

Attachment 6 to CP 296: Draft regulatory guide



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 000

Foreign passport funds

October 2017

About this guide

This guide is for foreign passport funds and their operators seeking to enter, or operating in, Australia under the Asia Region Funds Passport.

It explains our role as a host regulator under the Asia Region Funds Passport and our requirements for notified foreign passport funds and their operators.

Note: This draft guide is based on the exposure draft of the 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

The Asia Region Funds Passport allows passport funds established and regulated in one participating 'home' economy to offer interests to investors in another participating 'host' economy.

To do this, passport fund operators need to comply with entry and ongoing requirements under the Passport Rules agreed between the participating economies and incorporated in each participating economy's law.

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

The Asia Region Funds Passport

- RG 000.1 The Asia Region Funds Passport provides a multilaterally agreed framework to facilitate the cross-border marketing of managed funds across participating economies in the Asia region with limited additional regulatory requirements.
- RG 000.2 The [Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport](#) (Memorandum of Cooperation) contains in Annex 3 the Passport Rules agreed between the participating economies for implementing the Asia Region Funds Passport, to be incorporated into each participating economy's domestic law.
- 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. 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 000.3 Specifically, the Asia Region Funds Passport enables a foreign passport fund established and regulated in one participating 'home' economy to offer interests to persons in another participating 'host' economy, if the applicable legal and regulatory requirements of the host economy are met. A passport fund is a regulated collective investment scheme, as defined by the home economy Passport Rules, that is registered as a passport fund in the home economy.
- RG 000.4 The aim of the Asia Region Funds Passport is to promote investment between the participating economies by removing unnecessary regulatory barriers and reducing the cost of capital raising in all participating economies. At the same time, it maintains investor protection through appropriate disclosure and supervision of offerings.

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- RG 000.5 This guide will help foreign passport fund operators participating in or wishing to participate in the Asia Region Funds Passport by offering interests in a notified foreign passport fund to persons in Australia. It sets out our approach in applying the relevant provisions that we administer to foreign passport fund operators.
- RG 000.6 The requirements we administer for foreign passport fund operators that are operating in or seeking to enter the Australian market under the Asia Region Funds Passport are contained in the *Corporations Act 2001* (Corporations Act), the Corporations Regulations 2001 (Corporation Regulations), the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and the Australian Passport Rules.
- RG 000.7 There are other requirements under Australian law, not administered by ASIC, that apply to notified foreign passport funds, including those relating to:
- (a) taxation;
 - (b) privacy;
 - (c) anti-money laundering; and
 - (d) counter-terrorism financing requirements.
- RG 000.8 This guide does not cover laws or requirements that are administered by other Australian government agencies.

Requirements for foreign passport funds and their operators

- RG 000.9 The Australian financial services (AFS) licensing, conduct and disclosure obligations in the Corporations Act that apply when carrying on a financial services business in Australia generally apply in the same way to Australian and non-Australian persons.
- RG 000.10 Under the Asia Region Funds Passport, foreign passport fund operators seeking to carry on a financial services business of issuing interests in a notified foreign passport fund to persons in Australia are exempt from some requirements in the Corporations Act that would normally apply.
- RG 000.11 Foreign passport fund operators seeking to issue interests in a notified foreign passport fund in Australia under the Asia Region Funds Passport must meet the applicable requirements summarised in Table 1 and explained in Sections B and C.

Table 1: Summary of requirements for foreign passport funds and their operators seeking to enter and offer interests in Australia under the Asia Region Funds Passport

Stage	Requirement	Guidance
Entry requirements (before making an offer)	<p>The foreign passport fund operator must:</p> <ul style="list-style-type: none"> • be a registered foreign company (see draft s1213(1)(a)(i) of the Corporations Act); • meet the requirement of an offer in the home economy in one of the available alternative ways (at either the time of applying for entry into Australia or when the interests in the notified foreign passport fund are offered in Australia); and • lodge with ASIC a completed notice of intention to offer interests in the fund to persons in Australia that is in the prescribed form (see draft s1213(2)(a)), including a copy of the Product Disclosure Statement (PDS) that is required to be provided in accordance with draft s1213(2)(b) of the Corporations Act) and pay the application fee. 	Section B
Ongoing requirements	<p>Notified foreign passport funds and their operators must comply with specific ongoing requirements, which include:</p> <ul style="list-style-type: none"> • lodging financial statements, audit reports and implementation review reports with ASIC; • notifying ASIC of certain circumstances; and • complying with all applicable Australian laws. 	Section C

ASIC's role

- RG 000.12 ASIC is an independent agency of the Australian Government that regulates registered companies, financial markets and financial services providers by enforcing and administering relevant legislation, including the Corporations Act.
- RG 000.13 We aim to promote fair and efficient financial product and services markets characterised by integrity and transparency, and to support confident and informed participation by investors and consumers.
- RG 000.14 Among other things, we license and monitor financial services businesses and markets to ensure that they operate efficiently, honestly and fairly. These businesses are typically involved in superannuation, managed funds, shares and company securities, derivatives and insurance. We also maintain a register of AFS licensees and authorised representatives of AFS licensees.
- RG 000.15 We are a passport regulator under the Asia Region Funds Passport with responsibilities to enforce and administer the Passport Rules, including maintaining the register of passport funds. Section D outlines the main powers we have to administer the Asia Region Funds Passport.

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How we will work with other passport regulators

- RG 000.16 The Memorandum of Cooperation, as signed by all participants in the Asia Region Funds Passport, sets out the internationally agreed rules and cooperation arrangements for passport regulators to consult, cooperate and exchange information and to oversee passport funds for the purpose of the implementation and operation of the Asia Region Funds Passport.
- RG 000.17 Regulatory cooperation is central to the continuing operation of the Asia Region Funds Passport as host regulators place considerable reliance on home regulators to regulate the operation of the passport funds. This is to avoid unnecessary duplication of regulatory requirements.
- RG 000.18 These cooperation arrangements are intended to complement and not override any other existing cross-border regulatory cooperation arrangements.

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B Entry requirements

Key points

Before offering interests in a foreign passport fund to persons in Australia under the Asia Region Funds Passport, an eligible foreign passport fund operator must apply for entry into Australia through the notification process.

To be eligible, you need to:

- be a registered foreign company (see RG 000.21–RG 000.23); and
- have an offer in the home economy, if applicable at this stage (see RG 000.24–RG 000.26).

You must submit a completed notice of intention to offer interests (notice of intention), a copy of the required PDS and the application fee (see RG 000.27–RG 000.28).

We will assess your submitted notice of intention against the grounds for rejection. This includes assessing your procedures and processes for complying with requirements under Australian law. We may also review the submitted PDS to verify that it meets disclosure requirements (see RG 000.30–RG 000.47).

If we do not refuse your notice of intention within the consideration period (which is usually 21 days, and can be extended by periods of seven days), the notification process is complete and you can offer interests in the notified foreign passport fund to persons in Australia (see RG 000.48–RG 000.62).

Application for entry through the notification process

- RG 000.19 A foreign passport fund operator may offer interests in a foreign passport fund to persons in Australia if it successfully completes the notification process. If you successfully complete this process, then the fund is a ‘notified foreign passport fund’: see draft s1213C(2) of the Corporations Act.

Note: References to ‘you’ in this guide cover both a foreign passport fund operator and a notified foreign passport fund, as appropriate.

- RG 000.20 A key policy objective for the entry requirements is to maintain appropriate protection for Australian investors. A further objective is to maintain information on notified foreign passport funds on our public register.

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Eligibility to lodge a notice of intention

Registered foreign company

- RG 000.21 Only a foreign passport fund operator that is a registered foreign company (or a person acting on its behalf) can lodge a notice of intention: see draft s1213(1) of the Corporations Act.
- RG 000.22 A foreign company is a company incorporated or formed outside of Australia. A registered foreign company is a foreign company that is registered with ASIC to carry on business in Australia under Div 2 of Pt 5B.2 of the Corporations Act: see s601CD(1) of the Corporations Act. To register with ASIC, a foreign company must appoint as its local agent a natural person or a company that is resident in Australia and is authorised to accept service or process and notices on the foreign company's behalf: see s601CF(2) and 601CG(1) of the Corporations Act.

Note: See s9 of the Corporations Act for the definition of 'foreign company'. See our website for information on [how to register as a foreign company](#).

- RG 000.23 The main objective of this requirement is to ensure a person with a sufficient connection to Australia can assume responsibility for the notified foreign passport fund's local regulatory actions and consequences. This is reflected in the obligations imposed on a local agent of a registered foreign company under Pt 5B.2 of the Corporations Act, including:
- (a) being answerable for all acts, matters and things that the registered foreign company is required to do by or under the Corporations Act; and
 - (b) being personally liable for a penalty imposed on the registered foreign company for a contravention of the Corporations Act if a court or tribunal is satisfied that the local agent should be so liable: see s601CJ of the Corporations Act.

Offer in home economy

- RG 000.24 Under the Australian Passport Rules, a foreign passport fund operator cannot offer interests in the fund in Australia unless there is an ongoing offer in the home economy.
- RG 000.25 This requirement can be met in one of the following alternative ways:
- (a) *when a notice of intention to offer interests is lodged with ASIC*: at least 30% of the value of interests in collective investment schemes for which the operator is responsible are held by members with an address in the home economy and the operator has provided a disclosure document to the home regulator that meets the home economy requirements; or

- (b) *when the interests are offered in Australia*: there is an ongoing offer of interests (either in the passport fund or a sub-fund) in the home economy that is subject to the home economy requirements for an offer to the general public and does not exclude retail investors resident in the home economy.

RG 000.26 You will need to specify which one of these methods you will use as part of the notification process.

What do you need to give to ASIC?

RG 000.27 You will need to submit to ASIC a notice of intention that:

- (a) is in the prescribed form; and

Note: Our website will provide more information about how to lodge a notice of intention.

- (b) includes a copy of the PDS that is required to be provided in accordance with draft s1213(2)(b) of the Corporations Act.

Note: For guidance on the applicable requirements for PDSs, see RG 000.89–RG 000.98.

RG 000.28 You will need to pay the applicable fee when submitting your notice of intention.

Note: Our website will provide more information on our fees and methods of payment.

Completeness check

RG 000.29 After we receive your notice of intention including a copy of your PDS, we will form an opinion about whether the information required under the prescribed form for the notice of intention has been provided. If the information has not been provided, we will notify you of this in writing within the period of 21 days beginning on the day after the notice of intention is lodged with ASIC, or any extended period agreed between the operator and ASIC: see draft s1213A and s1213D of the Corporations Act. If we give you such a notice, you may not offer interests in the foreign passport fund in Australia: see draft s1213C(1)(b)(i). You may start the notification process again by lodging another notice of intention, and you should ensure it includes all of the required information.

Our assessment of your notice of intention

RG 000.30 Once we have formed the opinion that the information required under the prescribed form for the notice of intention has been provided, we will assess your notice of intention against the grounds of rejection in the Corporations Act.

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Grounds for rejection

- RG 000.31 Under draft s1213B(1) of the Corporations Act, we may reject a notice of intention if:
- (a) we are of the opinion that the Corporations Act (other than the Australian Passport Rules), the ASIC Act and the applicable law of the home economy (including the home economy Passport Rules) have not been, are not being, or are not likely to be, complied with in relation to the foreign passport fund;
 - (b) we are of the opinion that it is not in Australia's public interest for the foreign passport operator to offer interests in the fund in Australia;
 - (c) we have not consented to an exemption or modification made to the home economy Passport Rules that affects the foreign passport fund or entities connected with the fund (which may include its directors, custodian or auditor); or
 - (d) the name of the foreign passport fund in the notice of intention is unavailable in Australia for one of the reasons specified in draft s1213B(1)(d), and the foreign passport fund operator has not notified us and the home regulator of the fund in writing that it will adopt an available alternative name for the fund in Australia.
- RG 000.32 We must reject a notice of intention if the relevant Minister has made a determination under draft s1210B(1) that foreign passport fund operators or a class of foreign passport funds from a specified home economy must not offer interests in Australia and that determination applies to the fund in the notice of intention: see draft s1213B(5).

Note: Determinations that relate to passport funds from a particular home economy may only be made if there are grounds for making the determination under the Memorandum of Cooperation and the processes have been followed. The two main situations contemplated by the Memorandum of Cooperation for prohibiting foreign passport funds from offering interests in a host economy are a difference concerning the interpretation, application or implementation of the Memorandum of Cooperation or where the foreign passport fund's home economy has ceased to be a participating economy and has formally withdrawn from the Memorandum of Cooperation.

Not likely to comply with relevant Australian law and home economy law

- RG 000.33 This ground for rejection supports the key objectives of the Asia Region Funds Passport—to maintain the legal and regulatory frameworks that promote investor protection and fair, efficient and transparent markets for financial services, support financial stability and provide high standards in the management and distribution of collective investment schemes.

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RG 000.34 When completing your notice of intention, you will be asked about your processes and procedures to assess your capability to comply with applicable Australian law, including around:

- (a) receiving, considering and responding to complaints by Australian members and potential investors;
- (b) monitoring the compliance of your distributor in Australia;
- (c) preparing and reviewing your PDS;
- (d) preparing advertising and marketing in Australia;
- (e) communicating with Australian members and potential investors;
- (f) if relevant, lodging communications with an Australian financial market; and
- (g) lodging ongoing notifications with ASIC.

RG 000.35 In assessing your processes and procedures for complying with Australian law, we do not take a 'one-size-fits-all' approach. We assess your compliance processes and procedures collectively and in proportion to the nature, scale and complexity of your business activities. In assessing that nature, scale and complexity, we will take into account the following considerations as a minimum:

- (a) the number of funds managed and the size of funds under management;
- (b) the investment strategies of the foreign passport fund, including the extent to which it will employ leverage;
- (c) whether the foreign passport fund is listed, traded or unlisted;
- (d) the types of investments and investment location;
- (e) the distribution model and investor base;
- (f) the activities, including investment approach, the foreign passport fund engages in;
- (g) the extent to which the foreign passport fund operator delegates material operational activities;
- (h) the diversity and structure of the operations (including the geographical spread of operations and the extent to which the foreign passport operator outsources any of its functions);
- (i) the volume and size of the transactions the foreign passport fund operator is responsible for;
- (j) whether the foreign passport fund operator's main business is undertaking funds management; and
- (k) the number of people in the foreign passport fund operator's organisation.

- RG 000.36 However, where we consider appropriate (for example, for areas of high compliance risk), we may assess specific procedures and processes individually. In conducting this assessment (still in line with the nature, scale and complexity of your operations), we may take into account factors such as whether:
- (a) the procedure or process is aligned with the foreign passport fund operator's values, objectives and strategy, taking into account the nature, scale and complexity of the particular foreign passport fund;
 - (b) there is a clear and demonstrated nexus between the compliance obligation(s) and the procedure or process, and the procedure or process reflects the actual procedures, processes and practices of the foreign passport fund operator and the foreign passport fund;
 - (c) the procedure or process is set out with enough certainty to allow the foreign passport fund operator, ASIC and the auditor of the compliance plan to assess whether the foreign passport fund operator has complied with the procedure or process;
 - (d) the procedure or process is written and documented in a clear manner so that it is usable by its target audience;
 - (e) the procedure or process provides for separate people to have responsibility for carrying out a particular compliance control and the monitoring of that procedure or process;
 - (f) the frequency and quantity of compliance controls for the procedure or process, and their monitoring, are sufficient to effectively manage the compliance risks related to the procedure or process;
 - (g) compliance with the procedure or process is monitored, the processes for monitoring compliance with the procedure or process are described with sufficient details and certainty to ensure whether they will or have been complied with, and any non-compliance is reported to the compliance committee, the board or ASIC as required; and
 - (h) the procedure or process is maintained so that it is up to date at all times.
- RG 000.37 We may also review the PDS to check whether it has been prepared in accordance with the disclosure requirements in the Corporations Act and any relevant ASIC policy. If we consider a PDS is defective, we may request amendments to resolve the identified disclosure issues.
- RG 000.38 When determining the likelihood of a foreign passport fund complying with applicable home economy laws (including the home economy Passport Rules), we must request the opinion of the home regulator. If the home regulator provides its opinion within the requested period, we must give effect to that opinion: see draft s1213B(2) of the Corporations Act.

Public interest

- RG 000.39 The term ‘public interest’ is not defined. Under this ground of rejection, we must weigh the public interest in allowing the foreign passport fund to operate in Australia against any potential detriments or risks for Australian investors.
- RG 000.40 Benefits to the public interest may include greater competition, increased investment opportunities for Australian investors, and the strengthening of Australia’s relationship with the host economy.
- RG 000.41 Harm to the public interest may result from concerns that the fund will breach Australian laws or place Australian investors at risk. When considering harm to the public interest, we must not take into account any negative consequences of greater competition for Australia’s fund management industry: see draft s1213B(3) of the Corporations Act.
- RG 000.42 We are not required by draft s1213B to conduct an assessment of the public interest in relation to every notice of intention we receive, but may do so if we consider it appropriate: see draft s1213B(4).

ASIC does not consent to an exemption or modification to the home economy Passport Rules

- RG 000.43 A passport regulator may exercise its powers to grant exemptions from or make modifications to its own laws and regulations in relation to a passport fund for which it is the home or host regulator. A home regulator may grant exemptions from or make modifications to the home economy Passport Rules in relation to a passport fund, if all host regulators of the passport fund consent.
- RG 000.44 Where ASIC (as a host regulator) has not consented to an exemption or modification to the home economy Passport Rules made by a home regulator, we may consider it appropriate not to permit interests in an affected foreign passport fund to be offered in Australia. Where the foreign relief relates to conduct that may not comply with the Australian Passport Rules, you will need to apply for relief from the relevant Australian Passport Rules when (or before) you give your notice of intention.

Note: You can apply for relief by sending an application to applications@asic.gov.au. Your application for relief should be complete, in sufficient detail and accompanied by the prescribed fee. Our powers and policy for granting exemptions and modifications in this context are discussed below in Section D.

Unavailability of the name for the foreign passport fund

- RG 000.45 Under draft s1213B(1)(d), we may reject a notice of intention if:
- (a) the name of the foreign passport fund is unavailable because:
 - (i) another entity has registered or reserved the same name under the Corporations Act;

- (ii) the name is identical to the name of a new managed investment scheme that has lodged an application with ASIC for registration under s601EB of the Corporations Act;
 - (iii) the name is the business name of another individual or body that is not the operator of the foreign passport fund; and
 - (iv) the name is unacceptable in Australia under Sch 6 to the Corporations Regulations because it is offensive, or suggests a misleading connection with the government; and
- (b) you have not notified us and your home regulator in writing that you will adopt an available alternative name for the fund in Australia.

RG 000.46 The policy objective for this potential ground for rejecting a notice of intention is to prevent any conflict or contravention of Australian legal requirements on the use of names in a commercial context.

RG 000.47 You will not be able to submit your notice of intention where the proposed name is already registered with us as a business name. In the notice of intention you can notify us of an alternative name you will use for the fund in Australia.

Note: See ASIC's website for further information on [business name availability](#) and how to check the availability of a business name by [searching our Business Names Register](#).

Extension of consideration period

RG 000.48 Once we have accepted your notice of intention for lodgement, we have 21 days to assess it (the 'consideration period'). This 21-day consideration period can be extended for an additional period of up to seven days, if agreed in writing between you and ASIC: see draft s1213D(1)(b) of the Corporations Act. There can be more than one extension of the consideration period, but each extension must be for no more than seven days: see draft s1213D(2).

Note: Examples of when an extension may be needed include when the consideration period extends over a holiday period or the notice of intention raises issues that are complex.

Additional information

RG 000.49 We might ask you in writing to give us additional information before we can complete our assessment of your notice of intention. You will need to make sure we receive this within the timeframe in our request. If the information is not provided within the timeframe requested, we may have to make a decision about your notice of intention on the basis of the information already provided. We may give you more time to provide a response, if you agree to an extension of the consideration period.

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Withdrawing your notice of intention

- RG 000.50 You can withdraw your notice of intention at any stage of the process.
- RG 000.51 If you withdraw your notice of intention after it has been accepted for assessment, we will not be able to refund the fee for lodging the notice of intention or hold it over if you decide to reapply.

What happens when you reapply?

- RG 000.52 You can reapply using details from your original notice of intention, so you do not have to start again.

What if your notice of intention is rejected?

- RG 000.53 When we assess your notice of intention, we may conclude that we have grounds to reject the notice of intention under draft s1213B of the Corporations Act.
- RG 000.54 Before we reject your notice of intention, we will normally write to you explaining why we are proposing to do so, and giving you two options:
- (a) You can make written submissions. This will give you an opportunity to further explain why you believe we should not reject your notice of intention. If, after considering any submissions, we decide to reject your notice of intention, we will write to you setting out the decision and reasons why. We will tell you the review rights you may have in relation to the decision. We will also notify your home regulator that we have refused an application for entry for your foreign passport fund. The fact the notice of intention was rejected will be on the public record.
 - (b) You can choose to withdraw your notice of intention. If you take this option, we won't be able to refund your application fee or hold it over if you decide to reapply. We may notify your home regulator, and the fact that the notice of intention was withdrawn will be on the public record.
- RG 000.55 This process is designed to provide applicants with procedural fairness and ensure we make our decision with due regard to all the relevant circumstances. We will normally do this by giving you an opportunity to reply and make submissions before we make any proposed decisions that would negatively affect your ability to offer interests in a foreign passport fund to persons in Australia. However, we do have to limit the time you have to respond so that we can make a decision within the consideration period. We may give you more time to provide a response, if you agree to an extension of the consideration period.
- RG 000.56 If we ultimately decide to reject your notice of intention, we must give you notice of our decision of the rejection in writing: see draft s1213B(6).

What happens to the information you send to ASIC?

RG 000.57 Some parts of the information you provide during the notification process are confidential, and other parts are not. Some or all of the non-confidential information may be uploaded to a searchable public register at the time when you apply or subsequently.

Note: See the [privacy statement](#) on our website for more information.

RG 000.58 ASIC may by legislative instrument determine that information that is lodged with ASIC in a notice of intention will not be available for inspection or copying from ASIC if it is of a kind specified in the determination: see draft s1213(3) of the Corporations Act.

RG 000.59 In certain other circumstances, we may disclose confidential information if required or permitted by law. Our powers and policy for disclosing and using confidential information in this context are discussed further in Section D.

When can you start offering interests in Australia?

RG 000.60 You may offer interests in the fund to persons in Australia, and the fund will be a notified foreign passport fund (see draft s1213C of the Corporations Act), if 21 days have passed since you lodged your notice of intention and we have not notified you:

- (a) that we are of the opinion that information required under the prescribed form for the notice of intention has not been provided; or
- (b) that your notice of intention has been rejected.

RG 000.61 We will confirm your status as a notified foreign passport fund.

RG 000.62 You can also check your status as a notified foreign passport fund by viewing ASIC's register of passport funds and/or the equivalent register maintained by your home regulator.

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C Ongoing requirements

Key points

While an offer of interests in a foreign passport fund remains open to persons in Australia, you must continue to comply with ongoing requirements in Australia, including under the Australian Passport Rules. These include:

- lodging financial statement reports, audit reports and implementation review reports (see RG 000.63–RG 000.66);
- notifying ASIC of certain change of events (see RG 000.67–RG 000.71);
- reporting significant breaches to ASIC (see RG 000.72–RG 000.87); and
- providing required disclosure (see RG 000.89–RG 000.113).

Lodgement of reports

RG 000.63 The Australian Passport Rules require a foreign passport fund operator to lodge with ASIC (as a host regulator) copies of the following reports for a notified foreign passport fund:

- (a) financial statement reports;
- (b) audit reports in relation to the financial statement reports; and
- (c) implementation review reports.

Note: The implementation review report covers the annual compliance review of the operations of the notified foreign passport fund. The implementation review must be conducted by an entity of the kind that is permitted by the home regulator to conduct such reviews: see section 15 of the Passport Rules.

RG 000.64 The reports must be prepared in accordance with the financial reporting requirements under the home economy laws and regulations, or in the case of the implementation review, the home economy Passport Rules and any applicable host economy Passport Rules (including the Australian Passport Rules).

RG 000.65 You must lodge the financial statement reports, auditing reports and implementation review reports with ASIC within three months after the end of the period covered by these reports.

RG 000.66 The policy objectives underlying these report lodgement requirements are:

- (a) maintaining investor confidence, enhancing market efficiency and ensuring the accountability of management through the provision of timely and reliable financial and other relevant information; and

- (b) making information available to a wide range of investors in Australia to help them make economic decisions.

Change of events notification

- RG 000.67 A foreign passport fund operator must notify ASIC about any of the events set out in the first column of Table 2 below.
- RG 000.68 These change of events notification requirements ensure that the relevant details of a notified foreign passport fund are updated in the register of passport funds, which helps to promote confident and informed participation by Australian investors in the fund.
- RG 000.69 We may also consider the information in a change of events notification to decide whether it is necessary or appropriate to take any further action. We do not take action on all change of events matters reported to us.
- RG 000.70 These notifications play an important role in facilitating our oversight of notified foreign passport funds, and give us valuable information to help identify any relevant emerging trends.

Table 2: Change of events notification requirements for foreign passport fund operators

Event	Notification requirement
Interests in the notified foreign passport fund are permitted to be lawfully offered as a passport fund in a host economy other than Australia	Foreign passport fund operator must notify ASIC as soon as practicable and no later than seven days after it becomes aware that the event has occurred
The foreign passport fund operator first discloses to any person (other than its associate or an associate of the notified foreign passport fund, or by way of a lawful disclosure on a confidential basis in relation to incomplete negotiations relating to a transaction), that it intends to propose a change in the foreign passport fund operator	Foreign passport fund operator must notify ASIC as soon as practicable and no later than seven days after it becomes aware that the disclosure has occurred
The foreign passport fund operator is changed in accordance with the home economy laws and regulations	Foreign passport fund operator must notify ASIC as soon as practicable and no later than seven days after it becomes aware that the event has occurred
The foreign passport fund operator first discloses to any person (other than its associated or an associate of the notified foreign passport fund, or by way of a lawful disclosure on a confidential basis in relation to incomplete negotiations relating to a transaction), that it intends to propose the that notified foreign passport fund be wound up	Foreign passport fund operator must notify ASIC as soon as practicable and no later than seven days after it becomes aware that the disclosure has occurred

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Event	Notification requirement
A notified foreign passport fund commences being wound up in accordance with the home economy laws and regulations	Foreign passport fund operator must notify ASIC as soon as practicable and no later than seven days after it becomes aware that the event has occurred
A notified foreign passport fund completes being wound up in accordance with the home economy laws and regulations	Foreign passport fund operator must notify ASIC as soon as practicable and no later than seven days after it becomes aware that the event has occurred
The foreign passport fund operator first discloses to any person (other than its associate or an associate of the notified foreign passport fund) that it intends to apply for the deregistration of the notified foreign passport fund as a regulated collective investment scheme	Foreign passport fund operator must notify ASIC as soon as practicable and no later than seven days after it becomes aware that the event has occurred
The foreign passport fund operator applies for deregistration of the notified foreign passport fund as a passport fund or as a regulated collective investment scheme (if the intention to apply has not been notified)	Foreign passport fund operator must notify ASIC as soon as practicable and no later than seven days after it becomes aware that the event has occurred
A regulated collective investment scheme or a sub-fund of a regulated collective investment scheme is deregistered as a passport fund	Operator of the regulated collective investment scheme must notify ASIC as soon as practicable and no later than seven days after it becomes aware that the event has occurred
A regulated collective investment scheme that has been deregistered is no longer required to be operated in compliance with the Passport Rules	Operator of the former regulated collective investment scheme must notify ASIC as soon as practicable and no later than seven days after it becomes aware that the event has occurred
Redemption of interests in a notified foreign passport fund in accordance with the Passport Rules is suspended or ceases to be suspended	Foreign passport fund operator must notify ASIC as soon as practicable and no later than seven days after it becomes aware that the event has occurred

When do you 'become aware'?

RG 000.71 We consider that you become aware of an event when a person responsible for compliance becomes aware of the relevant event. We expect your internal systems to ensure that the relevant people are aware of these events (where applicable) in a timely and efficient manner.

Breach reporting

RG 000.72 Under the Passport Rules, a foreign passport fund operator must notify a host regulator in writing of a breach of the applicable law in the host economy if that breach:

- (a) might reasonably be regarded as ‘significant’, including having regard to any other breaches; or
- (b) when considered on its own or together with any other related breach, adversely affects the value of the assets of the notified foreign passport fund attributable to members in the host economy by more than 1%.

RG 000.73 You need to notify us of such a breach (in relation to the notified foreign passport fund) of any obligation under the applicable disclosure requirements.

Note: For information on these requirements, see RG 000.89–RG 000.113.

When must you report a breach?

RG 000.74 You must notify us as soon as practicable and in any event within seven days after you become aware of the relevant breach.

RG 000.75 Delays may defeat the intention for ASIC to be informed of reportable breaches as soon as practicable, so you should not wait until after the following events to send us your report:

- (a) you have completed all possible avenues of investigation to satisfy yourself whether or not the breach is a reportable breach;
- (b) the breach has been considered by your board of directors;
- (c) you have reported the breach to the home regulator or are required to do so;
- (d) the breach has been considered by your internal or external legal advisers; or
- (e) you have rectified (when appropriate), or you have taken steps to rectify, the breach.

RG 000.76 Failing to report a reportable breach under this requirement is an offence and may result in penalties: see RG 000.164(a) and RG 000.175. In deciding whether to take action for a failure to notify us of a significant breach, we will conduct inquiries to determine whether or not you have met your breach reporting obligations generally and we will take into account whether or not you have genuinely attempted to comply with these obligations.

RG 000.77 You must address a breach even if you may not have to report it to ASIC.

What does reportable breach mean?

RG 000.78 You do not have to report all breaches of Australian law. Under the Australian Passport Rules, you only have to report relevant breaches that are ‘significant’ or have a particular adverse effect on the value of assets of the notified foreign passport fund attributable to Australian members.

What is a significant breach?

- RG 000.79 The term ‘significant’ is not defined in the Australian Passport Rules. Whether a breach is significant or not will depend on the individual circumstances of the breach. You will need to decide whether a breach is significant and therefore reportable. When you are not sure whether a breach is significant, we encourage you to report the breach.
- RG 000.80 For the purposes of Australian law, you may have regard to the factors listed in Table 3 when deciding whether a breach is significant. A breach may be significant where only one, or a combination, of factors applies to your circumstances.
- RG 000.81 We expect that, when you become aware of any breach, you will:
- (a) consider the circumstances and impact of the breach in light of each of the factors in Table 3; and
 - (b) decide if the breach is significant.

Note: For further information on the factors summarised in Table 3, see [Regulatory Guide 78 Breach reporting by AFS licensees](#) (RG 78).

Table 3: Factors that may determine whether a breach is ‘significant’

Factor	Explanation
The number or frequency of similar previous breaches	The greater the number or frequency of similar breaches, including in other economies, the more likely the new breach will be significant.
The impact of the breach on your ability to operate the notified foreign passport fund	If a breach reduces your ability or capacity to compliantly operate the notified foreign passport fund, it may be significant.
The extent to which the breach indicates inadequate arrangements to ensure compliance with the obligations	If the breach indicates that your arrangements to ensure compliance are inadequate only in an isolated instance, it may not be significant. However, if the breach indicates broader inadequacies in your compliance arrangements, it is more likely to be significant and, if so, you should report it to us.

Factor	Explanation
<p>The actual or potential financial loss to your clients, or you, arising from the breach</p>	<p>Loss to Australian members</p> <p>If the breach, when considered on its own or together with any other related breach, adversely affects the value of the assets of the notified foreign passport fund attributable to members in Australia by more than 1%, it must be reported to us: RG 000.72(b).</p> <p>We consider that any breach of your obligations that causes actual or potential financial loss to Australian members is likely to be significant. Of course, if the breach is an isolated or occasional breach, the amount of the loss involved is minimal and immaterial, and the breach affects a very small number of clients, the breach is less likely to be significant.</p> <p>You must rectify breaches where appropriate, even if those breaches are not reported because they are not significant.</p> <p>Loss to the foreign passport fund operator</p> <p>If the breach causes actual or potential loss to you, the breach may or may not be significant, depending on the size of the loss compared with your overall business. However, if your actual or potential financial loss resulting from the breach means you no longer have the resources to comply with your obligations as a foreign passport fund operator, it would be significant.</p>

How do you report a breach?

- RG 000.82 A breach must be reported to us in writing by addressing the report to: ‘Misconduct and Breach Reporting, Australian Securities and Investments Commission’ and emailing it to fsr.breach.reporting@asic.gov.au.

What should you include in a breach report?

- RG 000.83 Your breach report should include the information in Table 4.
- RG 000.84 If you do not have information about any of the matters in Table 4 at the date of reporting:
- (a) include the information you do have; and
 - (b) supplement it by lodging further information as it becomes available.

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Table 4: Content of a written breach report

Item	Explanation
Date of the breach	<p>Include both:</p> <ul style="list-style-type: none"> the date that the breach occurred; and the date you became aware of the breach. <p>Note: If the breach is significant, you must report it to ASIC within seven days of the date when you became aware of it. You should therefore have a record of that date to ensure timely reporting.</p>
Description of the breach	Describe the obligation that has been breached, including references to the section of the Corporations Act or ASIC Act that sets out that obligation.
Why the breach is significant	Describe the factors that you considered in determining whether the breach is significant or adversely affects the value of the assets of the notified foreign passport fund attributable to Australian members by more than 1%, and therefore required to be reported to ASIC.
Reported to any other passport regulator	If the breach is or relates to a matter that you have reported or are reporting or are required to report to another passport regulator, give details of what has or will be reported and when.
How the breach was identified	For example, the breach may have been identified through your compliance arrangements or as a result of a client complaint.
How long the breach lasted	Include details as relevant.
Information about an AFS licensee	<p>If an AFS licensee is involved, include:</p> <ul style="list-style-type: none"> the AFS licensee's name and number; and if the AFS licensee's authorisation has been revoked, all last known contact details.
How the breach has been rectified	<p>Describe the process and responsibilities for handling the breach (or likely breach), including any steps that have been taken to remedy it (e.g. any compensation paid to clients).</p> <p>If ongoing steps are being taken to rectify the breach (or likely breach), indicate when you expect to send us a report on your progress in rectifying it.</p>
Future compliance	Describe any steps that have been, or will be, taken to ensure future compliance with the obligation.

What will we do with the information in a breach report?

- RG 000.85 We will consider the information in a breach report to decide whether it is necessary or appropriate to take any further action. We do not take action on all matters reported to us.
- RG 000.86 Breach notifications play a very important role in ASIC's oversight of passport funds. As well as alerting us to significant breaches of the law, they give us valuable information to help identify emerging trends of non-compliance.

RG 000.87 We follow a standard procedure when we receive a breach report: see Table 5.

Table 5: What we do with a breach report

Step	Explanation
Acknowledgement	On receipt of the breach report, we acknowledge it.
Request for more information (if needed)	If we have insufficient information to form a view, we will ask you for more information.
Decision by ASIC	When we have all the information we need (including possibly consulting other relevant sources of information, for example, complaints received by us), we will decide whether any further action on our part is necessary.
Notification to foreign passport fund operator	<p>If the following factors are satisfied, we may inform you that we do not intend to make further inquiries about the matter:</p> <ul style="list-style-type: none"> • you have made a genuine attempt to comply with the law and your breach reporting obligations; • either: <ul style="list-style-type: none"> – the cause(s) of the breach have been identified and, if readily rectified, addressed so that it is unlikely to recur; or – in other cases, a plan for rectifying the compliance failure has been developed and submitted to us; • the consequences (particularly to retail clients) are able to be dealt with comprehensively (e.g. by compensation and communication); • there has been no undue delay in notifying us; and • if the circumstances suggest there are more significant compliance issues within your business, they are identified. <p>If these factors are not satisfied, we will consider whether to take enforcement action: see Section D.</p>
Addressing compliance issues (if appropriate)	We may contact you to discuss how to improve your compliance procedures. This may involve working with you to address continuing compliance issues and determining how to reverse or minimise any damage resulting from the breach.
Consultation with other passport regulator (including your home regulator)	We may consult with other passport regulators (including your home regulator) about the breach, what information they may have relevant to assessing it and what action they may take and we may take relating to it.
Formal surveillance (if appropriate)	In appropriate circumstances, we may resolve outstanding compliance concerns by conducting a formal surveillance to test your compliance procedures or check whether there is a systemic compliance problem.
Enforcement action (if appropriate)	In more serious cases, or in cases involving unusual complexity to resolve the causes and consequences of the breach, we will consider taking enforcement action. We can commence an investigation if we have reason to suspect there has been a contravention of the law (see further s13(1) of the ASIC Act). We may take into account any action taken or that will be taken by other passport regulators as part of that consideration. See Section D for further information.

Note: For further information on the factors summarised in Table 5, see RG 78.

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Applicable Australian laws and how we administer them

RG 000.88 Under the Memorandum of Cooperation, host regulators can choose to apply their laws and regulations for regulated collective investment schemes to foreign passport funds in specified subject areas.

Note: See also the interim [Guidance on host economy laws and regulations relating to the Asia Region Funds Passport](#) published for consultation by the Asia Region Funds Passport Joint Committee on 25 July 2017.

Disclosure requirements

Product Disclosure Statements (PDSs)

RG 000.89 Under the Corporations Act, a retail client must be given certain disclosure documents before acquiring an interest in a notified foreign passport fund.

RG 000.90 The point of sale disclosure requirements only apply to offers and recommendations that are received in Australia, and issues that are made in Australia: see s1011A of the Corporations Act.

RG 000.91 A PDS must be prepared by or on behalf of the operator of a notified foreign passport fund: see s1013A of the Corporations Act. A PDS must contain sufficient information so that a retail client may make an informed decision about whether to purchase a financial product: s1013D of the Corporations Act.

Note: See s1013D(1) of the Corporations Act for the list of required statements and information to be included in a PDS.

RG 000.92 In addition to the required items of information under s1013D, a PDS must contain any other information that might reasonably influence the decision of a reasonable person, as a retail client, whether to acquire an interest in the notified foreign passport fund: see s1013E of the Corporations Act.

RG 000.93 For a notified foreign passport fund that will be traded on a financial market, the PDS must either inform a retail client of their right to obtain a copy of the financial report most recently lodged with ASIC (including any continuous disclosure notices), or be accompanied by or include a copy of those documents: see s1013FA of the Corporations Act.

Note: See s1013I of the Corporations Act, which sets out similar (and overlapping) requirements. See also [Regulatory Guide 66](#) *Transaction-specific disclosure for PDSs* (RG 66) for our policy on the use of transaction-specific PDSs under s1013FA.

RG 000.94 A PDS may be given electronically: see s1015C of the Corporations Act.

Note: See [Regulatory Guide 221](#) *Facilitating digital financial services disclosures* (RG 221) for information and guidance on when you can make electronic financial services disclosure to Australian retail clients, including the relief available under [ASIC Corporations \(Facilitating Electronic Delivery of Financial Services Disclosure\)](#)

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[Instrument 2015/647](#) and [ASIC Corporations \(Removing Barriers to Electronic Disclosure\) Instrument 2015/649](#).

RG 000.95 All information contained in a PDS must be worded and presented in a ‘clear, concise and effective’ manner: see s1013C(3) of the Corporations Act.

Note: The content requirements for a PDS for an interest in a notified foreign passport fund are set out in Pt 7.9, Div 2, Subdiv C of the Corporations Act. For further details, see s1013C, 1013D, 1013E and Pt 7.9, Div 4 and Sch 10 of the Corporations Regulations.

RG 000.96 Information in a PDS must be up to date at the time it is given to the client: see s1012J of the Corporations Act. A supplementary PDS containing updated information may be given with a PDS that has become out of date: see s1014E of the Corporations Act. The updated information is taken to be included in the PDS: see the Note to s1012J and 1014D of the Corporations Act.

Note: See [ASIC Corporations \(Updated Product Disclosure Statements\) Instrument 2016/1055](#) which provides relief from the requirement for a supplementary PDS where there is a mechanism in place under which retail clients may conveniently obtain up-to-date information about matters that change frequently but is not materially adverse information.

RG 000.97 Section D outlines our powers to make an interim and/or final stop order in certain circumstances when we detect or are made aware of disclosure concerns about a PDS: see RG 000.145.

RG 000.98 For additional guidance on disclosure in PDSs, see:

- (a) [Regulatory Guide 168](#) *Disclosure: Product Disclosure Statements (and other disclosure obligations)* (RG 168); and
- (b) [Regulatory Guide 97](#) *Disclosing fees and costs in PDSs and periodic statements* (RG 97).

Application form

RG 000.99 An application form for interests in the notified foreign passport fund must be attached to, accompany or be derived from the PDS: see s1016A of the Corporations Act. The application form must contain the applicant’s name, date of birth and address. Under reg 7.9.74(1) the address must be that of the actual applicant and cannot be the address of the AFS licensee or authorised representative advising the applicant. This is so the product issuer can identify the client. It is also consistent with the requirement that a PDS be ‘given’ to a client. The additional provision of an AFS licensee’s address for correspondence purposes is not prohibited—however, it is preferable for correspondence to also be sent to the client’s own address.

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Requirement to give certain documents on request

- RG 000.100 Under the Corporations Act, you must give to certain persons (on their application), a copy of the notified foreign passport fund's:
- (a) constituent document (constitution): see draft s1213F of the Corporations Act; or
 - (b) register of members: see draft s1213G of the Corporations Act.
- RG 000.101 Failure to provide a copy as requested is an offence, which is also subject to the infringement notice scheme. The use of information about a person obtained from a copy of a register of members of a notified foreign passport fund that contravenes draft s1213H(1) or (3) of the Corporations Act is also an offence, which is also subject to the infringement notice scheme.
- RG 000.102 The restrictions on the use of information in the register of members are designed to protect the privacy of members of the fund and prevent their details being used for soliciting donations, advertising or other improper purposes.
- RG 000.103 A person who breaches this prohibition on using the information in a register to contact members may have to pay compensation for any loss or damage suffered because of the breach. Any profits made by the person committing the breach may be recovered by the notified foreign passport fund as a debt owed to the fund: see draft s1213H(6)–(8).
- RG 000.104 Information on when we can issue an infringement notice is set out further in Section D at RG 000.163–RG 000.170.

Who may request a copy?

- RG 000.105 For a constitution, only a member or former member who acquired an interest in the notified foreign passport fund in Australia may request a copy under these provisions: see draft s1213F(1)(b).
- RG 000.106 For the register of members, any person in Australia, or any member or former member who acquired an interest in the notified foreign passport fund in Australia, may request a copy under these provisions: see draft s1213G(1)(b).

How a request can be made

- RG 000.107 A request for a constitution or register of members must be made in writing to the foreign passport fund operator: see draft s1213F(2) and 1213G(2).
- RG 000.108 The person making the request must pay your costs for providing the copy of the requested document. The amount that you charge must be reasonable and cannot exceed the prescribed amount: see draft s1213F(1)(c) and 1213G(1)(c). An amount is reasonable if it reflects your reasonable costs—

for example, the cost of processing the request (making a copy and postage), but not of translating the document into English.

- RG 000.109 A request for a copy of a register of members must also state the purpose for the intended use of the information, which must not be a prohibited purpose: see draft s1213G(2).

Processing the request

- RG 000.110 You must provide requested documents in English, unless the applicant specifically requests that the constitution or register of members be provided in an official language of the home economy of the notified foreign passport fund: see draft s1213F(6) and (7) and draft s1213G(6) and (7).

Note: In Australia, you can obtain a translation of documents into English using a translator accredited by the National Accreditation Authority for Translators and Interpreters (NAATI)—see the [NAATI website](#) for further information.

- RG 000.111 The copy should be provided electronically, unless the applicant expressly requests a paper copy: see draft s1213F(3) and (4) and draft s1213G(3) and (4).
- RG 000.112 Regardless of whether the copy of the requested document is to be provided electronically or in paper, you must provide it within seven days after the application is made: see draft s1213F(3) and (4) and draft s1213G(3) and (4).
- RG 000.113 We may allow a longer period to provide a copy of the requested document if you apply for relief (see RG 000.114–RG 000.120 on applications for relief): see draft s1213F(5) and draft s1213G(5).

D ASIC's powers and responsibilities

Key points

ASIC has certain powers and responsibilities in relation to notified foreign passport funds and foreign passport fund operators to administer the Asia Region Funds Passport, including to:

- grant exemptions and modifications to the Australian Passport Rules and some other applicable laws that we administer (see RG 000.114–RG 000.125);
- recognise exemptions and modifications granted by other passport regulators (see RG 000.126–RG 000.128);
- disclose and use confidential information (see RG 000.129–RG 000.140);
- check compliance and conduct investigations (see RG 000.141–RG 000.144);
- make a stop order (see RG 000.145–RG 000.158);
- take civil action (see RG 000.159–RG 000.162);
- issue an infringement notice (see RG 000.163–RG 000.170);
- accept an enforceable undertaking (see RG 000.171–RG 000.173); and
- take criminal prosecution action (see RG 000.174–RG 000.178).

As intended under the Asia Region Funds Passport, we (in our capacity as a host regulator) will generally rely on the relevant home regulator to assess and monitor compliance with the home economy laws and regulations and home economy Passport Rules, and take necessary action.

Our discretionary powers to grant exemptions and modifications

RG 000.114 ASIC has discretionary powers to grant exemptions from and declare modifications to draft Ch 8A of the Corporations Act (and any regulations made for the purposes of draft Ch 8A) and the Australian Passport Rules: see draft s1217 and 1217A of the Corporations Act. However, we can only grant exemptions from and declare modifications to the Australian Passport Rules for a notified foreign passport fund if its home regulator has granted an equivalent exemption or made a similar omission, modification or variation to the home economy Passport Rules: see draft s1217A(3)(b). We may give relief on our own initiative or on application.

Note: There is also a regulation making power under draft s1217B to make regulations providing exemptions from or modifications to draft Ch 8A, the Australian Passport Rules or a provision of any other chapter of the Corporations Act or the ASIC Act.

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- RG 000.115 The purpose of the exemption and modification powers is to allow ASIC to provide administrative relief in circumstances where the strict operation of the Corporations Act would produce unintended or unforeseen consequences. Such issues may arise because the Asia Region Funds Passport is a new regime, the funds industry is undergoing rapid innovation and many foreign passport funds are structured differently to Australian managed investment schemes or use vehicles that are not available in Australia.
- RG 000.116 ASIC also has powers of exemption and modification in relation to some other relevant requirements in the Corporations Act that apply to notified foreign passport funds, such as the requirements for PDSs and ongoing disclosures.

Applying for relief

- RG 000.117 We can give partial or complete relief from the draft Ch 8A provisions and/or the Australian Passport Rules, including with conditions. We will consider and determine all applications for relief on the basis of the facts, circumstances and merits of each individual application.
- RG 000.118 Applications for relief must identify the relief being sought, contain all the required information and be accompanied by the prescribed fee. Further detailed information on the application process is set out at Section C of [Regulatory Guide 51 Applications for relief](#) (RG 51).
- RG 000.119 In assessing an application for partial or complete relief, we will take into account our policy in RG 51, including the following factors:
- (a) the broad objective of consistency, to ensure that we exercise our discretion consistently and on the basis of consistent regulatory objectives, without turning our administrative policies into inflexible rules;
 - (b) the broad objective of definite principles, to ensure that we decide applications on the basis of principles which are definite and whose limits are clearly defined;
 - (c) the impact on relevant regulatory objectives, including whether the sought relief would produce a net regulatory benefit and whether the regulatory detriment is minimal and clearly outweighed by any resulting financial or commercial benefit;
 - (d) the purpose of the particular provision or requirement in relation to which relief is sought, including whether the sought relief promotes the objectives underlying the Corporations Act and the Asia Region Funds Passport.

Note: For an explanation of some of the factors we may take into account in applying the principles under RG 51 to grant relief for managed investment schemes and CCIVs, see also Section B of draft updated Regulatory Guide 136 *Funds management*:

Discretionary powers, which is available on our website at www.asic.gov.au/cp under CP 296.

- RG 000.120 The kind of relief that we give (if any), the extent of the relief and the situations in which the relief applies will depend on what is appropriate in the circumstances.

Home regulator must have granted equivalent exemption or modification

- RG 000.121 We can only make an exemption or modification to the Australian Passport Rules for a notified foreign passport fund if its home regulator has granted an equivalent exemption or made a similar omission, modification or variation to the home economy Passport Rules. This requirement is aimed at promoting the consistent and seamless application of the Passport Rules.
- RG 000.122 Where we receive an application seeking relief from the Australian Passport Rules, we may seek to confirm any information that you provide with your relevant home regulator. We may also share the application with other passport regulators and seek their views.
- RG 000.123 In your application you will need to explain whether you have obtained, and if not whether you have sought, relief from the home regulator (including whether such relief is pending), and if not, why not. It will not be appropriate for ASIC to give relief from the Australian Passport Rules until the home regulator has given corresponding relief.

Exemptions and modifications to be made publicly available

- RG 000.124 We maintain a register of passport funds. If we grant an exemption from or declare a modification to the Australian Passport Rules or a provision under draft Ch 8A of the Corporations Act in relation to a specific notified foreign passport fund, its operator or another person responsible for the fund's compliance with the relevant rule or provision, we will make the details of the exemption or modification (including any variation or revocation) publicly available on the register of passport funds.
- RG 000.125 This requirement promotes transparency around how the Asia Region Funds Passport is being administered by all passport regulators.

Our approach to recognising exemptions and modifications granted by other passport regulators

- RG 000.126 The home regulator of a notified foreign passport fund may exercise its powers to grant relief to the fund, its operator or another person responsible

for compliance in relation to that fund, in the form of exemptions from or modifications to the home economy's laws and regulations or the home economy Passport Rules. However, the home regulator must obtain written consent from all host regulators of the notified foreign passport fund to any exemption from or modification to the home economy Passport Rules.

RG 000.127 We will normally provide corresponding relief to the affected notified foreign passport fund in relation to the equivalent Australian Passport Rules, unless we do not consent to the exemption or modification or there are specific reasons why the relief should not be provided from the equivalent Australian Passport Rules.

RG 000.128 In deciding whether to grant or refuse consent to a home regulator for a proposed exemption or modification, we may take into account whether:

(a) the home economy's laws and regulations (including the home economy Passport Rules) remain sufficiently equivalent to Australian laws and regulations (including the Australian Passport Rules), in relation to the degree of Australian investor protection, market integrity and reduction of systemic risk;

Note: See [Regulatory Guide 54](#) *Principles for cross-border financial regulation* (RG 54) and [Regulatory Guide 176](#) *Foreign financial services providers* (RG 176) for information relating to our approach to equivalency assessment.

- (b) ASIC continues to have effective cooperation arrangements with the home regulator;
- (c) ASIC remains able to enforce our laws and regulations (including the Australian Passport Rules) that apply to the notified foreign passport fund, its operator or a person responsible for the fund's compliance;
- (d) adequate rights and remedies remain practically available to Australian investors who have acquired or will acquire an interest in the notified foreign passport fund;
- (e) there is adequate disclosure of information that Australian investors may reasonably require to make an informed assessment of any significant differences between the regulation of the notified foreign passport fund, its operator, or a person responsible for the fund's compliance and the regulation of comparable notified foreign passport funds offering interests in Australia, their operators or persons responsible for their compliance. In light of this, we may impose on the relief additional disclosure conditions, to ensure that the implications are clearly disclosed to Australian investors;
- (f) the exemption or modification adversely or unfairly impacts on one group of investors, operators or passport funds;
- (g) the exemption or modification would impair or nullify the policy rationale underlying the affected requirement(s);

- (h) the exemption or modification would conflict with Australian law and/or otherwise cause difficulties for the offering of the interests in the relevant notified foreign passport fund in Australia; and
- (i) there is a net regulatory benefit, or any regulatory detriment is minimal and is outweighed by the commercial and financial benefit.

Our powers to disclose and use confidential information

RG 000.129 ASIC must take all reasonable measures to protect from unauthorised use and disclosure information we receive in confidence in connection with our statutory functions and powers: see s127(1) of the ASIC Act. In the context of the Asia Region Funds Passport, we (like all passport regulators) must take all reasonable measures to keep confidential any information provided to us by a passport fund or passport fund operator on a confidential basis.

RG 000.130 Certain uses and disclosures are authorised: see s127(2)–(6) of the ASIC Act.

Note: See [Regulatory Guide 103 Confidentiality and release of information](#) (RG 103) for information about our approach to releasing confidential information we have obtained in connection with our statutory functions.

RG 000.131 This includes disclosure by ASIC under the *Freedom of Information Act 1982* (Cwlth) (FOI Act). In Australia, the FOI Act provides a legally enforceable right of access to government documents unless the document falls under an exemption or conditional exemption in the FOI Act (and releasing the document would be contrary to the public interest test). Government documents cover any documents held by ASIC, including those provided to us by a notified foreign passport fund or its operator on a confidential basis.

Note 1: For general information on the FOI Act and its operation, see the [Office of the Australian Information Commissioner website](#).

Note 2: See our website for general information on [how we approach our responsibilities under the FOI Act](#).

Authorised disclosure of confidential information

RG 000.132 Under s127(2) of the ASIC Act, we may disclose confidential information provided by a notified foreign passport fund or its operator if the disclosure is required or permitted by Australian law.

RG 000.133 Where disclosure is permitted but not required under Australian law, consistent with Annex 2 of the Memorandum of Cooperation, we will consider whether the disclosure is reasonable having regard to the purposes of the Memorandum of Cooperation and the interests of the passport fund

and operator of the passport fund to which the information relates. For a written request for information from another passport regulator, we will also consider whether the information is otherwise available to the requesting passport regulator and the matters (as relevant) set out at RG 000.135.

Disclosure to other passport regulators

Exchange of information arrangements under the Memorandum of Cooperation

- RG 000.134 Under Annex 4 of the Memorandum of Cooperation, we will cooperate as fully as possible under applicable Australian law with our fellow passport regulators and may exchange information in the following situations:
- (a) on written request from another passport regulator to enable it to assess compliance with its laws and regulations in relation to regulated entities, or to assess a relief application;
 - (b) by providing notification of specific events to the home regulator of a notified foreign passport fund and any other passport regulators in jurisdictions where interests in the notified foreign passport fund are offered (as set out in RG 000.138);
 - (c) on an ‘unsolicited’ basis, where we may give information that we have to another passport regulator if we consider it useful to that passport regulator in the performance of its functions and for the purposes specified by us.
- RG 000.135 However, we may deny cooperation (including the exchange of information with our fellow passport regulators) in any of the following circumstances set out in Annex 4 of the Memorandum of Cooperation:
- (a) where cooperation would require us to act in a manner that would violate Australian law;
 - (b) where criminal proceedings have already been initiated in Australia based on the same facts and against the same notified foreign passport fund (and/or its operator) and the cooperation requested relates to the subject matter of the Australian criminal proceedings;
 - (c) where the cooperation sought is in the context of enforcement investigations conducted for the purpose in whole or in part of taking legal proceedings for:
 - (i) a criminal offence; or
 - (ii) other penalty to be imposed on a person;
 - (d) where the request for assistance by a passport regulator is not made in accordance with Annex 4 of the Memorandum of Cooperation;

- (e) where the cooperation sought is not for the purpose of considering or providing grounds for the:
 - (i) admission of a passport fund into a host economy;
 - (ii) registration of a passport fund in a home economy;
 - (iii) imposition of a stop order;
 - (iv) deregistration of a passport fund;
 - (v) removal, cancellation or suspension or the application of additional restrictions, directions or conditions on any relevant licence, authority, approval or registration;
 - (vi) imposition of a ban on engaging in regulated activity;
 - (vii) granting an exemption or modification; or
 - (viii) civil proceedings or administrative proceedings (but not proceedings for a criminal offence or other penalty).
- (f) a request for assistance is made under the terms and conditions of the [IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information](#) (IOSCO MMOU), or under the terms and conditions of any other memoranda of understanding or agreements between a passport regulator and another authority (including a passport regulator); or
- (g) on the grounds of the public interest or essential national interest notified in writing.

Other international cooperation exchange of information arrangements

RG 000.136 As stated at RG 000.18, the arrangements under the Memorandum of Cooperation (including those outlined at RG 000.134–RG 000.135) are intended to complement and not override any other existing cross-border regulatory cooperation arrangements: see also Annex 4, Part 2, Clause 3(2) and (3) to the Memorandum of Cooperation.

RG 000.137 The main other existing such arrangements are:

- (a) requests from foreign regulators for assistance under international cooperation agreements, including the IOSCO MMOU and other bilateral Memoranda of Understanding (MOUs);

Note 1: See our website for further information on [our approach to international regulatory and enforcement cooperation](#) (including a list of MOUs and other international agreements to which we are a signatory).

Note 2: See the IOSCO website for general information on the [IOSCO MMOU](#).

- (b) exchange of information with a government or agency of a foreign country under s127(4)(c) of the ASIC Act if we are satisfied that the release of information will enable that foreign government party to perform or exercise any of its functions or powers. This would include

exchanging confidential information (including that relating to notified foreign passport funds and their operators) with other passport regulators to further promote cross-border supervisory cooperation for the Asia Region Funds Passport;

- (c) where authorised under the *Mutual Assistance in Business Regulation Act 1992* (Cwlth), we may also obtain information on behalf of another foreign (passport) regulator by exercising compulsory powers to obtain documents, information or testimony; and

Note: See our website for general information on [our approach to requests from foreign regulators and other foreign agencies for information and other material](#).

- (d) the formal mutual assistance regime (Australia is a participant), whereby countries provide assistance to each other to investigate and prosecute offences, and to recover the proceeds of crime. The mutual assistance regime in Australia is governed by the *Mutual Assistance in Criminal Matters Act 1987* (Cwlth), which is administered by the Australian Government's Attorney-General's Department.

Note: For general information on the mutual assistance process in Australia, see the [Attorney-General's Department website](#).

Support of specific notification obligations to other passport regulators

RG 000.138 As a host regulator we have committed in the Memorandum of Cooperation to notify other passport regulators of the following matters:

- (a) pending regulatory changes in Australia that in our opinion are likely to have a significant adverse impact on the operations, activities or reputation of a regulated entity in connection with a passport fund;
- (b) events we are aware of that in our opinion are likely to have a significant adverse impact on a regulated entity in connection with a passport fund (including changes in the operating environment, operations, financial resources, management or systems and control of a regulated entity in connection with a passport fund);
- (c) any enforcement or regulatory actions or sanctions taken in Australia against a regulated person (e.g. refusal, revocation or suspension of a licence) that may have a significant impact on other passport regulators' confidence in a regulated entity's ability or willingness to comply with any applicable laws, regulations and the Passport Rules; and
- (d) any stop orders we have made in relation to a notified foreign passport fund operator.

Permitted use of confidential information

RG 000.139 Any confidential information exchanged between passport regulators under Annex 4 of the Memorandum of Cooperation may be used for:

- (a) performing functions of a passport regulator under the Memorandum of Cooperation;
- (b) seeking to ensure compliance with the laws or regulations of the passport regulator receiving the confidential information; or
- (c) considering or providing grounds for taking the following specified regulatory action in respect of a passport fund:
 - (i) admission of a passport fund into a host economy;
 - (ii) registration of a passport fund in a home economy;
 - (iii) imposition of a stop order;
 - (iv) deregistration of a passport fund;
 - (v) removal, cancellation or suspension or the application of additional restrictions, directions or conditions on any relevant licence, authority, approval or registration;
 - (vi) imposition of a ban on engaging in regulated activity;
 - (vii) granting an exemption or modification; or
 - (viii) civil proceedings or administrative proceedings (but not criminal proceedings or proceedings for the imposition of a penalty, except with the consent of the passport regulator that provided the information and use of the information is subject to the terms and conditions in the IOSCO MMOU).

Procedural fairness

RG 000.140 In some cases, we may be required to consult with you or another potentially affected third party before we make a decision to disclose confidential information.

Note: See RG 103 for information about our approach to our procedural fairness obligations.

Checking compliance and investigations

RG 000.141 One of the goals of the Memorandum of Cooperation is to maintain the legal and regulatory frameworks that promote investor protection and fair, efficient and transparent markets for financial services, support financial stability and provide high standards in the management and distribution of collective investment schemes.

RG 000.142 You may be subject to administrative, civil or criminal action for failure to comply with an obligation applying to you under the Corporations Act or ASIC Act, including under the Australian Passport Rules.

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RG 000.143 Generally, we expect the home regulator to take necessary enforcement action. However, we may also consider taking enforcement action in relation to alleged misconduct concerning the applicable Australian laws we administer (see RG 000.88–RG 000.113) if we consider it necessary to protect Australian members of, or potential Australian investors in, a notified foreign passport fund. We will take into account any action that has been or may be taken by a home regulator in considering whether to take administrative, civil or criminal action in Australia.

Note: For example, we may take enforcement action in relation to contraventions of the obligations not to make false or misleading statements or engage in misleading or deceptive conduct in communications with Australian members or potential investors (such as in relation to the PDS or advertising).

RG 000.144 We can use our investigative and information gathering powers under Pt 3 of the ASIC Act where we have reason to suspect non-compliance with the Corporations Act or ASIC Act, including the Australian Passport Rules.

Note 1: We can also investigate a suspected contravention of a law of the state or territory where the suspected contravention concerns the management or affairs of a managed investment scheme and/or involves fraud or dishonesty that relates to a managed investment scheme or financial products: see s13(1)(b) of the ASIC Act.

Note 2: See our website for information on [our compulsory information gathering powers](#).

Note 3: See [Information Sheet 151 ASIC's approach to enforcement](#) (INFO 151) for information on how we select matters for formal investigation under Pt 3 of the ASIC Act.

When can we make a stop order?

RG 000.145 A stop order is an administrative mechanism that allows ASIC to make an order (a 'stop order') that the operator of a notified foreign passport fund do one or more of the following:

- (a) cease offering, or not begin offering, interests in the notified foreign passport fund in Australia, either indefinitely or for a specified period;
- (b) take some other specified action; or
- (c) cease taking some other specified action: see draft s1215A(1) of the Corporations Act.

Note: ASIC also has a statutory power under s1020E of the Corporations Act to make a stop order in relation to specified situations, including where there is a misleading or deceptive statement in, or omission from, a disclosure document, supplement or other disclosure material, or any advertising or promotional material (see RG 000.89–RG 000.99) or a disclosure document or statement is not worded in a 'clear, concise and effective' manner (see RG 000.95). RG 168 sets out guidance on how we will use s1020E in this context and will be applicable if we make a stop order under s1020E in relation to a notified foreign passport fund and/or its operator.

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Preconditions to the exercise of our stop order powers

RG 000.146 Under draft s1215A(3) of the Corporations Act, we may only make a stop order where:

- (a) in our opinion, both of the following are satisfied:
 - (i) the Corporations Act (including the Australian Passport Rules), the ASIC Act or the law of the home economy (including the home economy Passport Rules) has not been, is not being, or is not likely to be complied with in relation to the notified foreign passport fund (whether in Australia or in any other place); and

Note: In determining our opinion on the matters relating to compliance with the law of the home economy, we must seek the home regulator's opinion on the issue: see draft s1215A(5)(a)–(c). If received by us, we must give effect to the opinion of the home regulator: see draft s1215A(5)(d).

- (ii) the stop order is necessary having regard to the impact on present and prospective members of the failure or potential failure to comply with the law mentioned in RG 000.146(a)(i) and any action taken or that may be taken by the home regulator;
- (b) the operator of the notified foreign passport fund has ceased to be a registered foreign company;
- (c) the foreign passport fund operator has not had a local agent for more than 21 days;
- (d) the relevant Minister has made a determination under draft s1210B of the Corporations Act that operators of foreign passport funds, or a class of foreign passport funds, from a specified home economy must not offer interests in Australia and that determination applies to the notified foreign passport fund; or
- (e) in the case of an order to take or not take an action specified in the order, taking the specified action or not taking the action (as applicable) is reasonably necessary to ensure the foreign passport fund operator ceases offering, or does not begin offering, interests in Australia.

RG 000.147 Stop orders must be in writing and given to the foreign passport fund operator as soon as reasonably practicable after they are made: see draft s1215A(1) and (8). If we make a stop order, we may include a statement that specified conduct engaged in contrary to the stop order will be regarded as non-compliance with the requirements of a specified provision of the Corporations Act: see draft s1215A(2).

RG 000.148 It is an offence for a foreign passport fund operator to contravene a stop order (whether interim or final): see draft s1215D(2) of the Corporations Act. You must also take reasonable steps to ensure that any other person who might engage in conduct that is contrary to a stop order is aware of the order: see draft s1215D(3). It is an offence for a person who is aware of a

stop order to engage in conduct that is contrary to that stop order: see draft s1215D(4).

Hearing and opportunity to provide written submissions

RG 000.149 Before we make a stop order on the basis set out in RG 000.146(a), we are obliged to hold a hearing and give a reasonable opportunity to interested persons to make oral or written submissions to us on whether the order should be made: see draft s1215A(7) of the Corporations Act.

RG 000.150 The decision whether to impose a stop order is made by one of our staff members to whom the power to make this type of decision has been delegated. The delegate decides whether to exercise ASIC's powers after considering the evidence and submissions put by the foreign passport fund operator, and other relevant matters.

Interim stop orders

RG 000.151 In circumstances where we need to hold a hearing and give interested persons time to make any oral or written submissions about whether an order should be made, there will be a delay between the time when we determine that the grounds for a stop order appear to be satisfied and the time when we decide to make a stop order.

RG 000.152 Accordingly, where we are of the opinion that such a delay would be prejudicial to the public interest and that grounds for a stop order exist, ASIC has the power under draft s1215B(1) of the Corporations Act to make a stop order of the kind set out in RG 000.145 on an interim basis (an 'interim stop order').

RG 000.153 We may make an interim stop order without holding a hearing, or during a hearing, if we are of the opinion that there are circumstances that would be grounds for a final stop order under draft s1215A(3) and that any delay in making the final stop order would be prejudicial to the public interest.

RG 000.154 The maximum duration of an interim stop order that is not made during a hearing is 21 days. Interim stop orders made during a hearing last until ASIC makes a stop order after the conclusion of the hearing or the interim stop order is revoked: see draft s1215B(2).

RG 000.155 Interim stop orders must be in writing and given to the notified foreign passport fund operator as soon as reasonably practicable after they are made: see draft s1215B(2) and (3).

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Revoking stop orders

- RG 000.156 You can make an application to ASIC to have a stop order that is in force in relation to the notified foreign passport fund revoked on the basis there are no longer any grounds under draft s1215A(3) for the order: see draft s1215C(2) of the Corporations Act.
- RG 000.157 The application must be in the prescribed form and set out the basis on which you believe there are no longer grounds for the stop order: see draft s1215C(3).
- RG 000.158 Following such an application by an operator of a notified foreign passport fund, we must revoke a stop order made under draft s1215A if we are of the opinion that there are no longer grounds for the stop order: see draft s1215C(4)(b).

Note: Section 1215C does not limit the circumstances in which we may revoke or vary a stop order made under draft s1215A: see draft s1215C(5).

When can we take civil action?

- RG 000.159 We can take court action to seek a wide range of civil enforcement remedies for breaches of the Australian Passport Rules, the Corporations Act and any other applicable Australian law that we administer as host economy laws and regulations. These remedies include:
- (a) ‘preservative’ remedies, which are designed to prevent or contain damage caused by suspected wrongdoing;
 - (b) ‘compensation’ remedies, which aim to recover damages for persons who have suffered loss;
 - (c) ‘protective’ remedies, which are primarily designed to protect investors and financial consumers, rather than punish those involved in breaches of the law; and
 - (d) civil penalties, which may be imposed for serious contraventions of specified Corporations Act provisions with the penalty based on civil court processes and which involve a lesser onus of proof than criminal prosecution.
- RG 000.160 These remedies may be available in relation to alleged misconduct involving a notified foreign passport fund, its operator and/or a person distributing interests in the notified foreign passport fund in Australia.
- RG 000.161 Civil action may be undertaken on its own or in addition to criminal action: see RG 000.174–RG 000.178.

RG 000.162 INFO 151 sets out how we generally approach our enforcement role, including the circumstances where we may take court action to obtain civil enforcement remedies.

When can we issue an infringement notice?

RG 000.163 The infringement notice regime allows ASIC to deal with certain criminal offences by requiring payment of a penalty as an alternative to prosecution.

RG 000.164 Under draft s1216(1) of the Corporations Act, the following strict liability offences are subject to an infringement notice under Pt 5 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cwlth) ('Regulatory Powers Act'):

- (a) failure to comply with an obligation under the Australian Passport Rules in relation to a notified foreign passport fund that results, or is likely to result, in a person in Australia who holds an interest in the fund suffering financial or other disadvantage: see draft s1211C(2) of the Corporations Act;
- (b) failure or refusal to give a person a copy of the constitution of the notified foreign passport fund in accordance with draft s1213F of the Corporations Act;
- (c) failure or refusal to give a person a copy of the register of members of the notified foreign passport fund in accordance with draft s1213G(1) of the Corporations Act; and
- (d) using information about a person obtained from a copy of the register of members of a notified foreign passport fund that contravenes draft s1213H(1) or (3).

RG 000.165 For the purposes of Pt 5 of the Regulatory Powers Act, ASIC is the infringement officer and the relevant chief executive in relation to the provisions mentioned in RG 000.164: see draft s1216(2) and (3) of the Corporations Act. As the infringement officer ASIC can, if we believe on reasonable grounds that a person has contravened one of the provisions mentioned in RG 000.164, give the person an infringement notice for the alleged contravention: see s103(1) of the Regulatory Powers Act. The infringement notice must be given within 12 months after the day on which the contravention is alleged to have taken place: see s103(2) of the Regulatory Powers Act.

RG 000.166 Infringement notices are designed to provide a fast and effective remedy that is proportionate and proximate to the alleged breach. We will aim to issue an infringement notice promptly after identifying the alleged breach, consistent with properly assessing the facts and our conclusion that there has been an actionable breach.

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- RG 000.167 An infringement notice will state the amount that is payable under the notice: see s104(1)(f) of the Regulatory Powers Act. The amount is payable within 28 days after the notice is given unless ASIC as relevant chief executive grants an extension: see s105 of the Regulatory Powers Act.
- RG 000.168 ASIC as relevant chief executive may also withdraw an infringement notice given to a person, whether or not the person has made written representations seeking withdrawal: see s106 of the Regulatory Powers Act.
- RG 000.169 If the infringement notice in relation to an alleged contravention is not withdrawn, and the person to whom the infringement notice is given elects to pay the amount stated in the notice before the end of the period for compliance, then:
- (a) the person's liability for the alleged contravention is discharged;
 - (b) if the provision is an offence provision and does not also constitute a civil penalty provision—the person may not be prosecuted in a court for the alleged contravention;
 - (c) if the provision is an offence provision and can also constitute a civil penalty provision—the person may not be prosecuted in a court, and proceedings seeking a civil penalty order may not be brought, in relation to the alleged contravention;
 - (d) if the provision is a civil penalty provision—proceedings seeking a civil penalty order may not be brought in relation to the alleged contravention;
 - (e) the person is not regarded as having admitted guilt or liability for the alleged contravention; and
 - (f) if the provision is an offence provision—the person is not regarded as having been convicted of the alleged offence: see s107(1) of the Regulatory Powers Act.
- RG 000.170 Your liability for the alleged contravention will not be discharged or otherwise affected and you may be subject to other civil or criminal proceedings in relation to the alleged contravention, if:
- (a) we do not give you an infringement notice in relation to an alleged contravention of one of the provisions referred to in RG 000.164; or
 - (b) you do not comply with an infringement notice given to you in relation to such an alleged contravention; or
 - (c) an infringement notice given to you in relation to such an alleged contravention is subsequently withdrawn.

Note: See our website for further information on [infringement notices](#) generally.

When can we accept an enforceable undertaking?

- RG 000.171 Under s93AA of the ASIC Act, ASIC has the power to accept a written undertaking from a person in connection with a matter in relation to which we have a function or power under the Corporations Act or the ASIC Act, including our functions and powers relating to notified foreign passport funds. These undertakings are enforceable by the Federal Court of Australia and are known as ‘enforceable undertakings’.
- RG 000.172 As an administrative settlement, we may only accept enforceable undertakings as an alternative to civil court action or certain administrative actions. There are a number of situations where we cannot accept an enforceable undertaking—most notably, we cannot accept an enforceable undertaking as an alternative to commencing criminal proceedings.
- RG 000.173 We have set out how we use enforceable undertakings in [Regulatory Guide 100 Enforceable undertakings](#) (RG 100). See also INFO 151 for general information on enforceable undertakings.

When can we take criminal prosecution action?

- RG 000.174 Chapter 8A of the Corporations Act sets out offences for persons who breach the Australian Passport Rules in relation to a notified foreign passport fund. These are outlined at RG 000.164(a)–RG 000.164(d).
- RG 000.175 If a person does not comply with an obligation under the Australian Passport Rules in relation to a notified foreign passport fund and the non-compliance results or is likely to result in an Australian member suffering financial or other disadvantage, that person commits an offence under draft s1211C(2) of the Corporations Act. This is a strict liability offence attracting a fine of up to 60 penalty units: see draft s1211C(4) of the Corporations Act. A more serious offence applies if the person acted intentionally or recklessly, attracting a fine of up to 2,000 penalty units or imprisonment for five years or both: see draft s1211C(3).
- RG 000.176 The draft Ch 8A offences outlined at RG 000.164(b)–RG 000.164(d) are also each strict liability offences attracting a fine of up to 60 penalty units: see draft s1213F(1), 1213G(1) and 1213H(4) of the Corporations Act.
- RG 000.177 Similarly, contravention of one of the requirements in the Corporations Act (as part of the applicable host economy laws and regulations) may lead to criminal liability. Part 9.4 Div 2 of the Corporations Act contains the general penalty provisions.
- RG 000.178 INFO 151 also sets out when we may take criminal prosecution action.

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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.
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	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Australia	Has the meaning given for the term 'this jurisdiction' in s5 of the Corporations Act
Ch 7 (for example)	A chapter of the Corporations Act (in this example numbered 7), unless otherwise specified
collective investment scheme	Has the meaning given in section 55 of the Passport Rules
consideration period	A period of 21 days beginning on the day after a notice of intention is lodged with ASIC, or any extended period as agreed between ASIC and the foreign passport fund operator Note: See draft s1213D of the Corporations Act for the exact definition.
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
foreign passport fund	A passport fund with a home economy other than Australia
home economy	The participating economy in which a passport fund is first registered, approved or authorised as a regulated collective investment scheme
home regulator	The passport regulator in a passport fund's home economy

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Term	Meaning in this document
host economy	<p>A participating economy that is not a passport fund's home economy and either:</p> <ul style="list-style-type: none"> • permits the fund to offer interests in the fund in that economy under the Asia Region Funds Passport; or • 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)
host regulator	The passport regulator in a passport fund's host economy
Memorandum of Cooperation	The Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport
notice of intention	<p>A notice of intention to offer interests in a foreign passport fund to persons in Australia</p> <p>Note: Under s25C of the <i>Acts Interpretation Act 1901</i>, the lodged notice of intention must be in substantial compliance with the prescribed form.</p>
participating economy	<p>An economy that is a participant under the Memorandum of Cooperation (while it is in effect) and has:</p> <ul style="list-style-type: none"> • advised the Asia Region Funds Passport Joint Committee that it has implemented the Asia Region Funds Passport; and • not withdrawn from the Memorandum of Cooperation
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	<p>The requirements in Annex 3 to the Memorandum of Cooperation, as incorporated into the domestic law of a participating economy</p> <p>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.</p>
PDS	<p>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</p> <p>Note: See s761A for the exact definition.</p>
Pt 7.7A (for example)	A part of the Corporations Act (in this example numbered 7.7A), unless otherwise specified
reg 7.9.74 (for example)	A regulation of the Corporations Regulations 2001 (in this example numbered 7.9.74), unless otherwise specified

Term	Meaning in this document
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
retail client	A client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of the Corporations Regulations
RG 51 (for example)	An ASIC regulatory guide (in this example numbered 51)
s9 (for example)	A section of the Corporations Act (in this example numbered 9), unless otherwise specified

Related information

Headnotes

AFS licence, AFS licensee, Asia Region Funds Passport, consideration period, foreign passport fund, foreign passport fund operator, home economy, home regulator, host economy, host regulator, Memorandum of Cooperation, notice of intention, passport regulator, Passport Rules, register of passport funds

Legislative instruments

[ASIC Corporations \(Facilitating Electronic Delivery of Financial Services Disclosure\) Instrument 2015/647](#)

[ASIC Corporations \(Removing Barriers to Electronic Disclosure\) Instrument 2015/649](#)

[ASIC Corporations \(Updated Product Disclosure Statements\) Instrument 2016/1055](#)

Regulatory guides

Draft updated RG 136 *Funds management: Discretionary powers*

[RG 51](#) *Applications for relief*

[RG 66](#) *Transaction-specific disclosure for PDSs*

[RG 78](#) *Breach reporting by AFS licensees*

[RG 97](#) *Disclosing fees and costs in PDSs and periodic statements*

[RG 100](#) *Enforceable undertakings*

[RG 103](#) *Confidentiality and release of information*

[RG 168](#) *Disclosure: Product Disclosure Statements (and other disclosure obligations)*

[RG 176](#) *Foreign financial services providers*

[RG 221](#) *Facilitating digital financial services disclosures*

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Legislation

ASIC Act, Pt 3, s13, 127

Corporations Act, Pts 5B.2, 7.9, 9.4, s9, 601CD, 601CF, 601CG, 601CJ, 761A, 1011A, 1012J, 1013A, 1013C, 1013D, 1013E, 1013FA, 1013I, 1014D, 1014E, 1016A

Corporations Amendment (Asia Region Funds Passport) Bill 2017 (exposure draft), draft Ch 8A, draft Pt 8A.4, draft s1210B, 1211, 1211A, 1211C, 1213, 1213A, 1213B, 1213C, 1213D, 1213F, 1213G, 1213H, 1215A, 1215B, 1215C, 1215D, 1216, 1217, 1217A, 1217B

Corporations Regulations, Pt 7.9, reg 7.9.74, Sch 10

FOI Act

Regulatory Powers Act, Pt 5, s103, 104, 105, 106, 107

Information sheets

[INFO 151](#) *ASIC's approach to enforcement*

Consultation papers

[CP 296](#) *Funds management*

Other documents

[IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information](#)

[Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport](#)