



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Banking Code of Practice – Revocation of June 2019 Approval) Instrument 2019/1254
ASIC Corporations (Approval of March 2020 Banking Code of Practice) Instrument 2019/1255

This is the Explanatory Statement for *ASIC Corporations (Banking Code of Practice – Revocation of June 2019 Approval) Instrument 2019/1254* (New Revocation Instrument) and *ASIC Corporations (Approval of March 2020 Banking Code of Practice) Instrument 2019/1255* (New Approval Instrument).

The Explanatory Statement is approved by the Australian Securities and Investments Commission (ASIC).

Summary

1. The Banking Code of Practice (Code) is a self-regulatory document created by the banking industry, as represented by the Australian Banking Association (ABA), and is administered by an independent Code monitoring body. The Code sets out standards of practice and service in the Australian banking industry for individual and small business customers, and their guarantors. ASIC does not administer the Code.
2. On 19 December 2017, the ABA applied to ASIC for approval of its Banking Code of Practice (2018 Banking Code) under section 1101A of the *Corporations Act 2001* (Corporations Act). ASIC approved the 2018 Banking Code by issuing *ASIC Corporations (Banking Code of Practice) Instrument 2018/700* (2018 Approval Instrument). The 2018 Banking Code was due to commence operation on 1 July 2019.
3. After ASIC issued the 2018 Approval Instrument, the ABA proposed a number of changes to the 2018 Banking Code. On 14 December 2018 and 14 May 2019, the ABA applied to ASIC for approval of variations to the 2018 Banking Code. The variations, which ASIC approved in June 2019 by way of *ASIC Corporations (Approval of Banking Code of Practice) 2019/663* (June 2019 Approval Instrument), were designed to:
 - (a) clarify that a bank will not charge fees for services to deceased customers, where services are no longer being provided to that customer's estate;

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- (b) modify banks' commitment to provide a copy of a valuation to a small business borrower to allow banks to place reasonable limitations on the use to which the borrower (or any third parties) can put that valuation;
 - (c) clarify the original intention and the position in the ABA's *Industry Guideline: Appointing property valuers when lending to small businesses and primary producers* that a copy of the valuation be provided to a small business borrower only where the loan is secured against commercial or agricultural property;
 - (d) reflect ASIC's implementation of law reforms to credit card responsible lending in *ASIC Credit (Unsuitability – Credit Cards) Instrument 2018/753*; and
 - (e) make minor and technical corrections throughout the 2018 Banking Code.
 4. Also on 14 May 2019, the ABA proposed a number of changes to the Code, which were primarily designed to address:
 - (a) recommendations 1.8 (relating to accessibility to banking products and services) and 1.13 (relating to the charging of default interest on loans secured by agricultural land in areas declared to be affected by drought and natural disaster) in the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry;
 - (b) some stakeholder feedback about perceived shortcomings in the Code's small business protections; and
 - (c) some minor and technical issues identified by the ABA.
 5. In September and October 2019, the Australian Competition and Consumer Commission (ACCC) undertook public consultations on its draft determination in response to the ABA's application for authorisation of relevant Code provisions under subsection 88(1) of the *Competition and Consumer Act 2010*. Following stakeholder submissions in October 2019, the ABA proposed further changes to the Code. The changes were intended to give greater clarity to clauses 44B and 47 of the Code, which deal with basic, low and no-fee accounts for eligible customers.
 6. The ABA has requested that ASIC revoke the June 2019 Approval Instrument – with effect from 1 March 2020 – and approve a new Code (March 2020 Banking Code), which is set to commence on 1 March 2020 (reflecting the variations in paragraphs 3, 4 and 5 above).

Purpose of the instruments

7. The purpose of the New Revocation Instrument is to revoke the June 2019 Approval Instrument, so that the version of the Code that ASIC approved in June 2019 (June 2019 Banking Code) is no longer approved by ASIC. The New Revocation Instrument commences on 1 March 2020, which is when the

March 2020 Banking Code is due to commence. ASIC has set a delayed commencement date for the New Revocation Instrument so that the June 2019 Banking Code continues to have ASIC's approval until the March 2020 Banking Code commences.

8. The purpose of the New Approval Instrument is to give ASIC's approval of the ABA's March 2020 Banking Code, as published on 12 December 2019. As mentioned, the March 2020 Banking Code will commence on 1 March 2020.
9. ASIC has assessed the March 2020 Banking Code and is satisfied, as at the date of issuing the New Approval Instrument, that the March 2020 Banking Code meets the requirements of subsection 1101A(3) of the Corporations Act. In particular:
 - (a) ASIC has assessed that the Code is not inconsistent with the Corporations Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities;
 - (b) ASIC is satisfied that there are arrangements in place to ensure compliance with the Code (e.g. the Code forms contractual promises between the bank and its customer, the Code monitoring body is well-equipped to monitor compliance and take appropriate measures in response to non-compliance and customers may take breaches of the Code to the Australian Financial Complaints Authority for external dispute resolution);
 - (c) ASIC is comfortable that the Code applies to an appropriate range of entities (i.e. ABA member banks) and that the Code does not substantially duplicate provisions in other codes of conduct relating to ABA members; and
 - (d) ASIC considers the Code includes significant commitments beyond what the law requires.

Consultation

10. ASIC engaged with a targeted range of stakeholders to invite their feedback on the content of the draft March 2020 Banking Code (as well as the earlier 2018 Banking Code and June 2019 Banking Code). Stakeholders with whom ASIC consulted in relation to the March 2020 Banking Code included small business representatives, consumer representatives and the Banking Code Compliance Committee. ASIC's earlier consultation on the 2018 Banking Code and the June 2019 Banking Code contributed to ASIC's assessment of the March 2020 Banking Code, as the March 2020 Banking Code is based largely on the 2018 Banking Code and June 2019 Banking Code (with updates).

Operation of the instrument

11. Section 2 of the New Revocation Instrument provides that the New Revocation Instrument commences on 1 March 2020. Section 5 provides that approval of the 2018 Banking Code is revoked.

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12. Section 2 of the New Approval Instrument provides that the New Approval Instrument commences on the day after it is registered on the Federal Register of Legislation. Section 5 provides that the March 2020 Banking Code is approved. The March 2020 Banking Code states, “This version of the Code takes effect from 1 March 2020.”

Incorporation by reference

13. The New Revocation Instrument incorporates by reference the June 2019 Banking Code.
14. The New Approval Instrument incorporates by reference the March 2020 Banking Code.
15. Both documents are available at <http://www.ausbanking.org.au>.

Legislative authority

16. Subsection 1101A(1) of the Corporations Act provides that ASIC may, on application, approve codes of conduct that relate to any aspect of the activities of financial services licensees, authorised representatives of financial services licensees, or issuers of financial products, being activities in relation to which ASIC has a regulatory responsibility. The approval must be in writing.
17. Paragraph 1101A(4)(a) of the Corporations Act provides that ASIC may, on application by the person who applied for the approval, revoke an approval of a code of conduct.
18. Subsection 1101A(3) of the Corporations Act provides that ASIC must not approve a code of conduct under section 1101A unless it is satisfied that:
- (a) the code is not inconsistent with the Corporations Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities; and
 - (b) it is appropriate to approve the code, having regard to the following matters, and to any other matters that ASIC considers are relevant:
 - (i) the ability of the applicant to ensure that persons who hold out that they comply with the code will comply with the code as in force from time to time; and
 - (ii) the desirability of codes of conduct being harmonised to the greatest extent possible.
19. Instruments made under subsection 1101A(1) and paragraph 1101A(4)(a) are disallowable legislative instruments.

Statement of Compatibility with Human Rights

14. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1)

of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the Attachment.

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

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Overview

1. *ASIC Corporations (Banking Code of Practice -Revocation of June 2019 approval) Instrument 2019/1254* (New Revocation Instrument) revokes *ASIC Corporations (Banking Code of Practice) Instrument 2019/663*, which approved an earlier June 2019 version of the Banking Code of Practice (Code). The New Revocation Instrument commences on 1 March 2020, which is the date when a new version of the Code (March 2020 Banking Code) commences.
2. *ASIC Corporations (Approval of March 2020 Banking Code of Practice) Instrument 2019/1255* (New Approval Instrument) approves the March 2020 Banking Code (as published by the Australian Banking Association on 12 December 2019).

Assessment of human rights implications

3. The New Revocation Instrument does not engage any of the applicable rights or freedoms.
4. The New Approval Instrument does not engage any of the applicable rights or freedoms.

Conclusion

5. The New Revocation Instrument and the New Approval Instrument are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.