceeded by less than 5%.
- RG 000.128 We may ask for further information about:
- (a) any related party that is being relied on;
  - (b) how each related party is a related party within the meaning of the Memorandum of Cooperation; and
  - (c) how the amount was calculated.
- RG 000.129 We may also ask for the financial accounts used to derive the total amount of assets under management.

**Relevant qualifications test**

- RG 000.130 The Australian passport fund operator must have officers with the relevant qualifications.
- RG 000.131 We will assess whether:
- (a) the chief executive officer (CEO) has relevant experience in an organisation that carries on business in financial or capital markets or financial services in a country that is an ordinary member or associate member of the International Organization of Securities Commissions (IOSCO). The CEO must have spent 10 of the last 15 years in such an organisation and five of those 10 years in a managerial or supervisory role;
  - (b) at least two executive directors (which may include the CEO) have relevant experience in a managerial or supervisory role in an organisation that carries on business in financial or capital markets or

financial services in a country that is an ordinary member or associate member of IOSCO. The executive directors must have spent five of the last seven years in such an organisation;

- (c) all discretionary investment decisions to be made for the Australian passport fund will be made, or supervised at least on a joint basis, by an officer or employee who has experience in a role with responsibility for making or supervising discretionary investment decisions in an organisation that carries on business in financial or capital markets or financial services in a country that is an ordinary member or associate member of IOSCO. The employee or officer must have spent either:
  - (i) five of the last seven years in such an organisation; or
  - (ii) three of the last five years in such an organisation and hold a bachelor degree or higher qualification in a relevant discipline.

RG 000.132 We will not allow the Australian passport fund operator to submit the application if some of the requirements of the relevant qualifications test (set out in RG 000.131) are not met—in particular, where the length of time in the role does not meet the requirements of the test and where a specific type of qualification is required.

RG 000.133 We may also request further information about:

- (a) the ways in which the experience of the CEO, executive directors, or an officer or employee is relevant;
- (b) how the organisation carries on business in financial or capital markets or financial services;
- (c) how a qualification is the equivalent of a bachelor degree or higher qualification; and
- (d) how a qualification is in a relevant discipline.

RG 000.134 If following the submission of an application, an officer or employee of an Australian passport fund operator no longer complies with the relevant qualifications requirements, for example due to an unexpected employee resignation, the Australian passport fund operator must take all reasonable steps to redress this non-compliance as quickly as possible.

RG 000.135 We are unlikely to reject an application where there is evidence the Australian passport fund operator has taken reasonable steps to seek, or is actively seeking, a suitable replacement, which may include an advertisement for the vacant position or having appointed a suitable acting replacement. However, we will not grant an application unless a suitable replacement is found and appointed.

#### **Financial resources test**

RG 000.136 The Australian passport fund operator must meet the financial resources test.

- RG 000.137 We will generally consider that the Australian passport fund operator is meeting the financial resources test if its equity:
- (a) is greater than US\$21 million;
  - (b) is greater than US\$1 million but less than US\$21 million, and the total assets under management of the Australian passport fund operator is greater than US\$500 million; or
  - (c) is greater than US\$1 million but less than US \$21 million, the total assets under management of the Australian passport fund operator is greater than US\$500 million and the equity is greater than US\$1 million plus the additional capital amount.

RG 000.138 The additional capital amount is calculated by subtracting US\$500 million from the total assets under management of the Australian passport fund operator, and then multiplying that figure by 0.001. The additional capital amount is capped at US\$20 million.

RG 000.139 We will not allow the Australian passport fund operator to submit the application if its equity is less than US\$1 million. We will allow submission of the application where the amount of equity is between US\$1 million and US\$1.05 million. However, we will generally ask for further information or documents where the test has been exceeded by less than 5%.

- RG 000.140 In order to assess whether the financial resources test is met, we may ask for:
- (a) financial accounts;
  - (b) documentation of the guarantee or undertaking; and
  - (c) the approved personal indemnity insurance policy.

Note: In general, we consider that satisfying the AFS licence requirement under reg 7.6.02AAA of the Corporations Regulations 2001 to hold 'adequate' PI insurance will ensure that an operator meets the 'approved PI insurance policy' requirement if it applies.

### **Organisational arrangements test**

RG 000.141 The Australian passport fund operator must meet the organisational arrangements test.

RG 000.142 We will generally check that the Australian passport fund operator has in place controls, processes and frameworks to ensure it will comply with all aspects of the organisational arrangements test. When considering the processes and procedures the Australian passport fund operator has in place, we will apply our guidance in Section B of draft updated Regulatory Guide 132 *Funds management: Compliance and oversight*. We will generally be satisfied that the Australian passport fund operator meets the organisational arrangements test when it meets this guidance.

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RG 000.143 We may ask for further information about the controls, processes and frameworks in relation to:

- (a) maintaining organisational competence;
- (b) compliance arrangements;
- (c) risk monitoring and management procedures;
- (d) compliance frameworks; and
- (e) conflicts of interest.

#### **Track record test**

RG 000.144 The Australian passport fund operator must meet the track record test. It can do this by relying on its own track record or that of a related party, but the test cannot be satisfied by both.

RG 000.145 If the Australian passport fund operator meets the track record test but there has been a change in control, we will generally check if a majority of the directors and responsible managers have been in their roles for at least five years. We will also generally check this if the Australian passport fund operator is relying on the track record of a related party.

RG 000.146 Where there has been a relevant change of control, we will assess whether there has been substantial continuity among officers and employees. In determining whether there has been substantial continuity, we will consider if:

- (a) the personnel responsible for operating the registered scheme, who were employed by a related body corporate, remained the same;
- (b) the same operating systems and procedures were used;
- (c) there was sharing of the same resources (including key portfolio management, operational and other staff);
- (d) both parties used the same control structures (including reporting lines and compliance systems, procedures for monitoring service providers and accounting, computer and IT systems); and
- (e) apart from preparing and issuing new disclosure documents, minimal or no trading or other operational changes needed to occur as a result of the change in control.

RG 000.147 We consider that an Australian registered scheme or regulated public offer superannuation fund will meet the definition of a regulated collective investment scheme in the Australian Passport Rules.

RG 000.148 We will not allow the Australian passport fund operator to submit the application if:

- (a) our registers indicate that its nominated Australian regulated collective investment scheme is not a regulated collective investment scheme;



- (b) the regulated collective investment scheme has not been offered to retail clients; or
- (c) the Australian passport fund operator or related party has not been operating for at least five years.

RG 000.149 If an Australian passport fund operator nominates a foreign related party that has had regulatory action taken against it or been involved in a dispute, we may seek information from the:

- (a) regulatory body that took action against the relevant foreign related party; or
- (b) dispute resolution service.

#### **Good standing test**

RG 000.150 The Australian passport fund operator must meet the good standing test.

RG 000.151 We will require an overseas police check for any jurisdiction the relevant party has resided in during the past 10 years. We will not require an Australian police check if the relevant party has never resided in Australia during the past 10 years.

RG 000.152 In assessing whether the Australian passport fund operator meets the good standing test, we will:

- (a) review the police records check and bankruptcy check (or statutory declaration);
- (b) check our systems and data collected to see whether any previous events give a reason to believe that the Australian passport fund operator, the officers of the Australian passport fund operator, any entity that controls the Australian passport fund operator and, where relevant, officers of any entity that controls the Australian passport fund operator are not of good standing; and
- (c) consider the number of previous events and the seriousness and age of any allegations or breaches when forming an opinion about whether the relevant party is of good standing. Where any previous event relates to dishonesty or incompetence, it will generally indicate that there is a material risk that the relevant party does not have the integrity or competence to operate or be involved in the operation of an Australian passport fund.

RG 000.153 We may request further information, including an explanation of any previous events and whether there were any mitigating factors. We may also request an original or certified copy of the police records check, bankruptcy check or statutory declaration.

RG 000.154 Where we have concerns about the conduct of a relevant party, we may undertake surveillance to test ongoing compliance.

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### Home economy and home regulator test

RG 000.155 The Australian passport fund operator must have its principal place of business in Australia. The Australian passport fund operator will not be able to submit an application if it does not have a principal place of business in Australia, as listed in our registers.

### Compliance with Corporations Act, including the Australian Passport Rules, and ASIC Act

RG 000.156 Under draft s1212A of the Corporations Act, we must be of the opinion that the Australian passport fund operator is likely to comply with the Corporations Act, including the Australian Passport Rules, and the ASIC Act. In forming this opinion, we will take into account:

- (a) the Australian passport fund operator's compliance history; and
- (b) whether the Australian passport fund operator's compliance management system is sufficiently effective and responsive to allow it to demonstrate its commitment to complying with its obligations under the Corporations Act and ASIC Act: see our guidance in draft updated Regulatory Guide 132 *Funds management: Compliance and oversight*.

RG 000.157 In our view, there is a greater likelihood of non-compliance with the Corporations Act and ASIC Act when the compliance management system is not effective and responsive. To be effective and responsive, we consider the compliance management system should be planned, implemented, evaluated, improved and documented.

RG 000.158 We will ask Australian passport fund operators to identify the compliance controls in place to meet the requirements of the Corporations Act, including the Australian Passport Rules, the frequency with which they are undertaken and the frequency with which compliance with them is monitored. We have included some common compliance controls and frequencies in the prescribed form to make it less time consuming for an Australian passport fund operator to describe all of the compliance controls and their frequencies. However, we do not expect Australian passport fund operators to use this list if they do not have those compliance controls or frequencies. Australian passport fund operators have the option of describing the actual compliance controls and frequencies instead.

RG 000.159 When we assess the application to register as an Australian passport fund, we will pay particular attention to answers that provide descriptions about compliance controls, and procedures to monitor compliance with the compliance controls. We will look to ensure the compliance controls are consistent with our guidance in Section B of draft updated Regulatory Guide 132 *Funds management: Compliance and oversight*.

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- RG 000.160 We may also ask for information about compliance with similar requirements in the Corporations Act and ASIC Act. This is because many compliance controls an Australian passport fund operator may implement have wider application to compliance with similar requirements in the Corporations Act that are not part of the Australian Passport Rules. Where we have concerns about an answer given in relation to a compliance control for the Australian Passport Rules and it could apply more broadly, we will generally ask more broadly about it.
- RG 000.161 When we assess the application to register as an Australian passport fund, we may ask for additional information or documents that will demonstrate the Australian passport fund operator's ability to meet the requirements in the Corporations Act, including the Australian Passport Rules, and the ASIC Act. The Australian passport fund operator must be able to provide the information and evidence we require or may subsequently request, to demonstrate that it can meet the eligibility requirements.

#### **Conflict between the constitution and Australian Passport Rules**

- RG 000.162 Where the constitution of an existing registered scheme allows the Australian passport fund to do something that is not permitted under the Australian Passport Rules, we will closely examine the compliance controls that the Australian passport fund operator has in place to prevent a breach of the Australian Passport Rules.
- RG 000.163 We will not require an Australian passport fund operator to amend its constitution to be consistent with the Australian Passport Rules in all cases. However, we encourage Australian passport fund operators to amend the constitution to be consistent with the Australian Passport Rules where they can. If the Australian passport fund operator subsequently amends the constitution for another reason, we consider it should, at that time, take reasonable steps to amend the constitution to be consistent with the Australian Passport Rules.

#### **Exceptional circumstances and reasonable actions**

- RG 000.164 Some specific provisions in the Australian Passport Rules allow an action to be taken in 'exceptional circumstances'. Where the Australian Passport Rules allow something to be done in exceptional circumstances, we will assess the answers in each case to determine whether exceptional circumstances exist. We will look for something unusual or out of the ordinary in the circumstances that substantiates or warrants the action, taking into account the purpose of the specific provision.
- RG 000.165 Some specific provisions in the Australian Passport Rules allow, or require, an action to be taken only where it is 'reasonable'. Where the Australian Passport Rules requires something to be reasonable, we will assess the

answers in each case by applying a standard of objective rationality, taking into account all of the facts.

### **Permitted investments**

- RG 000.166 Division 6.2 of the Australian Passport Rules governs the types of assets in which an Australian passport fund is permitted to invest. Those assets include investments in regulated collective investment schemes, deposits, currency, derivatives, transferable securities, money market instruments and depository receipts over gold. We note that the purpose behind restricting Australian passport funds to holding only certain types of assets is to secure the reputation of the Asia Region Funds Passport as a regulatory arrangement that provides for liquid investments that are readily able to be priced.
- RG 000.167 There is no specific requirement for a prospective Australian passport fund operator to divest an asset that would not be permitted to be acquired under the Australian Passport Rules. However, we encourage prospective Australian passport fund operators to divest assets that would not meet sections 18 and 19 of the Australian Passport Rules. If the prospective Australian passport fund operator lodges an application to register as an Australian passport fund without divesting assets that do not meet sections 18 and 19 of the Australian Passport Rules, we may refuse the application on the basis that it is against the public interest. We consider that allowing existing registered schemes to hold non-complying investments, but requiring new registered schemes to only hold assets permitted under sections 18 and 19 of the Australian Passport Rules, is unfair and not within the spirit of the purpose for restricting assets.

Note: Section 18 of the Australian Passport Rules provides that an Australian passport fund can hold goods and services, as long as they are not held for investment purposes. These are not considered to be assets of the Australian passport fund for this purpose.

- RG 000.168 The prescribed form generally asks questions about the permitted assets that will be held by the Australian passport fund with the aim of breaking down the requirements of the relevant specific provision of the Australian Passport Rules into its key components. When we assess the answers given, we will focus on the purpose of the specific provision and the objectives of the Australian Passport Rules.
- RG 000.169 We will also pay increased attention to assessing the compliance controls put in place.

### **Lodgement with a breach of the Australian Passport Rules**

- RG 000.170 To lodge an application to become an Australian passport fund, the prospective Australian passport fund operator must be able to comply with the Australian Passport Rules. Where there is a breach of the Australian Passport Rules, any attempt to submit an application will most likely result

in an inability to submit or a refusal. We expect prospective Australian passport fund operators to rectify any breach of the Australian Passport Rules, and have no reasonable basis to expect a further breach, before submitting an application.

### **Exceeding portfolio allocation limits**

- RG 000.171 The Australian Passport Rules set out portfolio allocation limits across the permitted asset types: see Division 6.3 of the Australian Passport Rules. These limits seek to ensure that an Australian passport fund is well diversified across different issuers and equivalent assets with similar characteristics. However, it is not a breach of the Australian Passport Rules to exceed a portfolio allocation limit: see section 29 of the Australian Passport Rules.
- RG 000.172 The Australian Passport Rules require any Australian passport fund exceeding a limit to cease to do so as soon as reasonably practicable, but no later than three months after the date the limit was first exceeded: see section 29(2) of the Australian Passport Rules. If the Australian passport fund operator writes to the independent oversight committee and satisfies the committee that an extension would be in the best interests of members, this three-month period may be extended by one month (with one further one-month extension allowed): see section 29(3) of the Australian Passport Rules.
- RG 000.173 If an existing registered scheme has exceeded one or more of the portfolio allocation limits, and the period allowed in section 29(2) and (3) has expired, we will not allow the prospective Australian passport fund operator to submit the application until this is remedied.
- RG 000.174 However, where an existing registered scheme has exceeded one or more portfolio allocation limits, or it is considered likely that a limit may soon be exceeded, but the period in section 29(2) and (3) has not expired, it may still be possible to submit an application for registration.
- RG 000.175 If an application is submitted and one or more portfolio allocation limit has been exceeded, we:
- (a) will generally pay particular attention to the controls the Australian passport fund operator has in place to monitor the investment portfolio;
  - (b) will generally look into whether any extension under section 29(3) is consistent with our expectations for proper assessment by the independent oversight entity or external directors of whether it was in the best interests of members not to bring the limit within the Australian Passport Rules. This is particularly the case if there has been more than one extension;

- (c) may request further information and/or supporting documentation, including:
  - (i) why a particular limit has been exceeded;
  - (ii) why the limit continues to be exceeded;
  - (iii) when the Australian passport fund operator anticipates the registered scheme will operate within the limit;
  - (iv) the steps that are actively being taken to bring the registered scheme within the limit and to ensure the limit is not exceeded again;
  - (v) whether the Australian passport fund operator acquired an asset or entered into a derivative or securities lending arrangement that resulted in the limit being exceeded to a greater extent after it had already been exceeded;
  - (vi) the number of extensions of time that have been sought and granted by the independent oversight entity;
  - (vii) if there was any occasion where the independent oversight entity did not grant an extension of time and why;
  - (viii) the earliest date the limit was exceeded; and
  - (ix) the approximate percentage by which the Australian passport fund exceeds the limit; and
- (d) may ask for further information to enable us to fully understand the circumstances causing the limit to be exceeded and the actions being taken to resolve the matter.

RG 000.176 We will be unlikely to register the Australian passport fund while the registered scheme exceeds one or more portfolio allocation limits.

RG 000.177 Where an existing registered scheme exceeds one or more of the portfolio allocation limits, we encourage the prospective Australian passport fund operator to raise any concerns or discussion points with us before lodging an application.

## **PDS**

RG 000.178 A prospective Australian passport fund operator must also provide a copy of the PDS, which is required before the Australian passport fund may offer interests to retail clients: see draft s1212(2).

RG 000.179 The PDS must comply with the requirements in s1013C of the Corporations Act and must contain sufficient information about the Australian passport fund for a retail client to make an informed decision about whether to purchase an interest in the fund.

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- RG 000.180 We may review the PDS as part of our assessment of the application to register as an Australian passport fund. If we review the PDS, we may ask for:
- (a) further information to understand the contents of the PDS; or
  - (b) additional or corrective disclosure to be made to the PDS.
- RG 000.181 The fact that we do not comment on the PDS does not indicate approval of the content of the PDS, or stop us from taking subsequent action against the operator.

## Assessment by ASIC

- RG 000.182 When an application to register as an Australian passport fund is lodged with ASIC, we will assess whether it complies with 1212A.
- RG 000.183 We take a risk-based approach to assessment. We will consider each question answered and the underlying risk the relevant provision in the Australian Passport Rules is intended to address.
- RG 000.184 There is no statutory timeframe for us to make a decision about whether to register an Australian passport fund. The time it takes us to assess an application may vary, depending on the quality of the information provided in the application and any subsequent information we request. An Australian passport fund operator can minimise the time it takes us to assess the application by providing all the information we ask for and promptly responding to all other queries we may raise. Not doing so will delay our assessment or may mean we will refuse the application because we are unable to form an opinion that the Australian passport fund operator is an eligible entity or likely to comply with the Corporations Act or ASIC Act.
- RG 000.185 If we decide to refuse registration, we will write to the Australian passport fund operator setting out the decision and the reasons why. We will also tell the Australian passport fund operator how to apply to the Administrative Appeals Tribunal for a review if it considers the decision is wrong.
- RG 000.186 The Australian passport fund operator may choose to withdraw the application. If it takes this option, we will not be able to refund the application fee or hold it over if the Australian passport operator decides to reapply. The fact that the application has been withdrawn will be on the public record.

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## Entry on the register of passport funds

- RG 000.187 We are required to establish and maintain a register of passport funds, or ensure that a register of passport funds is established and maintained: see draft s1214 of the Corporations Act.
- RG 000.188 The register of passport funds includes details of Australian passport funds and notified foreign passport funds, and may include details of other passport funds: see draft s1214(3).
- RG 000.189 When we are satisfied a registered scheme meets the requirements to become registered as an Australian passport fund, we will register it as an Australian passport fund by:
- (a) assigning it a unique Australian Passport Fund Registration Number (APFRN): see draft s1212A(2)(a); and
  - (b) ensuring that details of the Australian passport fund are entered on the register of passport funds: see draft s1212A(2)(b).
- RG 000.190 A person will be able to search our registers to obtain details about Australian passport funds, and registered schemes and CCIVs.



## Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services  Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act  Note: This is a definition contained in s761A.
APFRN	Australian Passport Fund Registration Number—the number assigned to an Australian passport fund under draft s1212A(2)(a) of the Corporations Act
Asia Region Funds Passport	An agreement between economies in the Asia region that allows passport funds established and regulated in one participating economy to offer interests to investors in another participating economy
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
assets under management test	A requirement in the Australian Passport Rules reflecting the minimum total value of assets under management that an Australian passport fund operator must have to be an eligible entity within the meaning of section 3 of Annex 2 of the Memorandum of Cooperation
Australian passport fund	A registered scheme that is also registered as a passport fund under draft Pt 8A.3 of the Corporations Act
CCIV	A corporate collective investment vehicle—a company that is registered as a corporate collective investment vehicle under the Corporations Act  Note: This is a definition contained in draft s9 of the Corporations Act.
collective investment scheme	Has the meaning given in section 55 of the Passport Rules
corporate director	The company named in ASIC's record of the CCIV's registration as the corporate director or temporary corporate director of the CCIV  Note: This is a definition contained in draft s9 of the Corporations Act.
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001

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Term	Meaning in this document
depository	The company named in ASIC's record of the CCIV's registration as the depository or temporary depository of the CCIV  Note: This is a definition contained in draft s9 of the Corporations Act.
financial resources test	A requirement in section 7 of the Australian Passport Rules regarding the financial resources that must be held by an Australian passport fund operator to be an eligible entity within the meaning of section 3 of Annex 2 of the Memorandum of Cooperation
foreign passport fund	A passport fund with a home economy other than Australia
Form 5100 (for example)	An ASIC form (in this example numbered 5100)
good standing test	A requirement in section 10 of the Australian Passport Rules regarding the good standing of an Australian passport fund operator to be an eligible entity within the meaning of section 3 of Annex 2 of the Memorandum of Cooperation
home economy	The participating economy in which a passport fund is first registered, approved or authorised as a regulated collective investment scheme
home economy and home regulator test	A requirement in the Australian Passport Rules regarding the location of the principal place of business of an Australian passport fund operator to be an eligible entity within the meaning of section 3 of Annex 2 of the Memorandum of Cooperation
home regulator	The passport regulator in a passport fund's home economy
host economy	A participating economy that is not a passport fund's home economy and either: <ul style="list-style-type: none"> <li>• permits the fund to offer interests in the fund in that economy under the Asia Region Funds Passport; or</li> <li>• has accepted an application from the fund to offer interests in the fund in that economy under the Asia Region Funds Passport (but not to register the fund as a passport fund in that economy)</li> </ul>
managed investment scheme	Has the meaning given in s9 of the Corporations Act
member	A member of a registered scheme or shareholder of a CCIV
Memorandum of Cooperation	The <a href="#">Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport</a>

Term	Meaning in this document
organisational arrangements test	A requirement in section 8 of the Australian Passport Rules regarding the processes and procedures an Australian passport fund operator must have in place to be an eligible entity within the meaning of section 3 of Annex 2 of the Memorandum of Cooperation
participating economy	An economy that is a participant under the Memorandum of Cooperation (while it is in effect) and has: <ul style="list-style-type: none"> <li>• advised the Asia Region Funds Passport Joint Committee that it has implemented the Asia Region Funds Passport; and</li> <li>• not withdrawn from the Memorandum of Cooperation</li> </ul>
passport fund	A regulated collective investment scheme, or sub-fund of a regulated collective investment scheme, registered as a passport fund in a participating economy
passport fund operator	An entity that operates a passport fund
passport regulator	The entity that regulates passport funds in a participating economy
Passport Rules	The requirements in Annex 3 to the Memorandum of Cooperation, as incorporated into the domestic law of a participating economy  Note: The Australian passport rules will be made by the relevant Minister as a legislative instrument under draft s1211 and 1211A of the Corporations Act.
PDS	A Product Disclosure Statement—a document that must be given to a retail client for the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act  Note: See s761A for the exact definition.
relevant qualifications test	A requirement in section 6 of the Australian Passport Rules regarding the relevant qualifications that must be held by officers of the Australian passport fund operator to be an eligible entity within the meaning of section 3 of Annex 2 of the Memorandum of Cooperation
register of passport funds	A register of all current and deregistered passport funds in a home economy, maintained by the home regulator
registered scheme	A managed investment scheme that is registered under s601EB of the Corporations Act
regulated collective investment scheme	A regulated collective investment scheme as defined by the Passport Rules for a participating economy
responsible entity	A responsible entity of a registered scheme as defined in s9 of the Corporations Act

Term	Meaning in this document
retail CCIV	<p>A CCIV promoted by a person, or an associate of a person, who was, when the CCIV was promoted, in the business of promoting CCIVs to persons who are, or would be, retail clients or a CCIV that has at least one member that acquired one or more shares in the CCIV:</p> <ul style="list-style-type: none"> <li>• as a retail client; or</li> <li>• under a custodial arrangement and a PDS had to be provided to the shareholder before the acquisition</li> </ul> <p>Note: See draft s1154A of the Corporations Act.</p>
retail client	A client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of the Corporations Regulations
s601EB (for example)	A section of the Corporations Act (in this example numbered 601EB), unless otherwise specified
scheme	A managed investment scheme as defined in s9 of the Corporations Act
sub-fund	<p>A part of a CCIV that:</p> <ul style="list-style-type: none"> <li>• is established as a sub-fund in the records of the CCIV by assigning a unique name to the sub-fund and identifying one or more classes of shares in the CCIV that are to be referable to the sub-fund; and</li> <li>• either relates to the entire business of the CCIV (in the case where there is one sub-fund) or relates solely to a particular part of the business of the CCIV (in the case where there are two or more sub-funds)</li> </ul>
track record test	A requirement in section 9 of the Australian Passport Rules regarding the track record of an Australian passport fund operator to be an eligible entity within the meaning of section 3 of Annex 2 of the Memorandum of Cooperation
wholesale CCIV	A CCIV that is not a retail CCIV

## Related information

### Headnotes

Australian passport fund, Australian Passport Rules, compliance plan, constitution, corporate collective investment vehicle, corporate director, depositary, directors' statement, eligible entity requirements, passport fund operator, registered managed investment scheme, registration, responsible entity, retail CCIV, sub-fund

### Regulatory guides

Draft RG 000 *Foreign passport funds*

Draft updated RG 132 *Funds management: Compliance and oversight*

Draft updated RG 134 *Investment funds: Constitutions*

[RGs 1–3](#) *AFS Licensing Kit*

[RG 178](#) *Foreign collective investment schemes*

### Legislation

ASIC Act

Corporations Act, Ch 5C, Pts 5C.3, 5C.4, 5C.5, s9, 601EA, 601EB, 601FA, 601GA, 601GB, 601HA, 601HB, 601HC, 601HG, 1013C, 1308

Corporations Amendment (Asia Region Funds Passport) Bill 2017 (exposure draft), draft Ch 8A, draft s1211, 1211A, 1212, 1212A, 1214,

Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2017 (exposure draft), draft Ch 7A, draft Pt 7.9, draft s1137, 1137A, 1138, 1138A, 1141A, 1141D, 1142B, 1142E, 1142J, 1155, 1156, 1159, 1161, 1161A, 1161B, 1161C, 1161D, 1161E, 1161F, 1163, 1163A, 1163B, 1163C

### Consultation papers

[CP 296](#) *Funds management*

### ASIC forms

[Form 5100](#) *Application for registration of a managed investment scheme*

[Form 5103](#) *Directors' statement relating to application for registration of a managed investment scheme*

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