

Attachment 2 to CP 315: Draft instrument



ASIC
Australian Securities &
Investments Commission

ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2019/XXX

I, <insert name>, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Date 2019

[DRAFT ONLY – NOT FOR SIGNATURE]

<signature>

<insert name>

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Part 1—Preliminary

1 Name of legislative instrument

This is the *ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2019/XXX*.

2 Commencement

This instrument commences on the day after it is registered on the Federal Register of Legislation.

Note: The register may be accessed at www.legislation.gov.au.

3 Authority

This instrument is made under subsection 926A(2) of the *Corporations Act 2001*.

4 Definitions

In this instrument:

Act means the *Corporations Act 2001*.

agent of a foreign company means a natural person ordinarily resident in Australia or a company, whose name and address have been provided to ASIC in writing for the purposes of this instrument, and who is authorised to accept on the foreign company's behalf, service of process from ASIC and, in relation to proceedings relating to a financial services law, from any person referred to in subsection 659B(1) of the Act.

ASIC means the Australian Securities and Investments Commission.

cash has the same meaning as in AASB 107 – Statement of Cash Flows – August 2015.

cash equivalents has the same meaning as in AASB 107 – Statement of Cash Flows – August 2015.

consolidated gross revenue of a foreign company for a financial year of the person means the aggregate of:

- (a) the gross revenue of the foreign company for the financial year; and
- (b) the aggregate gross revenue of all the other entities in the same group, while they are members of the group, for the financial year.

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control has the same meaning as in AASB 10 – Consolidated Financial Statements – July 2015.

entity means a body corporate, a partnership, an unincorporated body or a trust.

financial year, in relation to a foreign company, means a financial year of the foreign company within the meaning of the law in the place of origin of the foreign company.

funds management financial service: a person provides a **funds management financial service** if they provide:

- (a) any of the following financial services to a professional investor in this jurisdiction:
 - (i) dealing in interests in, or securities issued by, an offshore fund;
 - (ii) providing financial product advice in relation to interests in, or securities issued by an offshore fund;
 - (iii) making a market in relation to interests in, or securities issued by, an offshore fund; or
- (b) portfolio management services.

group means, in relation to a foreign company for a financial year, the foreign company together with all of the following;

- (a) any other entity which controlled the foreign company at any time during, or at the end of, the financial year;
- (b) any other entity (a **corresponding entity**) which is controlled at any time during, or at the end of, the financial year by any entity (a **controlling entity**) which at the same time controls the foreign company;
- (c) any entity which is controlled at any time during, or at the end of, the financial year by the foreign company; and
- (d) any entity which is controlled by a corresponding entity during that part of the financial year when the corresponding entity is controlled by the same controlling entity as controls the foreign company.

home jurisdiction of a foreign company that provides funds management financial services means:

- (a) if conduct relating to the provision of the funds management financial services is regulated under the laws of a jurisdiction other than this jurisdiction (whether or not those laws also cover other conduct)—that jurisdiction; and

- (b) otherwise—the jurisdiction in which the foreign company was incorporated or formed.

home regulator of a foreign company means a foreign regulatory authority (if any) which regulates financial services and which is established by or for the purposes of a government or legislative body of the home jurisdiction of the foreign company.

interest in an offshore fund includes an interest in a partnership that is an offshore fund.

offer: a reference to offering securities or interests for issue includes a reference to inviting applications for the issue of the securities or interests.

offshore fund means a managed investment scheme or foreign company in relation to which the following are satisfied:

- (a) in the case of a managed investment scheme, the scheme:
- (i) was established outside this jurisdiction and is not operated in this jurisdiction; and
 - (ii) is operated on the basis that the assets of the scheme are to include investments in securities, interests in land, interests in, or securities issued by, other offshore funds or other investments; and
 - (iii) for the purposes referred to in subparagraph (ii), invests funds (directly or indirectly) following an offer of interests in the scheme for issue, the terms of which provided for the funds subscribed to be invested for those purposes;
- (b) in the case of a foreign company that is not a managed investment scheme, the foreign company:
- (i) does not carry on a business in this jurisdiction; and
 - (ii) carries on a business of investment in securities, interests in land, interests in, or securities issued by, other offshore funds or other investments; and
 - (iii) for the purposes referred to in subparagraph (ii), invests funds (directly or indirectly) following an offer of securities of, or interests in, the foreign company for issue, the terms of which provided for the funds subscribed to be invested for those purposes;
- (c) at least 50% by value of the assets of the scheme or foreign company that are not cash or cash equivalents are located outside this jurisdiction;

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- (d) the scheme or foreign company is not any of the following (within the meaning of the *Income Tax Assessment Act 1997*):
 - (i) an Australian trust;
 - (ii) a resident trust for capital gains tax purposes;
 - (iii) a resident unit trust.

portfolio management service means a financial service provided by a person that is the management of assets located outside this jurisdiction on behalf of any of the following:

- (a) a person in this jurisdiction that is a trustee of any of the following:
 - (i) a superannuation fund;
 - (ii) an approved deposit fund;
 - (iii) a pooled superannuation trust;
 - (iv) a public sector superannuation scheme;

(within the meaning of the *Superannuation Industry (Supervision) Act 1993*) and the fund, trust or scheme has net assets of at least \$10 million;
- (b) a person in this jurisdiction that operates a managed investment scheme that has net assets of at least \$10 million;
- (c) a life company (within the meaning of the *Life Insurance Act 1995*) in this jurisdiction;
- (d) an exempt public authority.

revenue means, in relation to a person, revenue within the meaning given by the law in force in the place of origin of the person that applies to the preparation of profit and loss statements of the person.

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Part 2—Exemption

5 Licensing

A foreign company that is carrying on a financial services business in this jurisdiction only because of the operation of section 911D of the Act in relation to funds management financial services provided by the foreign company does not have to comply with subsection 911A(1) of the Act for the provision of funds management financial services.

6 Where the exemption applies

- (1) The exemption in section 5 only applies to a foreign company that is carrying on a financial services business in this jurisdiction of providing funds management financial services if:
 - (a) the foreign company is not a registered foreign company and does not hold an Australian financial services licence covering the provision of funds management financial services; and
 - (b) the foreign company has given ASIC a written description of those funds management financial services and identified that it intends to rely on the exemption in section 5 in relation to the provision of those funds management financial services; and
 - (c) the foreign company:
 - (i) where the foreign company is relying on the exemption in section 5 in the first 3 months of the current financial year of the foreign company—has no reason to believe that the requirement in subsection (2) is not satisfied for the previous financial year of the foreign company; and
 - (ii) where the foreign company is relying on the exemption in section 5 after the first 3 months of the current financial year of the foreign company—reasonably believes and has documented in writing its belief and the basis for its belief that the requirement in subsection (2) is satisfied for the previous financial year of the foreign company; and
 - (d) the foreign company has documented in writing:
 - (i) the foreign company’s reasonable estimates of:
 - (A) the total gross revenue of the foreign company for the current financial year of the foreign company and the amount of that total gross revenue that will be derived from the provision of funds management financial services; and

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- (B) the total consolidated gross revenue of the foreign company for the current financial year and the amount of that total consolidated gross revenue that will be derived from the provision of funds management financial services; and
- (ii) the calculations and assumptions used in preparing those estimates, together with a description of why the assumptions are appropriate; and
- (e) the estimates referred to in subparagraph (d)(i) identify that:
 - (i) no more than 10% of the total gross revenue of the foreign company for the current financial year will be derived from the provision of funds management financial services; and
 - (ii) no more than 10% of the total consolidated gross revenue of the foreign company for the current financial year will be derived from the provision of funds management financial services; and
- (f) the foreign company prepared the estimate and the written documentation and description referred to in paragraph (d) no more than 6 months previously; and
- (g) the foreign company has provided to ASIC a deed from the foreign company for the benefit of and enforceable by ASIC and the other persons referred to in subsection 659B(1) of the Act that applies notwithstanding that the foreign company may have ceased to rely, or never have relied on, this instrument, that provides:
 - (i) the deed is irrevocable except with the prior written consent of ASIC; and
 - (ii) the foreign company submits to the non-exclusive jurisdiction of the Australian courts in legal proceedings conducted by ASIC (including under section 50 of the *Australian Securities and Investments Commission Act 2001*) and in relation to proceedings relating to a financial services law, by any person referred to in subsection 659B(1) of the Act and whether brought in the name of ASIC or the Crown or otherwise; and
 - (iii) the foreign company covenants to comply with any order of an Australian court in respect of any matters relating to the provision of the financial services; and
 - (iv) the foreign company covenants that, on the written request of ASIC or the overseas regulator in its home jurisdiction it will give or vary written consent and take all other practicable steps to enable and assist the home regulator to disclose to ASIC and ASIC to disclose to the home regulator any

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information or document that the home regulator or ASIC has that relates to the foreign company; and

- (v) the foreign company covenants that, if ASIC gives the foreign company a written notice directing the foreign company to give to ASIC, within the time specified in the notice, a written statement containing specific information about the financial services provided by the foreign company in this jurisdiction, the foreign company will comply with the notice; and
 - (vi) the foreign company covenants to give such assistance to ASIC, or a person authorised by ASIC, as ASIC or the authorised person reasonably requests in relation to whether the foreign company is complying with the financial services laws, and in relation to the performance of ASIC's other functions; and
 - (h) the foreign company has provided written consents to the disclosure by the overseas regulator to ASIC and by ASIC to the overseas regulator of any information the overseas regulator or ASIC has that relates to the foreign company; and
 - (i) the foreign company has an agent appointed at the time the foreign company first purports to rely on this instrument and, from that time, has not failed to have an agent for any consecutive period of 10 business days.
- (2) The requirement in this subsection is satisfied for the previous financial year of the foreign company if
- (a) no more than 10% of the gross revenue of the foreign company for the previous financial year of the foreign company was derived from the provision of funds management financial services; and
 - (b) no more than 10% of the consolidated gross revenue of the foreign company for the previous financial year of the foreign company was derived from the provision of funds management financial services.

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Part 3—Transitional

7 Continued effect of previous exemption

If, immediately before the date this instrument commences, a person provided financial services in reliance on section 6 of the *ASIC Corporations (Foreign Financial Service Providers—Limited Connection) Instrument 2017/182*, that section of that instrument continues to apply to the person, despite its repeal, until:

- (a) if the person provides a deed to ASIC under section 6 of this instrument within 6 months after the date this instrument commences—the day after the person provides the deed; and
- (b) otherwise—6 months after the date this instrument commences.

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