



ASIC
Australian Securities &
Investments Commission

ASIC Corporations (Design and Distribution Obligations—Exchange Traded Products) Instrument 2020/1090

I, Grant Moodie, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Date 10 December 2020

Grant Moodie

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Part 1—Preliminary

1 Name of legislative instrument

This is the *ASIC Corporations (Design and Distribution Obligations—Exchange Traded Products) Instrument 2020/1090*.

2 Commencement

This instrument commences on the later of:

- (a) 5 October 2021; and
- (b) 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 994L(2) of the *Corporations Act 2001*.

4 Definitions

In this instrument:

Act means the *Corporations Act 2001*.

exchange traded fund means a scheme or foreign company that satisfies all of the following:

- (a) is:
 - (i) a registered scheme or a managed investment scheme that is not required to be registered under Chapter 5C; or
 - (ii) a foreign company which has the economic features of a managed investment scheme and is an open-ended investment company registered with the U.S. Securities and Exchange Commission under the *Investment Company Act 1940* of the United States of America;
- (b) exchange traded products of the scheme or foreign company are in a class that are, or will be, able to be traded on a licensed market;
- (c) the operator of the scheme or the foreign company has the power and approval to issue exchange traded products in that class on any day that those financial products are able to be traded on the relevant financial market;

- (d) the operator of the scheme or the foreign company allows applications for and redemptions of exchange traded products in that class;
- (e) the price or value of the financial product, index, currency, commodity or other thing that the scheme or foreign company invests in or tracks is continuously disclosed or can be immediately ascertained.

exchange traded product, in relation to an exchange traded fund, means:

- (a) for an exchange traded fund covered by subparagraph (a)(i) of the definition of ***exchange traded fund***—an interest in the exchange traded fund; or
- (b) for an exchange traded fund covered by subparagraph (a)(ii) of the definition of ***exchange traded fund***—a share in the exchange traded fund; or
- (c) a legal or equitable right or interest in a financial product covered by paragraph (a) or (b).

Regulations means the *Corporations Regulations 2001*.

Part 2—Declaration

5 Exchange traded products

- (1) Subject to section 6 of this instrument, Part 7.8A of the Act applies in relation to an exchange traded product as if the following provisions of the Part were modified or varied as follows:

Target market determinations for financial products

- (a) omit subsection 994B(8), substitute:

“(8) A target market determination for a financial product must be such that it would be reasonable to conclude that either:

- (a) if the product were to be issued, or sold in a regulated sale:
 - (i) to a retail client in accordance with the distribution conditions—it would be likely that the retail client is in the target market; and
 - (ii) to a retail client in the target market—it would likely be consistent with the likely objectives, financial situation and needs of the retail client; or
- (b) if the product were to be sold within 12 months of the issue of the product:
 - (i) to a retail client in accordance with the distribution conditions—it would be likely that the retail client is in the target market; and
 - (ii) to a retail client in the target market—it would likely be consistent with the likely objectives, financial situation and needs of the retail client.”;

Target market determinations to be reviewed

- (b) omit subsection 994C(2) (excluding the notes), substitute:

“(2) A person contravenes this subsection if:

- (a) all of the following apply:
 - (i) the person makes a target market determination for a financial product; and
 - (ii) the product is able to be traded on a licensed market at or after the end of the review period; and

- (iii) the person did not complete a review of the determination during the review period; or
- (b) all of the following apply:
 - (i) the person makes a target market determination for a financial product;
 - (ii) the product is able to be traded on a licensed market at any time during a review period for the determination;
 - (iii) the person knows, or ought reasonably to know, that:
 - (A) a review trigger for the determination has occurred; or
 - (B) an event or circumstance has occurred that would reasonably suggest that the determination is no longer appropriate;
 - (iv) from as soon as practicable, but no later than 10 business days, after the person first knew of the occurrence of the review trigger, event or circumstance, the person has not:
 - (A) reviewed the determination; and
 - (B) if the determination is no longer appropriate—made a new target market determination in accordance with section 994B.”;
- (c) omit subsections 994C(3) to (7);
- (d) omit section 994D;

Distribution of financial products

- (e) omit subsection 994E(3);

Record keeping and notification obligations—other regulated persons

- (f) omit paragraph 994F(2)(b), substitute:
 - “(b) the product is able to be traded on a licensed market; and”;
- (g) omit paragraph 994F(3)(b);

- (h) in paragraph 994F(3)(d) omit “subsections (4), (5) or (6)”, substitute “subsections (4) or (5)”;
 - (i) omit subsection 994F(6).
- (2) Part 7.8A of the Regulations applies in relation to exchange traded products as if subregulation 7.8A.09(1) were modified or varied as follows:
- (a) omit paragraph (c), substitute:
 - “(c) the issuer issued the product with the purpose mentioned in subparagraph 707(3)(b)(i) or 1012C(6)(c)(i) of the Act;”
 - (b) omit the Note, substitute:
 - “Note: Subsections 707(4) and 1012C(7) of the Act affect whether the issuer is taken to have a particular purpose.”.

6 Application

Subsection 5(1) of this instrument does not apply to an exchange traded product to the extent the product is on offer for acquisition by issue, or for regulated sale, to retail clients other than on a licensed market.