



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 131

# Funds management: Establishing and registering a fund

July 2018

### About this guide

This guide is for responsible entities of registered managed investment schemes (registered schemes) and Australian passport fund operators, and their advisers.

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

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

### 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 guide was issued in July 2018 and is based on legislation and regulations as at the date of issue.

### Disclaimer

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

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## A Overview

### Key points

This guide provides information on how to establish and register a managed investment scheme.

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

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

### How our guidance applies

- RG 131.1 This guide is for:
- (a) responsible entities of registered managed investment schemes (registered schemes);
  - (b) Australian passport fund operators; and
  - (c) their advisers.
- RG 131.2 We will apply this guide when assessing applications lodged with ASIC to:
- (a) register a managed investment scheme; and
  - (b) register a registered scheme as an Australian passport fund.
- RG 131.3 This guide does not apply to operators of foreign passport funds lodging a notice of intention to enter or operate in Australia as a host economy under the Asia Region Funds Passport.

Note: For information on the requirements for foreign passport fund operators lodging a notice of intention to offer interests in Australia, see [Regulatory Guide 138 Foreign passport funds](#) (RG 138).

### Registering a managed investment scheme

- RG 131.4 To register a managed investment scheme, the responsible entity must be an Australian public company registered under the Corporations Act and hold an Australian financial services (AFS) licence authorising it to operate a registered scheme.
- RG 131.5 An application to register a managed investment scheme can be made to ASIC by completing [Form 5100 Application for registration of a managed investment scheme](#).

- RG 131.6 For a managed investment scheme to be registered, s601EB(1) of the Corporations Act sets out that:
- (a) the application must:
    - (i) state the name of the scheme, the name and address of the responsible entity, and the name and address of the person who has consented to act as auditor of the compliance plan; and
    - (ii) be accompanied by a copy of the constitution, a copy of the compliance plan and a statement signed by the directors (directors' statement) that the constitution meets s601GA and 601GB and the compliance plan meets s601HA (see s601EA);
  - (b) the responsible entity must be an Australian public company holding an AFS licence (see s601FA);
  - (c) the constitution must meet the requirements of s601GA and 601GB;
  - (d) the compliance plan must set out the adequate measures that the responsible entity will apply in operating the managed investment scheme (see s601HA);
  - (e) a copy of the compliance plan (signed by the directors of the responsible entity) must be lodged with ASIC (see s601HC); and
  - (f) arrangements that satisfy the requirements of s601HG must be in place to audit compliance with the compliance plan.

Note: In this guide, references to sections (s), chapters (Chs) and parts (Pts) are to the Corporations Act, unless otherwise specified.

- RG 131.7 When lodging an application, the responsible entity will also need to select the dominant asset kind relevant to the managed investment scheme.
- RG 131.8 When an application to register a managed investment scheme is lodged with ASIC, we assess whether the application complies with the requirements of the Corporations Act. We must register a managed investment scheme within 14 days of lodgement (14-day registration period), unless it appears to us that an application does not meet one or more legislative requirements under s601EB.
- RG 131.9 We may seek clarification about the information in an application or the documents attached to it during the 14-day registration period. We may also ask for amendments to the application form, constitution, compliance plan or directors' statement if they do not appear to comply with the requirements of the law as interpreted and set out in our regulatory guides. We may also refuse the application if we are of the opinion there is non-compliance, without asking for amendments.
- RG 131.10 We will refuse to register a managed investment scheme if the responsible entity or its advisers are unwilling or unable to make any requested amendments within the 14-day registration period, and it appears to us that s601EB is not met.

- RG 131.11 When a managed investment scheme is registered, we give it an Australian Registered Scheme Number (ARSN) and keep a record of it: see s601EB(2) and (3).

Note: See Section B for information on registering a managed investment scheme.

## Registering as an Australian passport fund

- RG 131.12 An Australian passport fund operator will use its Australian Company Number (ACN) or Australian Registered Business Number (ARBN) to log into the [ASIC Regulatory Portal](#) to apply for registration as an Australian passport fund.

- RG 131.13 An Australian passport fund operator seeking to register an Australian passport fund will need to complete and submit to ASIC an application and attach a copy of the Product Disclosure Statement (PDS): see s1212.

Note: For more information on [how to register as an Australian passport fund](#), which includes guidance on the requirements for PDSs, see our website.

- RG 131.14 A managed investment scheme must be registered under the Corporations Act before it may become registered as an Australian passport fund. However, it does not need to be registered at the time the application to register as an Australian passport fund is lodged.

- RG 131.15 We must register an Australian passport fund if we are of the opinion that the Australian passport fund operator:
- (a) meets the eligible entity requirements in section 3 of Annex 2 to the [Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport](#) (Memorandum of Cooperation); and
  - (b) is likely to comply with the Corporations Act, including the Australian Passport Rules, and the *Australian Securities and Investments Commission 2001* (ASIC Act).

Note: The Australian Passport Rules are made under s1211 and 1211A by the Australian Minister responsible for the Asia Region Funds Passport (the responsible Minister).

- RG 131.16 There is no prescribed timeframe for us to decide whether to register an Australian passport fund. We will aim to make decisions about applications promptly. However, the time we take to make a decision is likely to be impacted by the nature, scale and complexity of the Australian passport fund operator and the fund, and the quality of the information provided in support of the application.

- RG 131.17 In making any decision whether to register an Australian passport fund, we may:
- (a) ask for further information on answers the Australian passport fund operator has given in the application, particularly if they are unclear or do not appear to be consistent with the law and/or our guidance;
  - (b) give the operator the opportunity to make amendments to the answers it has given;
  - (c) seek clarification of the contents of the PDS; or
  - (d) give the operator the opportunity to make amendments to the PDS or provide explanations where we have concerns.
- RG 131.18 We may refuse registration as an Australian passport fund if the Australian passport fund operator or its advisers are unwilling or unable to provide information or make amendments needed to enable us to grant the registration.

Note: See Section C for more information on registering as an Australian passport fund.

## What to include with an application

- RG 131.19 Table 1 sets out what a responsible entity or Australian passport fund operator needs to provide and do to register a managed investment scheme or an Australian passport fund.

**Table 1: Application requirements for registering a managed investment scheme or an Australian passport fund**

| Application requirements    | Managed investment scheme   | Australian passport fund  |
|-----------------------------|---|---|
| <b>Application</b>          | <a href="#">Form 5100</a> <i>Application for registration of a managed investment scheme</i>                                  | Apply for registration as an Australian passport fund, will be available through the <a href="#">ASIC Regulatory Portal</a> |
| <b>Constitution</b>         | Must meet s601GA and 601GB  | Must meet section 4 of the Australian Passport Rules  |
| <b>Compliance plan</b>      | Must meet s601HA  | Must meet s601HA, including the additional obligations for an Australian passport fund                                      |
| <b>Directors' statement</b> | <a href="#">Form 5103</a> <i>Directors' statement relating to application for registration of a managed investment scheme</i> | Not applicable  |
| <b>PDS</b>                  | Not applicable  | Must meet Div 2 of Pt 7.9   |
| <b>Fee</b>                  | Yes   | Yes   |

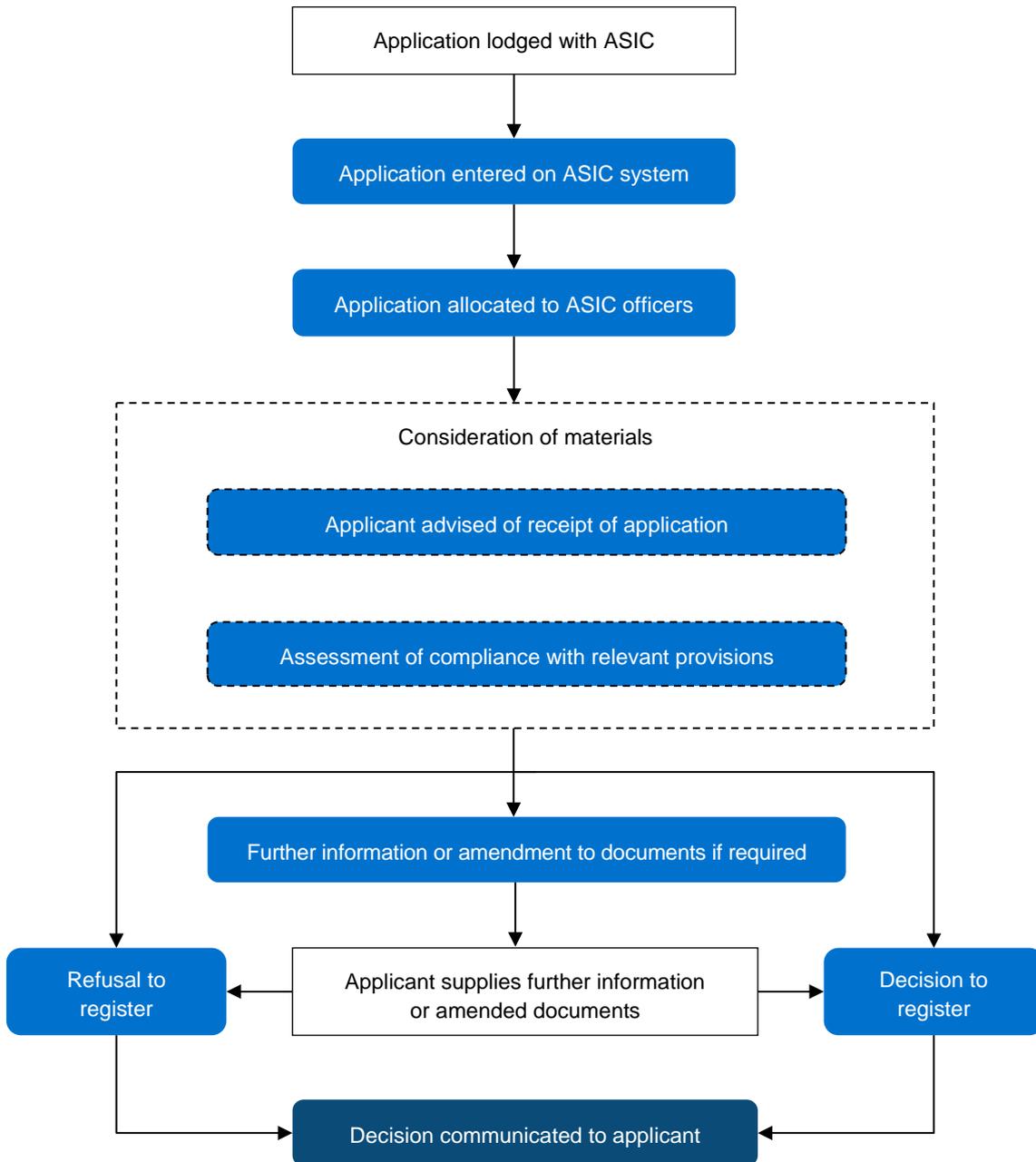
| Application requirements      | Managed investment scheme | Australian passport fund   |
|-------------------------------|---------------------------|--|
| <b>Additional information</b> | Not applicable            | <p>The Australian passport fund operator must supply:</p> <ul style="list-style-type: none"> <li>• an Australian criminal history check; and</li> <li>• a bankruptcy check</li> </ul> <p>Note: If an overseas criminal history or bankruptcy check has not been obtained, the operator may alternatively provide a statutory declaration explaining the efforts made to obtain the checks and stating their criminal and bankruptcy history.</p> |

Note 1: For more information on our fees and methods of payment, see [Information Sheet 30 Fees for commonly lodged documents](#) (INFO 30).

Note 2: For an Australian passport fund, overseas criminal history and bankruptcy checks are required for each country of residence (in addition to Australian criminal history and bankruptcy checks) if the person has resided overseas within the past 10 years. Australian criminal history and bankruptcy checks are not required if the person has not resided in Australia at all over the past 10 years.

## How we assess an application

- RG 131.20 Once an application has been submitted, we will advise the responsible entity or Australian passport fund operator that we have received the application.
- RG 131.21 We will contact the responsible entity or Australian passport fund operator to let them know whether we require more information or amendments to the application or documents, or if we have decided to register or refuse the application.
- RG 131.22 If we request more information or amendments, we will give the responsible entity or Australian passport fund operator a reasonable time to supply any more information or make any amendments required before deciding whether to register or refuse the application. We will communicate our decision to the responsible entity or operator once the further information is supplied or the amendments are made.
- Note: If the responsible entity or Australian passport fund operator does not supply the information or make the amendments within a reasonable time, we will refuse the application for registration if we are of the opinion it does not meet the requirements to be granted.
- RG 131.23 This process is shown in Figure 1.

**Figure 1: Application assessment process**

Note 1: The process in this flowchart is explained in RG 131.20–RG 131.22 (accessible version).

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

## B Registering a managed investment scheme

### Key points

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

The application must be in the approved form, and the contents of the application and necessary supporting documentation must meet the requirements of the Corporations Act. This section explains how we apply those requirements when assessing an application to register a scheme.

### Applying to register a scheme

- RG 131.24 An application to register a managed investment scheme must be lodged with ASIC and meet the requirements in s601EA.
- RG 131.25 After we receive an application, we will undertake a ‘completeness check’ to see whether it is complete. If it does not pass this check, we will reject the application and the responsible entity will have to reapply. We will generally tell the responsible entity which parts are incomplete.

### The responsible entity

- RG 131.26 To register a managed investment scheme, the responsible entity must be an Australian public company that has an AFS licence authorising it to operate the registered scheme: see s601FA.

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

- RG 131.27 If the responsible entity is not already authorised by its AFS licence to operate the relevant kind of registered scheme, an application to register a managed investment scheme should not be submitted until we have considered the AFS licensing application. We will indicate when an application to register the scheme can be made. If the application to register the scheme is made before we have given this indication, we may refuse the application because there is no responsible entity that meets the requirements of s601FA.

## Contents of the application

### Application

RG 131.28 The responsible entity must complete [Form 5100](#). The application requires details about the responsible entity and the person who has consented to be the auditor of the compliance plan: see s601EA(2)(a) and (b).

Note: The consent of the auditor under s601EA(2)(b) must be obtained before the application is lodged.

RG 131.29 All relevant fields on the application must be completed or we will reject the application for lodgement.

RG 131.30 Where the application requires detail about an aspect of the managed investment scheme, this should be completed with sufficient detail to enable us to properly understand and assess the answer.

### Constitution

RG 131.31 The constitution must meet the requirements in s601GA and 601GB.

RG 131.32 Under s601GA, the constitution must make adequate provision for, or specify, certain prescribed matters. These include:

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

RG 131.33 Under s601GB, the constitution of a registered scheme must be a legally enforceable document between the responsible entity and members. It must set out some or all of the rights, duties and liabilities of the responsible entity in its operation of the scheme.

RG 131.34 While there is no prescribed form for the constitution of a registered scheme, the application must state which provisions of the constitution address the matters in s601GA and 601GB. We will usually consider only these provisions, and other provisions that appear related, when registering a managed investment scheme.

## Compliance plan

- RG 131.35 The compliance plan must set out the adequate measures the responsible entity will apply to ensure the registered scheme operates in accordance with the Corporations Act and its constitution: see s601HA.
- RG 131.36 A compliance plan must include the following arrangements:
- (a) all scheme property is clearly identified as scheme property and held separately from the property of the responsible entity and any other scheme;
  - (b) the compliance committee functions properly;
  - (c) scheme property is valued at regular intervals appropriate to the nature of the property;
  - (d) the compliance plan is audited; and
  - (e) adequate records of the scheme's operations are kept (see s601HA(1)).
- RG 131.37 Under s601HB(1), the responsible entity may lodge a compliance plan that incorporates by reference specified provisions, as in force at a specified time or from time to time, of the compliance plan of another registered scheme of which it is also the responsible entity.
- RG 131.38 The compliance controls in a compliance plan should be prepared specifically by reference to the type of registered scheme and its investment strategy. Where a compliance plan incorporates parts of another plan, the compliance controls which make up that part of the incorporated plan should be appropriate compliance controls for that registered scheme. Because group compliance risks apply across all registered schemes the responsible entity operates, we consider group compliance controls are generally appropriate to be incorporated into all compliance plans for those schemes. However, registered scheme level compliance controls should only be incorporated where they are appropriate to the nature, scale and complexity of the particular scheme. For example, incorporating parts of a compliance plan which address compliance risks associated with the investment strategy for a mortgage fund into an agribusiness fund plan will not be appropriately tailored to addressing the specific risks of the second fund.

Note 1: For more information on incorporating parts of compliance plans into other compliance plans, see RG 132.88–RG 132.90 of [Regulatory Guide 132 Funds management: Compliance and oversight](#) (RG 132).

Note 2: For examples of 'group compliance risks' and 'scheme-level compliance risks', see RG 132.118 and RG 132.144–RG 132.145.

## Directors' statement

- RG 131.39 The directors of the responsible entity must declare that:
- (a) the contents of the constitution meet the requirements of the Corporations Act;
  - (b) the constitution is a legally enforceable document between the members and the responsible entity; and
  - (c) the compliance plan complies with s601HA.
- RG 131.40 The directors must make this or by lodging a signed [Form 5103](#) *Directors' statement relating to application for registration of a managed investment scheme*.
- RG 131.41 Where Form 5103 is used, each director of the responsible entity at the date of lodgement must have signed the directors' statement. Directors need to take care that their statement is correct. Under s1308, if a director does not take reasonable steps to ensure they do not make a false statement to ASIC, the director may be guilty of an offence.
- RG 131.42 Agents for the directors cannot make the declaration. However, on occasion, an alternate director may make the declaration. A director can appoint an alternate director with the other directors' approval. The alternate director will act as an alternate to exercise some or all of the director's powers for a specified period. Depending on the terms of appointment, an alternate may be granted the same powers and carry out the same duties as the appointing director.

## Assessment by ASIC

- RG 131.43 When an application to register a managed investment scheme is lodged with ASIC, we will look at whether it appears to comply with s601EB. We must register the managed investment scheme within the 14-day registration period, unless it appears to us that the application does not meet one or more of the requirements: see s601EB.

## Constitution

- RG 131.44 We will look at whether the constitution appears to meet the requirements in s601GA and 601GB: see our guidance on these requirements in [Regulatory Guide 134](#) *Funds management: Constitutions* (RG 134). This regulatory guide sets out the basis on which we will apply the content requirements for constitutions when an application to register a managed investment scheme is lodged with ASIC.

- RG 131.45 We will consider whether the constitution appears to make adequate provision for or specifies:
- (a) the consideration that is to be paid to acquire an interest in the scheme (see Section B of RG 134);
  - (b) the powers of the responsible entity in making investments of, or otherwise dealing with, scheme property (see RG 134.118–RG 134.122);
  - (c) any rights to be paid fees out of scheme property or to be indemnified out of scheme property for liabilities or expenses incurred in relation to performing its duties (see RG 134.123–RG 134.137);
  - (d) method by which complaints made by members in relation to the scheme are to be dealt with (see RG 134.138–RG 134.153);
  - (e) any right to withdraw from a registered scheme and the adequate procedures for making and dealing with withdrawal requests (see RG 134.170–RG 134.210);
  - (f) winding up the scheme (see Section H of RG 134).

### Compliance plan

- RG 131.46 We will consider whether the compliance plan appears to meet the requirements in s601HA: see our guidance on the requirements in [RG 132](#).
- RG 131.47 Taking into account our guidance in RG 132, we will check whether the compliance plan for a registered scheme appears to contain:
- (a) adequate compliance controls as set out in RG 131.36; and
  - (b) at a minimum, adequate detail about the things set out in RG 132.84.

Note: If the compliance plan incorporates provisions from the compliance plan of an earlier scheme, we will not generally check that the compliance plan of the earlier scheme contains this content at the point of registering the later scheme. However, if we have concerns about the content of the incorporated compliance plan, we may raise it at a later time.

- RG 131.48 Where a compliance plan incorporates parts of another plan, we will consider whether the compliance controls which make up that part of the incorporated plan appear to be appropriate compliance controls for the registered scheme: see RG 132.88–RG 132.90. We will apply greater scrutiny to scheme-level compliance controls that are incorporated into the compliance plan to satisfy ourselves that they are appropriate to the nature, scale and complexity of the particular scheme. We will generally also check that the parts of the other plan have been incorporated in the way that meets s601HB and [ASIC Corporations \(Chapter 5C—Miscellaneous Provisions\) Instrument 2017/125](#): see RG 132.88.

- RG 131.49 We will consider whether the group-level and scheme-level compliance controls appear adequate to ensure compliance with the Corporations Act and the scheme's constitution. We expect adequate compliance controls to:
- (a) align with the responsible entity's values, objectives and strategy (see RG 132.85);
  - (b) reflect the responsible entity's actual procedures, processes and practices (see RG 132.86 and RG 132.97);
  - (c) have a nexus to the compliance obligations and compliance risks (see RG 132.87);
  - (d) be set out with enough certainty (see RG 132.91–RG 132.94);
  - (e) be written in a clear manner so that they are usable by the target audience (see RG 132.95–RG 132.97);
  - (f) identify functional roles responsible for carrying out a particular compliance control (see RG 132.98–RG 132.99 and RG 132.104);
  - (g) have sufficient frequency and quantity to effectively manage the compliance risks (see RG 132.105 and RG 132.107);
  - (h) be tailored to the nature, scale and complexity of the scheme, taking into account the assets invested in by the scheme and the scheme's investment strategy (see RG 132.117–RG 132.167); and
  - (i) be reviewed and maintained (see RG 132.110–RG 132.116).
- RG 131.50 We will also consider the processes for monitoring compliance with the compliance controls: see RG 132.108. We expect adequate processes to:
- (a) evaluate the effectiveness of compliance controls;
  - (b) ensure that the allocation of roles is appropriate for meeting compliance obligations;
  - (c) ensure the compliance obligations are accurate and up to date;
  - (d) ensure that previously identified compliance failures are addressed effectively;
  - (e) identify and address instances where compliance controls were not complied with or there were 'near misses';
  - (f) note attitudes and behaviours in relation to compliance and the perceived competence of employees when dealing with issues that arise;
  - (g) assess performance against the compliance controls; and
  - (h) keep records of the compliance controls, results of testing and remediation undertaken.

## Director's statement

RG 131.51 For an application that uses [Form 5103](#), we will check that each and every director of the responsible entity, or a properly appointed alternate, has signed the form. We will check these directors were directors at the date of lodgement. If an alternate director has signed, we will review the terms of the alternate director's appointment to ensure they are broad enough to authorise the signing of the form.

## Action we may take

- RG 131.52 During the 14-day registration period, we may ask for:
- (a) in rare instances, an explanation of how the managed investment scheme meets the definition of a 'managed investment scheme' in s9;
  - (b) an amendment to the application or more information, particularly where an answer given does not provide sufficient detail to enable us to properly understand and assess the answer;
  - (c) a new Form 5103 to be signed by all directors and lodged;
  - (d) a further explanation of provisions in the constitution;
  - (e) amendments to be made to provisions in the constitution to meet s601GA and 601GB (see our guidance in [RG 134](#)), and the constitution to be re-executed;
  - (f) a further explanation about the contents of the compliance plan; and
  - (g) amendments to be made to the compliance plan to meet s601HA (see our guidance in [RG 132](#)).
- RG 131.53 We will refuse to register the managed investment scheme if the responsible entity or its advisers are unwilling or unable to provide this explanation, further information or amended documentation as required within the 14-day registration period.
- RG 131.54 We may also refuse to register the managed investment scheme if it appears to us that one or more of the criteria in s601EB are not met. We may do this without taking any of the steps in RG 131.52. This is because it is up to the responsible entity to ensure the application meets the requirements of the Corporations Act when lodged.
- RG 131.55 If we decide not to register the managed investment scheme, we will write to the responsible entity setting out the decision and the reasons why. We will also tell the responsible entity how to apply to the Administrative Appeals Tribunal for a review if the responsible entity considers the decision is wrong.
- RG 131.56 The responsible entity may choose to withdraw the application. If the responsible entity takes this option, we will not be able to refund the

application fee or hold it over if the responsible entity decides to reapply. The fact that the application has been withdrawn will be on the public record.

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

RG 131.57 When lodging an application to register the managed investment scheme, the responsible entity or its advisers should state that certain provisions of the constitution have been reviewed before lodgement if that is the case. We may refuse registration if:

- (a) the responsible entity or its advisers have not requested a review of provisions before lodgement;
- (b) the provisions appear to us to not meet the Corporations Act; and
- (c) we do not have sufficient time to seek information on whether the provisions will meet the Corporations Act.

Note: Generally, we will not review draft provisions of a scheme constitution before it is lodged for registration, except for the provisions for the consideration to acquire an interest or calculation of the withdrawal amount. For more information on requesting a review of provisions for constitutions, see [RG 134.26–RG 134.35](#).

RG 131.58 We will not give priority to or expedite the processing time of an application to register a managed investment scheme on the sole basis that it has been preceded by a review by our staff.

RG 131.59 Our review of the provisions in a constitution before lodgement does not prevent us from raising more matters when we assess whether the constitution meets the requirements under s601EB.

## C Registering as an Australian passport fund

### Key points

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

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

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

### Applying to register as an Australian passport fund

- RG 131.60 An Australian passport fund operator seeking to register an Australian passport fund will need to complete and submit to ASIC an application and attach a copy of the PDS: see s1212.
- RG 131.61 The requirements for applying to register as an Australian passport fund are in addition to the requirements for registering a managed investment scheme under Ch 5C.
- RG 131.62 To register an Australian passport fund, we need to be of the opinion that:
- (a) the Australian passport fund operator is an eligible entity within the meaning of section 3 of Annex 2 to the [Memorandum of Cooperation](#); and
  - (b) the Australian passport fund is likely to be operated in compliance with the Corporations Act, including the Australian Passport Rules, and the ASIC Act.
- RG 131.63 Section 1212(1) sets out that an application may be made to register as an Australian passport fund where:
- (a) the responsible entity or person acting on its behalf lodges the application; or
  - (b) the proposed responsible entity or person acting on its behalf lodges the application and has also applied to register the managed investment scheme under s601EB.

- RG 131.64 Where an application for registration of a managed investment scheme is lodged at the same time as an application to register as an Australian passport fund, we may:
- (a) begin our assessment of both applications on receiving them; and
  - (b) ask for further information or amendments at the same time.
- RG 131.65 As an Australian passport fund must be a registered scheme, we will refuse the application to register as an Australian passport fund if we also refuse the application to register the managed investment scheme.
- RG 131.66 We will be unlikely to make a decision to register the Australian passport fund at the same time as making a decision to register the managed investment scheme. This is because generally an application to register as an Australian passport fund is more complex and will take more time for us to assess.

## Contents of the application

### Application

- RG 131.67 The Australian passport fund operator can complete *Apply for registration as an Australian passport fund*, which will be available through the [ASIC Regulatory Portal](#).
- Note 1: For more information on [how to register as an Australian passport fund](#), which includes guidance on the requirements for PDSs, see our website.
- Note 2: An Australian passport fund operator will need to contact us to obtain a copy of the application if it cannot complete *Apply for registration as an Australian passport fund* using the ASIC Regulatory Portal. Please ask online or call 1300 300 630.
- RG 131.68 The Australian passport fund operator will also need to pay the applicable fee when submitting their application.
- Note: For more information on our fees and methods of payment, see [INFO 30](#).
- RG 131.69 The application is made up of yes/no, multiple choice and open-ended questions that take into account the purpose of each provision in the Australian Passport Rules.
- RG 131.70 Where we have asked for specific representations to be given about compliance with the Australian Passport Rules, we will usually rely on the answer that is given to form an opinion about the likelihood of compliance.
- RG 131.71 Australian passport fund operators need to take care that their representations are correct. Under s1308, if an operator does not take reasonable steps to ensure it does not make a false statement to ASIC, it may be guilty of an offence.

RG 131.72 The number of questions that an Australian passport fund operator will need to answer depends on a range of factors. These include the type of assets held, whether any portfolio limits have been exceeded and whether any functions are delegated.

### **Delegated functions**

RG 131.73 Under the Australian Passport Rules, delegated functions remain the responsibility of the Australian passport fund operator. This requires it to have suitable processes in place to ensure appropriate standards of care are applied by the delegate or sub-delegate in performing functions and that delegates' activities are monitored, controlled and evaluated: see section 11(1) of the Australian Passport Rules.

Note: Under 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](#). The Australian Passport Rules made under s1211(1) will be taken to be substantially the same where they together with other provisions of the Corporations legislation made by the responsible Minister have substantially the same effect as the Passport Rules set out in Annex 3 to the Memorandum of Cooperation.

RG 131.74 We consider suitable processes may include an established process for delegations that incorporates set accountabilities, reporting obligations and performance appraisals of delegates, along with appropriate oversight and knowledge of any sub-delegations and sub-delegates. We will generally check this information as part of the application.

RG 131.75 Section 11(3) of the Australian Passport Rules sets out requirements where an Australian passport fund operator delegates the investment management function for more than 20% of the value of the Australian passport fund's assets. Where this happens, the investment management business of every qualifying delegate must be regulated in:

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

Note: Section 11(3) does not require regulation in this way for a qualifying delegate of the investment management function if the delegation is for less than 20% of the assets.

RG 131.76 We consider that regulatory frameworks are broadly similar in effectiveness to the Australian framework for the purpose of section 11(3) in the following economies:

- (a) Hong Kong;
- (b) Singapore;
- (c) member states of the European Union; and
- (d) the United Kingdom.

- RG 131.77 Our view is based on an examination of the criteria that we use to assess whether a foreign regulatory regime is ‘sufficiently equivalent’.
- RG 131.78 If an Australian passport fund operator wants a further economy to be recognised, it should consider the principles we have developed for granting relief for foreign providers from certain Australian regulatory requirements. One key requirement is that the foreign provider is subject to a sufficiently equivalent overseas regulatory regime.

Note: For more information on sufficient equivalence, see [Regulatory Guide 54 Principles for cross-border financial regulation](#) (RG 54). These principles include the General Principles (see Table 1 of RG 54) and the Equivalence Principles (see Table 2 of RG 54).

- RG 131.79 To properly assess an application for relief, we need to understand how managed investments are regulated in the relevant overseas regulatory regime.

Note: Applications for relief should be lodged by email to [applications@asic.gov.au](mailto:applications@asic.gov.au).

- RG 131.80 The more complex the arrangements, the greater the likelihood more questions will need to be answered and, generally, the longer the assessment period.

### **Compliance with the Basel Committee on Banking Supervision guidelines**

- RG 131.81 Under the Australian Passport Rules, a body may be required to be regulated or supervised by a regulatory body in general compliance with the Basel Committee on Banking Supervision (BCBS) guidelines: see sections 7(3)(a)(iv), 13(10)(a), 21(1), 27(2)(a)(i) and 28(2)(a)(i), 30(2)(a)(ii) and 30(4)(a) of the Australian Passport Rules.

- RG 131.82 We have adopted a three-tiered approach when considering compliance with the BCBS guidelines. We consider that a body will be from a:

- (a) Tier 1 country—if that country is a member of the Basel Committee on Banking Supervision;

Note: This includes members of the European Union, as the European Union is a member of the Basel Committee on Banking Supervision.

- (b) Tier 2 country—if that country is a participating economy; or  
 (c) Tier 3 country—if that country is any other country.

- RG 131.83 We will accept all Tier 1 countries as complying with the BCBS guidelines. This is because, as members of Basel Committee on Banking Supervision, these countries are required to implement the initiatives of the committee. They must meet minimum standards of implementation, but can exceed them. Members of the European Union are required to meet similar requirements because of their membership of the European Union.

- RG 131.84 We will also accept all Tier 2 countries, because each participating economy has been subject to a Financial Sector Assessment Program country report.

RG 131.85 We will treat the BCBS guidelines referred to in the Australian Passport Rules as referring to the core principles methodology adopted by the BCBS.

### Eligible entity requirements

RG 131.86 An Australian passport fund operator must meet certain requirements in the Australian Passport Rules to be an eligible entity. These requirements apply at the time of application, unless there is an exemption or modification. The eligible entity requirements are summarised in Table 2, and the assessments we apply in considering whether the requirements have been met are discussed in further detail at RG 131.99–RG 131.130.

**Table 2: Summary of eligible entity requirements for Australian passport fund operators**

| Requirement  | Guidance  |
|--|---|
| <p><b>Assets under management test</b></p> <p>The Australian passport fund operator or its related parties must have assets under management with a total value of at least US\$500 million.</p>   | RG 131.103–<br>RG 131.105   |
| <p><b>Relevant qualifications test</b></p> <p>The Australian passport fund operator must have officers with the relevant qualifications set out in section 6 of the Australian Passport Rules.</p>   | RG 131.106–<br>RG 131.109   |
| <p><b>Financial resources test</b></p> <p>The Australian passport fund operator must have equity resources of at least US\$1 million, plus the additional capital amount: see section 7 of the Australian Passport Rules.</p>  | RG 131.110–<br>RG 131.113   |
| <p><b>Organisational arrangements test</b></p> <p>The Australian passport fund operator must have in place processes and procedures to ensure it meets the organisational arrangements test in section 8 of the Australian Passport Rules.</p>   | RG 131.114–<br>RG 131.118   |
| <p><b>Track record test</b></p> <p>The Australian passport fund operator or a related party must meet the track record test in section 9 of the Australian Passport Rules.</p>   | RG 131.119–<br>RG 131.124   |
| <p><b>Good standing test</b></p> <p>The Australian passport fund operator must meet the good standing test in section 10 of the Australian Passport Rules.</p>   | RG 131.125–<br>RG 131.130   |
| <p><b>Home economy and home regulator test</b></p> <p>The Australian passport fund operator must:</p> <ul style="list-style-type: none"> <li>• have its principal place of business in Australia; and</li> <li>• be regulated by ASIC as responsible entity of a registered scheme.</li> </ul> | See section 3 of Annex 2 to the <a href="#">Memorandum of Cooperation</a> |

RG 131.87 One of the key objectives of the Asia Region Funds Passport is to provide a high degree of investor protection. The eligibility requirements in the Australian Passport Rules aim to ensure high standards are met and, in

particular, that Australian passport fund operators are well established, competent, adequately resourced and adequately set up to manage retail collective investment schemes.

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

- RG 131.88 Under s1212A, we must be of the opinion that the Australian passport fund operator is likely to comply with the Corporations Act, including the Australian Passport Rules, and the ASIC Act. In forming this opinion, we will take into account:
- (a) the operator's compliance history; and
  - (b) whether the operator's compliance management system is sufficiently effective and responsive to allow it to demonstrate its commitment to complying with its obligations under the Corporations Act and ASIC Act (see Section B of [RG 132](#)).
- RG 131.89 In our view, there is a greater likelihood of non-compliance with the Corporations Act and ASIC Act when the compliance management system is not effective and responsive. To be effective and responsive, we consider the compliance management system should be planned, implemented, evaluated, improved and documented.
- RG 131.90 We will ask Australian passport fund operators to identify the compliance controls in place to meet the requirements of the Corporations Act, including the Australian Passport Rules, the frequency with which they are undertaken and the frequency with which compliance with them is monitored. We have included some common compliance controls and frequencies in the prescribed form to make it less time consuming for an operator to describe all of the compliance controls and their frequencies. However, we do not expect operators to use this list if they do not have those compliance controls or frequencies—in this case, operators can describe the actual compliance controls and frequencies instead.

### **Permitted investments**

- RG 131.91 Division 6.2 of the Australian Passport Rules governs the types of assets in which an Australian passport fund is permitted to invest. Those assets include investments in regulated collective investment schemes, deposits, currency, derivatives, transferable securities, money market instruments and depository receipts over gold. The purpose of restricting passport funds to holding only certain types of assets is to secure the reputation of the Asia Region Funds Passport as a regulatory arrangement that provides for liquid investments that are readily able to be priced.

- RG 131.92 The application asks questions about the permitted assets that will be held by the Australian passport fund, to break down the requirements of the relevant specific provision of the Australian Passport Rules into its key components.

### **Breach of the Australian Passport Rules**

- RG 131.93 To submit an application to become an Australian passport fund, the prospective Australian passport fund operator must be able to comply with the Australian Passport Rules. Where there is a breach of the Australian Passport Rules any attempt to submit an application will most likely result in a decision to refuse the application. We expect prospective operators to rectify any breach of the Australian Passport Rules, and have no reasonable basis to expect a further breach, before submitting an application.

### **Exceeding portfolio allocation limits**

- RG 131.94 The Australian Passport Rules set out portfolio allocation limits across the permitted asset types: see Division 6.3 of the Australian Passport Rules. These limits seek to ensure that a passport fund is well diversified across different issuers and equivalent assets with similar characteristics. However, it is not a breach of the Australian Passport Rules to exceed a portfolio allocation limit: see section 29 of the Australian Passport Rules.
- RG 131.95 An Australian passport fund that exceeds a portfolio allocation limit must cease to do so as soon as reasonably practicable, but no later than three months after the date the limit was first exceeded: see section 29(2) of the Australian Passport Rules. If the Australian passport fund operator satisfies the independent oversight entity that an extension would be in the best interests of members and receives notice in writing from the independent oversight entity, this three-month period may be extended by one month (with further one-month extensions allowed): see section 29(3) of the Australian Passport Rules.
- RG 131.96 Where an existing registered scheme has exceeded one or more portfolio allocation limits, or it is considered likely that a limit may soon be exceeded, but the period in section 29(2) and (3) has not expired, it may still be possible to submit an application for registration. In this case, we encourage the prospective Australian passport fund operator to raise any concerns or discussion points with us before lodging an application.

### **PDS**

- RG 131.97 An Australian passport fund operator must also attach to its application a copy of the PDS, which is required before the operator may offer interests to retail clients: see s1212(2).
- RG 131.98 The PDS must comply with the requirements in s1013C and must contain sufficient information on the Australian passport fund for a retail client to make an informed decision about whether to purchase an interest in the fund.

## Assessment by ASIC

- RG 131.99 When an application to register as an Australian passport fund is lodged with ASIC, we will assess whether it complies with s1212A.
- RG 131.100 We take a risk-based approach to assessment. We will consider each question answered and the underlying risk the relevant provision in the Australian Passport Rules is intended to address.

### Assessment of the eligible entity requirements

- RG 131.101 When we assess the application to register as an Australian passport fund, we may ask for more information or documents that will demonstrate the Australian passport fund operator's ability to meet the eligible entity requirements. If the operator does not provide the information and documentation we need, we may consider that it has not demonstrated that it can meet the eligible entity requirements.

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

- RG 131.102 We will refuse to register an Australian passport fund if:
- (a) the Australian passport fund operator or its advisers are unwilling or unable to provide more information or documentation within a reasonable time, and we are unable to form an opinion that the eligible entity test can be met; or
  - (b) in our opinion the operator cannot meet the relevant eligible entity test.

### Assets under management test

- RG 131.103 The Australian passport fund operator and its related parties must be collectively responsible for operating financial asset collective investment schemes that have total assets of at least US\$500 million. This is calculated using the method set out in section 3(5)(b) of the Australian Passport Rules. The calculation can include any amounts in relation to which the operator or related party has discretionary management powers.
- RG 131.104 We will generally check:
- (a) the percentage by which the test has been exceeded; and
  - (b) whether all assets invested directly or indirectly in other collective investment schemes or discretionary management accounts operated by the Australian passport fund operator or its related parties have been excluded to avoid double counting.
- RG 131.105 We will generally ask for more information or documents where the test has been exceeded by less than 1%. If the assets under management test is exceeded by only a small amount, there may be a higher likelihood that the

Australian passport fund operator will not meet section 7 of the Australian Passport Rules in the future. We may ask for the financial accounts used to derive the total amount of assets under management. We may also ask for more information on:

- (a) any related party that is being relied on;
- (b) how each related party is a related party within the meaning of the [Memorandum of Cooperation](#); and
- (c) how the amount was calculated.

#### **Relevant qualifications test**

RG 131.106 The Australian passport fund operator must have officers with the relevant qualifications. We will assess whether the following officers have relevant experience in an International Organization of Securities Commissions (IOSCO) financial services related business:

- (a) the chief executive officer (CEO)—the CEO must have spent 10 of the last 15 years in such an organisation and five of those 10 years in a managerial or supervisory role;
- (b) at least two executive directors (which may include the CEO)—the executive directors must have spent five of the last seven years in such an organisation; and
- (c) any officer or employee responsible for making, or supervising at least on a joint basis, all discretionary investment decisions for the Australian passport fund—the employee or officer must have spent either:
  - (i) five of the last seven years in such an organisation; or
  - (ii) three of the last five years in such an organisation and hold a bachelor degree or higher qualification in a relevant discipline.

Note: For the definition of 'IOSCO financial services related business', see the key terms.

RG 131.107 We may request more information on:

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

RG 131.108 If, after an application is submitted, an officer or employee no longer complies with the qualifications test, the Australian passport fund operator must do what is necessary to meet the test as quickly as possible.

Note: An example of an officer or employee no longer complying with the qualifications test is an unexpected employee resignation.

RG 131.109 We are unlikely to refuse an application where there is evidence the Australian passport fund operator has taken, or is taking, reasonable steps to meet the qualifications test. For example, this may include advertising for the vacant position or having appointed a suitable acting replacement. However, we will not register the Australian passport fund until a suitable replacement is found and appointed.

#### **Financial resources test**

RG 131.110 The Australian passport fund operator must meet the financial resources test. We will generally consider that the operator is meeting the financial resources test if its equity:

- (a) is greater than or equal to US\$21 million (we refer to this as the ‘capped scenario’);
- (b) is greater than US\$1 million, and the total assets under management of the operator is less than or equal to US\$500 million (we refer to this as the ‘additional capital amount scenario’); or
- (c) the total assets under management of the operator is greater than US\$500 million and the equity is greater than US\$1 million plus the additional capital amount (we refer to this as the ‘no additional capital amount scenario’).

Note 1: In calculating the Australian passport fund operator’s equity, a guarantee or undertaking held by the operator or an approved professional indemnity (re) insurance policy may be counted in certain circumstances.

Note 2: In general, we consider that satisfying the AFS licence requirement under reg 7.6.02AAA of the Corporations Regulations 2001 to hold ‘adequate’ PI insurance will ensure that an operator meets the ‘approved PI insurance policy’ requirement if it applies.

RG 131.111 The additional capital amount is calculated by subtracting US\$500 million from the total assets under management of the Australian passport fund operator, and then multiplying that figure by 0.001. The additional capital amount is capped at US\$20 million.

RG 131.112 We will generally ask for further information or documents where the financial resources test has been exceeded by less than 5%. If the assets under management test is exceeded by only a small amount, there may be a higher likelihood that the Australian passport fund operator will not meet section 4(3) of the Australian Passport Rules in the future. We will generally require the operator to demonstrate how the requirement has been satisfied.

RG 131.113 To assess whether the financial resources test is met, we may ask for:

- (a) financial accounts;
- (b) the guarantee or undertaking, if one is being relied on to meet the test; and
- (c) the approved PI insurance policy, if one is being relied on to meet the test.

**Organisational arrangements test**

- RG 131.114 The Australian passport fund operator must meet the organisational arrangements test. We will check that the operator has in place controls, processes and frameworks to ensure it will comply with all aspects of the organisational arrangements test. We will generally be satisfied that the operator meets the organisational arrangements test when it meets our guidance.
- RG 131.115 We will apply our guidance in Section B of [RG 132](#) when considering whether the compliance framework ensures ongoing compliance. We will check that the compliance management system:
- (a) has documented processes to comply with the Australian Passport Rules (see RG 132.51–RG 132.57 and RG 132.71–RG 132.76);
  - (b) identifies functional roles for carrying out each compliance control and monitoring that compliance control (see RG 132.58–RG 132.69); and
  - (c) will be reviewed and maintained (see RG 132.77–RG 132.79).
- RG 131.116 In considering whether there is an adequate risk monitoring and management process, we will apply the guidance in Section B of [Regulatory Guide 259](#) *Risk management systems of responsible entities* (RG 259). We will check whether the risk management framework:
- (a) is documented (see RG 259.30);
  - (b) contains a process for identifying, assessing and understanding each of the material risks of the Australian passport fund operator and fund (see RG 259.73–RG 259.87);
  - (c) contains a process for managing the risks identified (see RG 259.88–RG 259.94);
  - (d) contains a process for adequate oversight of the risk management systems by both the party responsible for ownership of the risk and the compliance function (see RG 259.51–RG 259.54);
  - (e) requires a risk appetite and tolerance statement for each identified material risk (see RG 259.41–RG 259.45); and
  - (f) will be reviewed and maintained (see RG 259.64–RG 259.66 and RG 259.97–RG 259.100).
- RG 131.117 We will apply our guidance in [Regulatory Guide 181](#) *Licensing: Managing conflicts of interest* (RG 181) when considering whether there are adequate procedures to manage conflicts of interest. We will check whether the Australian passport fund operator:
- (a) has a documented conflicts of interest policy (see RG 181.33 and RG 181.44–RG 181.48);

- (b) has processes to identify actual or potential conflicts of interest (see RG 181.30 and RG 181.46);
- (c) has implemented processes to manage conflicts of interest (see RG 181.34);
- (d) has processes to assess and evaluate the actual or potential conflicts of interest and implement a response (see RG 181.28);
- (e) has processes to monitor compliance and identify non-compliance (see RG 181.31, RG 181.37 and RG 181.45);
- (f) has processes for giving adequate disclosure to allow clients to make an informed decision about how the conflict may affect the service being provided to them (see RG 181.49–RG 181.53 and RG 181.57–RG 181.63); and
- (g) reviews and maintains its conflicts of interest policy and processes (see RG 181.34 and RG 181.37).

RG 131.118 We may ask for further information on the controls, processes and frameworks in relation to:

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

#### **Track record test**

RG 131.119 The Australian passport fund operator must meet the track record test. We will assess if the operator has been responsible for a financial asset collective investment scheme capable of offering interests to the general public over the past five years. This test can be met if the operator relies on its own track record or relies on the track record of a related party.

Note: The track record test cannot be met by relying on the track record of the Australian passport fund operator and a related party.

RG 131.120 If the scheme nominated in the application is Australian, we will check if the Australian passport fund operator or its related party has held AFS licence authorisations that allow it to offer interests to retail clients in a financial assets registered scheme or regulated public offer superannuation fund for at least the last five years. If the scheme nominated in the application is foreign, we will check the website of the foreign regulator to see if the related party has held a licence, registration or authorisation to operate a financial asset collective investment scheme capable of being offered to the general public for at least five years.

RG 131.121 We consider that an Australian registered scheme or regulated public offer superannuation fund will meet the definition of a financial assets collective investment scheme that is regulated so that it can be offered to the general public.

RG 131.122 We may not register an Australian passport fund if:

- (a) our registers indicate that any scheme nominated in the application is not a financial asset collective investment scheme;
- (b) interests in the scheme are not able to be offered to the general public; or
- (c) the Australian passport fund operator or related party has not been operating at least one nominated financial asset collective investment scheme at all times during the last five years.

#### *Change of control*

RG 131.123 If the Australian passport fund operator meets the track record test but there has been a change in control, we will generally check if a majority of the directors and responsible managers have been in their roles for at least five years. We will also generally check this if the operator is relying on the track record of a related party and there has been a relevant change in control of that related party.

RG 131.124 Where there has been a relevant change of control, we will assess whether there has been substantial continuity among staff, business processes and decision-making processes. In determining whether there has been substantial continuity, we will consider the extent to which:

- (a) the personnel responsible for operating the registered scheme who were employed by a related body corporate remained in that capacity;
- (b) the same operating systems and procedures were used;
- (c) the same resources were shared (including key portfolio management, operational and other staff);
- (d) both parties used the same control structures (including reporting lines and compliance systems, procedures for monitoring service providers and accounting, computer and IT systems);
- (e) apart from preparing and issuing new disclosure documents, the trading or other operational processes have substantially continued following the change in control; and
- (f) anything suggests that there will be a change in the substantial continuity of staff, business processes and decision-making processes.

### Good standing test

RG 131.125 The Australian passport fund operator must meet the good standing test. We will ask for an overseas criminal history check for any jurisdiction the relevant party has resided in during the past 10 years. We will not require an Australian criminal history check if the relevant party has never resided in Australia during the past 10 years.

Note 1: A relevant party includes the Australian passport fund operator, an officer of the operator, any entity that controls the operator and offers of any entity that controls the operator.

Note 2: Criminal history and bankruptcy checks must not be more than 12 months old.

RG 131.126 If an overseas criminal history or bankruptcy check has not been obtained, a statutory declaration may be provided. The statutory declaration must explain the efforts made to obtain the checks and state the criminal history and bankruptcy history of the relevant party.

RG 131.127 In assessing whether the Australian passport fund operator meets the good standing test, we will:

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

RG 131.128 We may request more information, including an explanation of any previous events and whether there were any mitigating factors. We may also request an original or certified copy of the criminal history check, bankruptcy check or statutory declaration.

RG 131.129 Where we have concerns about the conduct of a relevant party, we may undertake surveillance to test ongoing compliance.

RG 131.130 We may seek information from another entity about any regulatory action taken or disputes. This includes from an Australian or foreign regulatory body or dispute resolution service.

## **Assessment of compliance with the Corporations Act, including the Australian Passport Rules, and the ASIC Act**

- RG 131.131 When we assess the application to register as an Australian passport fund, we will pay particular attention to answers that provide descriptions about compliance controls, and procedures to monitor compliance with the compliance controls. We will look to ensure the compliance controls are consistent with our guidance in [RG 132.73](#) and [RG 132.107](#). This includes whether:
- (a) there is more than one compliance control for the compliance obligation;
  - (b) the frequencies for carrying out the compliance controls or processes to monitor compliance with the compliance controls are sufficient;
  - (c) the compliance controls use clear, definite and meaningful words to describe what is done; and
  - (d) the compliance controls are appropriate to the compliance obligation.
- RG 131.132 Where we have concerns about the compliance controls or procedures to monitor compliance with the compliance controls described in the application, we will also ask for information on compliance with requirements in the Corporations Act and ASIC Act. This is because many compliance controls that an Australian passport fund operator may implement are also relevant to compliance with similar requirements in the Corporations Act that are not part of the Australian Passport Rules.
- RG 131.133 We may ask for more information or documents that will demonstrate the Australian passport fund operator's ability to meet the requirements in the Corporations Act, including the Australian Passport Rules, and the ASIC Act. For the application to be granted, the operator must be able to provide the information and documents we need to demonstrate that it is likely to meet these requirements.

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

- RG 131.134 Where the constitution of an existing registered scheme allows the Australian passport fund to do something that is not permitted under the Australian Passport Rules, we will conduct a closer examination of the compliance controls that the Australian passport fund operator has in place to prevent a breach of the Australian Passport Rules.
- RG 131.135 An Australian passport fund operator will need to amend its constitution to be consistent with section 4 of the Australian Passport Rules. Where we see any inconsistency, we will ask for the constitution to be amended before registration.

### Exceptional circumstances and reasonable actions

RG 131.136 Some specific provisions in the Australian Passport Rules allow an action to be taken in ‘exceptional circumstances’. Where the Australian Passport Rules allow something to be done in exceptional circumstances, we will assess the answers in each case to determine whether exceptional circumstances exist or are likely to occur. We will look for something unusual or out of the ordinary in the circumstances that substantiates or warrants the action, taking into account the purpose of the specific provision.

Note: For more information on which sections of the Australian Passport Rules allow actions to be taken in exceptional circumstances, see sections 9(2)(b)(ii), 25(1)(c) and 33(3) of the Australian Passport Rules

RG 131.137 Some specific provisions in the Australian Passport Rules allow, or require, an action to be taken only where it is ‘reasonable’. Where the Australian Passport Rules require something to be reasonable, we will assess the answers in each case by applying a standard of objective rationality, taking into account all of the facts.

### Permitted investments

RG 131.138 If the Australian passport fund operator lodges an application without divesting assets that do not meet section 19 of the Australian Passport Rules, we will refuse the application on the basis that it is against the public interest. We consider that allowing existing registered schemes to hold non-complying investments, but requiring new registered schemes to only hold assets permitted under section 19, is unfair and not within the spirit of the purpose for restricting assets.

Note: Section 18 of the Australian Passport Rules provides that an Australian passport fund can hold goods and services, as long as they are not held for investment purposes. These are not considered to be assets of the Australian passport fund for the purpose of RG 131.138.

RG 131.139 When we assess the answers given, we will focus on the purpose of the specific provision and the objectives of the Australian Passport Rules.

### Exceeding portfolio allocation limits

RG 131.140 If an existing registered scheme has exceeded one or more of the portfolio allocation limits, and the period allowed in section 29(2) and (3) of the Australian Passport Rules has expired, we will not register the prospective Australian passport fund until this is remedied.

RG 131.141 If an application is submitted and one or more portfolio allocation limits has been exceeded, we:

- (a) will generally pay particular attention to the controls the Australian passport fund operator has in place to monitor the investment portfolio;

- (b) will generally look into whether any extension under section 29(3) is consistent with our expectations for proper assessment by the independent oversight entity of whether it was in the best interests of members not to bring the limit within the Australian Passport Rules. This is particularly the case if there has been more than one extension;
- (c) may request more information and/or supporting documentation, including:
  - (i) why a particular limit has been exceeded;
  - (ii) why the limit continues to be exceeded;
  - (iii) when the operator anticipates the Australian passport fund will operate within the limit;
  - (iv) the steps that are actively being taken to bring the Australian passport fund within the limit;
  - (v) whether the operator acquired an asset or entered into a derivative or securities lending arrangement that resulted in the limit being exceeded;
  - (vi) the number of extensions of time that have been sought and granted by the independent oversight entity;
  - (vii) the earliest date the limit was exceeded; and
  - (viii) the approximate percentage by which the Australian passport fund exceeds the limit; and
- (d) may ask for more information to enable us to fully understand the circumstances causing the limit to be exceeded and the actions being taken to resolve the matter. This is in order for us to be satisfied the time within which the operator expects to operate outside the limits is reasonable.

RG 131.142 We will be unlikely to register the Australian passport fund while the registered scheme continues to exceed one or more portfolio allocation limits.

### **Assessment of the PDS**

RG 131.143 We may review the PDS as part of our assessment of the application to register as an Australian passport fund. If we review the PDS, we may ask for:

- (a) more information to understand the contents of the PDS; or
- (b) additional or corrective disclosure to be made to the PDS.

RG 131.144 The fact that we do not comment on the PDS does not indicate approval of the content of the PDS, or stop us from taking subsequent action against the Australian passport fund operator.

## Decision by ASIC

- RG 131.145 There is no statutory timeframe for us to make a decision about whether to register an Australian passport fund. The time taken for a decision to be made is likely to be affected by the nature, scale and complexity of the Australian passport fund operator and the fund, and the quality of the information provided in support of an application. An Australian passport fund operator can minimise the time it takes us to assess the application by providing all the information we ask for and promptly responding to all other queries we may raise. Not doing so will delay our assessment or may mean we will refuse the application because we are unable to form an opinion that the operator is an eligible entity or likely to comply with the Corporations Act or ASIC Act.
- RG 131.146 If we decide to refuse registration, we will write to the Australian passport fund operator setting out the decision and the reasons why. We will also tell the operator how to apply to the Administrative Appeals Tribunal for a review if it considers the decision is wrong.
- RG 131.147 The Australian passport fund operator may choose to withdraw the application. If it takes this option, we will not be able to refund the application fee or hold it over if the operator decides to reapply. The fact that the application has been withdrawn will be on the public record.

## Entry on the Asia Region Funds Passport Register

- RG 131.148 We are required to establish and maintain an Asia Region Funds Passport Register, or ensure that such a register is established and maintained: see s1214.
- RG 131.149 The Asia Region Funds Passport Register includes details of Australian passport funds and notified foreign passport funds. The register includes details of Australian passport funds that have been deregistered and foreign passport funds that have been denotified. It may also include details of other passport funds: see s1214(3).
- RG 131.150 When an Australian passport fund becomes registered we will:
- (a) assign it a unique Australian Passport Fund Registration Number (APFRN) (see s1212A(2)(a)); and
  - (b) ensure that details of the Australian passport fund are entered on the Asia Region Funds Passport Register (see s1212A(2)(b)).
- RG 131.151 A person will be able to search the Asia Region Funds Passport Register to obtain details about Australian passport funds.

## 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<br><br>Note: This is a definition contained in s761A.                                |
| Annex 3 (for example)                  | An annex to the Memorandum of Cooperation   |
| APFRN                                  | Australian Passport Fund Registration Number—the number assigned to an Australian passport fund under s1212A(2)(a) of the Corporations Act and issued to a notified foreign passport fund for identification purposes   |
| 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  |
| Asia Region Funds Passport Register    | An ASIC register that will include prescribed details of Australian passport funds, notified foreign passport funds, deregistered Australian passport funds and funds that have been removed as notified foreign passport funds                                       |
| ASIC                                   | Australian Securities and Investments Commission  |
| ASIC Act                               | <i>Australian Securities and Investments Commission Act 2001</i>  |
| ASIC Regulatory Portal                 | The internet channel that allows authenticated regulated entities to interact securely with ASIC, which can be accessed at the <a href="#">portal landing page</a>  |
| assets under management test           | A requirement in the Australian Passport Rules reflecting the minimum total value of assets under management that an Australian passport fund operator must have to be an eligible entity within the meaning of section 3 of Annex 2 to the Memorandum of Cooperation |
| Australia                              | Has the meaning given for the term ‘this jurisdiction’ in s5 of the Corporations Act  |
| Australian passport fund               | A registered scheme that is also registered as a passport fund under Pt 8A.3 of the Corporations Act  |
| Australian Passport Rules              | Annex 3 to the Memorandum of Cooperation as incorporated by legislative instrument into Australian law under s1211 and 1211A of the Corporations Act  |
| Basel Committee on Banking Supervision | An international committee formed to develop standards for banking regulation   |

| Term                         | Meaning in this document   |
|------------------------------|--|
| BCBS guidelines              | Banking guidelines and standards developed by the Basel Committee on Banking Supervision   |
| Ch 5C (for example)          | A chapter of the Corporations Act (in this example numbered 5C), unless otherwise specified  |
| collective investment scheme | Has the meaning given in section 55 of the Australian Passport Rules   |
| Corporations Act             | <i>Corporations Act 2001</i> , including regulations made for the purposes of that Act   |
| Corporations Regulations     | Corporations Regulations 2001  |
| financial resources test     | A requirement in section 7 of the Australian Passport Rules regarding the financial resources that must be held by an Australian passport fund operator for it to be an eligible entity within the meaning of section 3 of Annex 2 to the Memorandum of Cooperation  |
| foreign passport fund        | A passport fund with a home economy other than Australia   |
| Form 5100 (for example)      | An ASIC form (in this example numbered 5100)   |
| good standing test           | A requirement in section 10 of the Australian Passport Rules regarding the good standing of an Australian passport fund operator for it to be an eligible entity within the meaning of section 3 of Annex 2 to the Memorandum of Cooperation   |
| home economy                 | The participating economy in which a passport fund is first registered, approved or authorised as a regulated collective investment scheme   |
| home regulator               | The passport regulator in a passport fund's home economy   |
| host economy                 | A participating economy that is not a passport fund's home economy and either: <ul style="list-style-type: none"> <li>permits the fund to offer interests in the fund in that economy under the Asia Region Funds Passport; or</li> <li>has accepted an application from the fund to offer interests in the fund in that economy under the Asia Region Funds Passport (but not to register the fund as a passport fund in that economy)</li> </ul> |
| INFO 30 (for example)        | An ASIC information sheet (in this example numbered 30)  |
| IOSCO                        | The International Organization of Securities Commissions   |

| Term                                      | Meaning in this document  |
|---|---|
| IOSCO financial services related business | <p>An entity that:</p> <ul style="list-style-type: none"> <li>• carries on business in a financial, capital markets or financial services industry and is regulated in an IOSCO jurisdiction;</li> <li>• provides legal, accounting or compliance services related to that kind of business; or</li> <li>• provides consultation services relating to, and addressing particular issues arising in, the operation of collective investment schemes within the meaning of section 55 of the Australian Passport Rules</li> </ul> |
| IOSCO jurisdiction                        | An administrative region in which the securities regulator is an ordinary or associate member of IOSCO within the meaning of section 55 of Australian Passport Rules  |
| managed investment scheme                 | Has the meaning given in s9 of the Corporations Act   |
| member                                    | A member of a registered scheme   |
| Memorandum of Cooperation                 | The <a href="#">Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport</a>   |
| notified foreign passport fund            | A foreign passport fund that has become a notified foreign passport fund under s1213C of the Corporations Act   |
| organisational arrangements test          | A requirement in section 8 of the Australian Passport Rules regarding the processes and procedures an Australian passport fund operator must have in place to be an eligible entity within the meaning of section 3 of Annex 2 to the Memorandum of Cooperation   |
| 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"> <li>• advised the Asia Region Funds Passport Joint Committee that it has implemented the Asia Region Funds Passport; and</li> <li>• not withdrawn from the Memorandum of Cooperation</li> </ul>   |
| passport fund                             | <p>A regulated collective investment scheme, or sub-fund of a regulated collective investment scheme, registered as a passport fund in a participating economy</p> <p>Note: Some regulated collective investment schemes, or sub-funds of regulated collective investment schemes, that have been deregistered as passport funds remain subject to obligations as if they were still a passport fund.</p>   |
| passport fund operator                    | An entity that operates a passport fund   |
| passport regulator                        | <p>The entity that regulates passport funds in a participating economy</p> <p>Note: See also the definition of 'passport regulator' in section 55 of the Australian Passport Rules.</p>   |

| Term                                   | Meaning in this document   |
|--|--|
| Passport Rules                         | The requirements in Annex 3 to the Memorandum of Cooperation, as incorporated into the domestic law of a participating economy   |
| PDS                                    | A Product Disclosure Statement—a document that must be given to a retail client for the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act<br><br>Note: See s761A for the exact definition.  |
| PI                                     | Professional indemnity   |
| Pt 7.9 (for example)                   | A part of the Corporations Act (in this example) number 7.9), unless otherwise specified   |
| reg 7.6.02AAA (for example)            | A regulation of the Corporations Regulations 2001 (in this example numbered 7.6.02AAA)   |
| registered scheme                      | A managed investment scheme that is registered under s601EB of the Corporations Act  |
| regulated collective investment scheme | A regulated collective investment scheme as defined by the Passport Rules for a participating economy  |
| responsible entity                     | A responsible entity of a registered scheme as defined in s9 of the Corporations Act   |
| retail client                          | A client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of the Corporations Regulations   |
| s601EB (for example)                   | A section of the Corporations Act (in this example numbered 601EB), unless otherwise specified   |
| scheme                                 | A managed investment scheme as defined in s9 of the Corporations Act   |
| Tier 1 country                         | A country that is a member of the Basel Committee on Banking Supervision   |
| Tier 2 country                         | A country that is a participating economy  |
| Tier 3 country                         | A country that is any country other than a Tier 1 or Tier 2 country  |
| track record test                      | A requirement in section 9 of the Australian Passport Rules regarding the track record of an Australian passport fund operator for it to be an eligible entity within the meaning of section 3 of Annex 2 to the Memorandum of Cooperation |

## Related information

### Headnotes

Australian passport fund, Australian Passport Rules, compliance plan, constitution, directors' statement, eligible entity requirements, passport fund operator, registered managed investment scheme, registered scheme, registration, responsible entity

### Legislative instruments

[ASIC Corporations \(Chapter 5C—Miscellaneous Provisions\) Instrument 2017/125](#)

### Regulatory guides

[RG 1–3 AFS Licensing Kit](#)

[RG 54 Principles for cross-border financial regulation](#)

[RG 132 Funds management: Compliance and oversight](#)

[RG 134 Funds management: Constitutions](#)

[RG 138 Foreign passport funds](#)

[RG 181 Licensing: Managing conflicts of interest](#)

[RG 259 Risk management systems of responsible entities](#)

### Information sheets

[INFO 30 Fees for commonly lodged documents](#)

### Legislation

ASIC Act

Australian Passport Rules, sections 3, 4, 6, 7, 8, 9, 10, 11, 13, 18, 19, 25, 27, 28, 29, 30, 33

Corporations Act, Chs 5C, 8A, Pt 7.9, Div 2, s9, 601EA, 601EB, 601FA, 601GA, 601GB, 601HA, 601HB, 601HC, 601HG, 1013C, 1308, 1211, 1211A, 1212, 1212A, 1213C, 1214

## **ASIC forms**

*Apply for registration as an Australian passport fund (available through the [ASIC Regulatory Portal](#))*

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

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

## **Consultation papers**

*[CP 296](#) Funds management*

*[REP 582](#) Response to submissions on CP 296 Funds management*

## **Other documents**

*[Memorandum of Cooperation](#)*