



ASIC
Australian Securities &
Investments Commission

No-action position for responsible entities of certain registered litigation funding schemes in relation to member registers

Following the commencement of the *Corporations Amendment (Litigation Funding) Regulations 2020*, from 22 August 2020 litigation funding schemes will generally be regulated under the *Corporations Act 2001 (the Act)* as managed investment schemes and will need to comply with the requirements for registered schemes set out in Chapter 5C of the Act.

Operators of litigation funding schemes will generally be required to hold an Australian financial services (**AFS**) licence authorising them to operate a registered managed investment scheme in their capacity as responsible entity of the litigation funding scheme.

Responsible entities of registered schemes have certain obligations in Part 2C of the Act with respect to registers of members. Under section 168 of the Act, the responsible entity of a registered scheme must set up and maintain a register of members. Under section 169 of the Act the register of members must contain the name and address of each member, and the date on which the entry of each member's name in the register is made.

ASIC is aware of the practical difficulty responsible entities of registered litigation funding schemes may face in complying with the obligations to set up and maintain member registers under sections 168 and 169 of the Act in relation to representative proceedings in which there are passive general members who cannot be individually identified.

No-action position

ASIC has formed the view that strict compliance with the member register requirements is not reasonably practical for responsible entities of registered litigation funding schemes that have one or more passive members (**open litigation funding schemes**).

ASIC does not have the power to grant relief from the member register obligations under the Act. We are therefore providing a 'no-action' position in relation to the obligations under sections 168 and 169 of the Act for responsible entities of registered litigation funding schemes that are open litigation funding schemes.

This no-action position means that ASIC will not take regulatory action in relation to a breach of sections 168 and 169 of the Act by responsible entities of registered litigation funding schemes that are open litigation funding schemes.

Terms used in this no-action position (including "active general member", "general member" and "passive general member") have the same meaning as those used in, and defined by, *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787*.

ASIC policy on no-action positions

ASIC's general policy on 'no-action' positions and their status is set out in Regulatory Guide 108 *No-action letters* ([RG 108](#)). In particular, it should be noted:

- a) A 'no-action' position is an expression of regulatory intention about how ASIC will exercise its powers. The purpose of a 'no-action' position is to provide an indication as to the future regulatory action that we might take.
- b) An ASIC 'no-action' position does not necessarily preclude third parties (including the Office of Director of Public Prosecutions) from taking legal action in relation to the same conduct or conduct of that kind. Nor does it prevent a court from holding that particular conduct infringes the relevant legislation. ASIC does not represent that the conduct covered by the 'no-action' position will not be held to contravene the relevant legislation. Nor does ASIC undertake to intervene in an action brought by third parties in respect of such conduct.

21 August 2020