**EXPLANATORY STATEMENT for**

**ASIC Financial Benchmark (Compelled) Rules 2018**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (**ASIC**) makes the *ASIC Financial Benchmark (Compelled) Rules 2018* (**the Instrument**) under section 908CD of the *Corporations Act 2001* (**the Act**).

Section 908CD of the Act provides that subject to Division 3 of Part 7.5B of the Act, ASIC may, by legislative instrument, make rules conferring one or more of the powers, or dealing with one or more of the matters, permitted by Subdivision B of Division 3 of Part 7.5B of the Act.

1. **Background**

Part 7.5B of the Act was introduced by the *Treasury Laws Amendment (2017 Measures No. 5) Act 2018* to implement a regime for the regulation of financial benchmarks. Certain provisions of Part 7.5B only apply to a financial benchmark that has been declared by ASIC to be a significant financial benchmark. In particular, ASIC may make compelled financial benchmark rules in relation to a significant financial benchmark specified in a benchmark administrator licensee's licence.

1. **Purpose of the Instrument**

The purpose of the Instrument is to make compelled financial benchmark rules (**Rules**) which, together with the *ASIC Financial Benchmark (Administration) Rules 2018,* implement a financial benchmark administration regime designed to ensure significant financial benchmarks are robust and reliable. The regime is in line with the Final Report titled “Principles for Financial Benchmarks”, dated July 2013 and published by the Board of the International Organization of Securities Commissions (**IOSCO Principles**), as well as the regimes in other overseas jurisdictions.

The Rules enable ASIC to compel:

1. the holder of a benchmark administrator licence that specifies a significant financial benchmark to:
	1. continue to generate or administer the significant financial benchmark; or
	2. generate or administer the significant financial benchmark in a particular way, including by changing the method used to generate or administer the significant benchmark; and
2. a contributor to contribute data or information to:
	1. the holder of a benchmark administrator licence for the generation or administration of a significant financial benchmark; or
	2. ASIC for purposes related to the generation or administration of the significant financial benchmark.

A contributor is as an entity whose activities result in the provision of data or information to a holder of a benchmark administrator licence for the generation or administration of a financial benchmark specified in that licence.

ASIC’s compulsion power under the Rules is subject to the constraints set out in the Act and described in paragraphs 5, 6 and 7 of this Explanatory Statement.

1. **Operation of the Instrument**

The operation of the Instrument is described in more detail in Attachment A.

1. **Matters that may be dealt with in the compelled rules**

Permitted matters

Subsection 908CE(1) of the Act provides that the permitted powers and matters that may be conferred by or dealt with in the compelled rules made under section 908CD, are:

1. the power for ASIC to require, by written notice, an entity referred to in paragraph 908CB(h):
	1. to provide data or information to a benchmark administrator licensee, or to another entity, for the generation or administration of a significant financial benchmark specified in that licence; and
	2. to provide ASIC with some or all of that data or information for purposes relating to the generation or administration of that significant financial benchmark;
2. the power for ASIC to require, by written notice, a benchmark administrator licensee:
	1. to continue to generate or administer a significant financial benchmark specified in that licence; or
	2. to generate or administer in a particular way a significant financial benchmark specified in that licence;
3. powers or matters incidental or related to:
	1. one or more of the above powers; or
	2. the compulsory generation or administration of a significant financial benchmark specified in a benchmark administrator licence;

including a power or matter prescribed by the regulations for the purposes of paragraph 908CE(1)(c).

An entity referred to in paragraph 908CB(h) is an entity whose activities result in the provision of data or information to benchmark administrator licensees for the generation or administration of the financial benchmarks specified in those licences.

The Rules deal with matters of the kind permitted under subsection 908CE(1) of the Act.

Limits on exercise of power

Subsection 908CE(2) of the Act provides that ASIC may only require something under a power referred to in subsection 908CE(1) if:

1. ASIC reasonably believes it is in the public interest to do so; and
2. in the case of paragraph 908CE(1)(a)—the activities of the entity concerned have previously resulted in the provision of data or information to that licensee for the generation or administration of that significant financial benchmark.

### Regulations may limit how rules may deal with certain matters

Subsection 908CP(2) of the Act provides that the regulations may prescribe limits on:

1. the extent to which, or the way in which, the compelled financial benchmark rules may deal with matters permitted by Subdivision B of Division 3 of Part 7.5B of the Act; or
2. the classes of persons on whom those rules may impose requirements; or
3. the extent to which those rules may impose requirements (or certain kinds of requirements) on certain classes of persons.

To date, no regulations have been made under subsection 908CP(2) of the Act.

1. **Matters to which ASIC has had regard when making the Rules**

Section 908CK of the Act provides that in considering whether to make a rule under Division 3 of Part 7.5B of the Act, ASIC:

1. must have regard to:
	1. the IOSCO Principles, as amended from time to time; and
	2. the likely effect of the proposed rule on the Australian economy, and on the efficiency, integrity and stability of the Australian financial system; and
	3. the likely regulatory impact of the proposed rule; and
2. may have regard to any other matters that ASIC considers relevant.

In making the Rules, ASIC has had regard to the matters specified in section 908CK of the Act, and has taken into account the Council of Financial Regulators’ final advice to Government on Reforming Australia’s Regulation of Financial Benchmarks[[1]](#footnote-2) (**Final CFR Advice**).

1. **Consultation**

Subsection 908CL(1) of the Act provides that ASIC must not make a rule under Division 3 of Part 7.5B of the Act unless ASIC:

1. has consulted the public about the proposed rule; and
2. has also consulted any other person or body as required by regulations made for the purposes of paragraph 908CL(1)(b) of the Act.

To date, no regulations have been made for the purpose of paragraph 908CL(1)(b) of the Act.

Subsection 908CL(2) of the Act provides that, without limiting the ways in which ASIC may comply with the obligation in paragraph 908CL(1)(a) to consult the public about a proposed rule, ASIC is taken to comply with that obligation if ASIC, on its website:

1. makes the proposed rule, or a description of the content of the proposed rule, available; and
2. invites the public to comment on the proposed rule.

Subsection 908CL(3) of the Act provides that a failure to consult as required by subsection 908CL(1) does not invalidate a rule.

ASIC publicly consulted on the Rules in ASIC Consultation Paper 292 *Implementing the financial benchmark regulatory regime* released on 17 July 2017. Submissions were due 21 August 2017. Following the receipt of eight submissions, and bilateral and industry meetings with stakeholders, ASIC considered that no substantive changes to the Rules were required.

The Treasury has certified that Final CFR Advice satisfies the requirements of a Regulation Impact Statement in respect of the benchmark administration regime, of which the Rules form a part.

1. **Ministerial consent**

Subsection 908CM(1) of the Act provides that ASIC must not make a rule under Division 3 of Part 7.5B of the Act unless consent for it has been given under subsection 90CM(2).

Subsection 908CM(2) of the Act provides that the Minister may, in writing, consent to the making of a rule under Division 3 of Part 7.5B of the Act.

On 30 May 2018, the Minister consented in writing to ASIC making the Rules under subsection 908CM(2) of the Act.

1. **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.*

***ASIC Financial Benchmark (Compelled) Rules 2018***

The *ASIC Financial Benchmark (Compelled) Rules 2018* (**the Legislative Instrument**) is 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.*

**Overview of the Legislative Instrument**

The Legislative Instrument, made by ASIC under section 908CD of the *Corporations Act 2001* (**the Act**),makes compelled financial benchmark rules (**Rules**) which, together with the *ASIC Financial Benchmark (Administration) Rules 2018,* implement a financial benchmark administration regime to ensure significant financial benchmarks are robust and reliable. The regime is in line with the Final Report titled “Principles for Financial Benchmarks”, dated July 2013 and published by the Board of the International Organization of Securities Commissions (**IOSCO Principles**), as well as the regimes in other overseas jurisdictions.

The Rules enable ASIC to compel:

1. the holder of a benchmark administrator licence that specifies a significant financial benchmark to:
	1. continue to generate or administer the significant financial benchmark; or
	2. generate or administer the significant financial benchmark in a particular way, including by changing the method used to generate or administer the significant benchmark; and
2. a contributor to contribute data or information to:
	1. the holder of a benchmark administrator licence for the generation or administration of a significant financial benchmark; or
	2. ASIC for purposes related to the generation or administration of the significant financial benchmark.

ASIC publicly consulted on the Rules on 17 July 2017. In making the Rules, ASIC has had regard to the matters specified in section 908CK of the Act, and has taken into account the Council of Financial Regulators’ final advice to Government on Reforming Australia’s Regulation of Financial Benchmarks[[2]](#footnote-3). The Minister consented in writing to ASIC making the Rules under subsection 908CM(2) of the Act.

**Human rights implications**

The Legislative Instrument does not engage any of the applicable rights or freedoms.

**Conclusion**

The Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

# Attachment A – Provision-by-provision description of the instrument

Capitalised terms used in this Attachment have the same meaning as in the Rules.

# Chapter 1: Introduction

## Part 1.1 Preliminary

### Rule 1.1.1 Enabling Legislation

Rule 1.1.1 provides that ASIC makes the Instrument under section 908CD of the Act. Section 908CD of the Act empowers ASIC to make rules conferring the powers and dealing with the matters permitted by section 908CE of the Act.

### Rule 1.1.2 Title

Rule 1.1.2 provides that the Instrument is the ASIC Financial Benchmark (Compelled) Rules 2018.

### Rule 1.1.3 Commencement

Rule 1.1.3 provides that the Instrument commences on the day after it is registered on the Federal Register of Legislation.

### Rule 1.1.4 Entities that must comply with the rules

Rule 1.1.4 provides that the Rules apply to benchmark administrator licensees and Contributors. A Contributor is defined in Rule 1.2.2 as an entity whose activities result in the provision of data or information to a holder of a benchmark administrator licence for the generation or administration of a financial benchmark specified in that licence.

### The note to Rule 1.1.4 explains that section 908CF of the Act provides that a person (whether a benchmark administrator licensee or otherwise) must comply with the provisions of the compelled financial benchmark rules that apply to the person.

Further, under section 908CJ of the Act, if:

1. a person (the ***protected person***):
2. provides financial benchmark data, or other information, to another person; or
3. otherwise allows another person access to financial benchmark data, or other information; or
4. generates or administers in a particular way a significant financial benchmark specified in a benchmark administrator licence; and
5. the protected person does so, in good faith, in compliance with a requirement imposed by the compelled financial benchmark rules;

the protected person is not liable to an action or other proceeding, whether civil or criminal, for or in relation to that conduct.

### Rule 1.1.5 Penalty amounts for each rule

Subrule 1.1.5(1) provides that, for paragraph 908CO(b) of the Act, the penalty amount specified under a Rule is the penalty amount for that Rule. Paragraph 908CO(b) of the Act provides that the compelled financial benchmark rules may specify a penalty amount for a rule and the penalty amount must not exceed 5,500 penalty units (for any entity). At the time of making the rules, a penalty unit for the purposes of paragraph 908CO(b) is $210 (see section 4AA of the Crimes Act 1914).

Subrule 1.1.5(2) provides that, if no penalty amount is specified under a Rule, there is no penalty for that Rule.

## Part 1.2 Interpretation

### Rule 1.2.1 Words and expressions defined in the Corporations Act

Rule 1.2.1 provides that words and expressions defined in the Act will, unless otherwise defined or specified in the Rules or the contrary intention appears, have the same meaning in the Rules.

### Rule 1.2.2 Definitions

Rule 1.2.2 provides definitions for the following terms used in the Rules:

* Act;
* Contributor; and
* Rules.

# Chapter 2: Mandatory generation or administration of a significant financial benchmark

### Rule 2.1.1 Notice to benchmark administrator licensee

Subrule 2.1.1(1) provides that ASIC may, by written notice, require the holder of a benchmark administrator licence that specifies a significant financial benchmark:

1. to continue to generate or administer the significant financial benchmark; or
2. to generate or administer the significant financial benchmark in a particular way.

Subrule 2.1.1(2) provides that the licensee must comply with the notice.

Subrule 2.1.1(3) provides that without limiting subrule 2.1.1(1), a notice under that subrule may:

1. specify the period during which the licensee must comply with the notice, including by reference to the occurrence of one or more events; and
2. specify requirements the licensee must comply with in generating or administering the significant financial benchmark, including:
3. requirements relating to changes to the method the licensee uses to generate or administer the significant financial benchmark; and
4. where the licensee intends to cease generating or administering the significant financial benchmark, requirements relating to the:
	* + 1. orderly transition of the significant financial benchmark to another holder of a benchmark administrator licence; or
			2. orderly cessation of the generation and administration of the significant financial benchmark.

The purpose of Rule 2.1.1 is to enable ASIC to compel a licensee to continue generating or administering the significant financial benchmark or to generate or administer it in a particular way in certain circumstances.

Rule 2.1.1 confers powers and deals with matters permitted by paragraph 908CE(1)(b) and (c) of the Act. Under paragraph 908CE(2)(a) of the Act, ASIC may only require something under its power in subrule 2.1.1(1) if ASIC reasonably believes it is in the public interest to do so. ASIC will provide guidance to industry about when it considers it would be in the public interest to compel a licensee to continue to generate or administer the significant financial benchmark, including in a particular way.

The notification requirement in Rule 2.4.1 of the *ASIC Financial Benchmark (Administration) Rules 2018* - which requires a licensee to notify ASIC if the licensee intends to cease generating or administering the financial benchmark - may be a trigger for ASIC to consider exercising the power in subrule 2.1.1(1) of the Rules.

At Schedule 1 of the Rules is an example of a notice that ASIC could issue under subrule 2.1.1(1). That example does not limit the form which a notice may take or the matters which may be dealt with in a notice.

# Chapter 3: Mandatory submissions to a significant financial benchmark

### Rule 3.1.1 Notice to Contributor

Subrule 3.1.1(1) provides that ASIC may require, by written notice, a Contributor:

1. to provide data or information to the holder of a benchmark administrator licence for the generation or administration of a significant financial benchmark specified in that licence; or
2. to provide ASIC with some or all of that data or information for purposes relating to the generation or administration of that significant financial benchmark.

Subrule 3.1.1(2) provides that the Contributor must comply with the notice.

Subrule 3.1.1(3) provides that without limiting subrule 3.1.1(1), a notice under that subrule may:

1. specify the period during which the Contributor must comply with the notice, including by reference to the occurrence of one or more events; and
2. specify requirements the Contributor must comply with in providing the data or information, including:
3. requirements relating to the manner and form in which the Contributor must provide the data or information; and
4. other requirements imposed by the holder of the benchmark administrator licence, ASIC, the Act or the *ASIC Financial Benchmark (Administration) Rules 2017*.

Rule 3.1.1 confers powers and deals with matters permitted by paragraph 908CE(1)(a) and (c) of the Act. Under subsection 908CE(2) of the Act, ASIC may only require something under the power in subrule 3.1.1(1) if ASIC reasonably believes it is in the public interest to do so and, in the case of the power referred to in paragraph 908CE(1)(a), if the Contributor is an entity whose activities have previously resulted in the provision of data or information to that licensee for the generation or administration of that significant financial benchmark. ASIC will provide guidance to industry about when it considers it would be in the public interest to compel a Contributor to provide data or information to ASIC or the benchmark administrator.

At Schedule 2 of the Rules is an example of a notice that ASIC could issue under paragraph 3.1.1(1)(a). That example does not limit the form which a notice may take or the matters which may be dealt with in a notice.

1. Available at http://sjm.ministers.treasury.gov.au/files/2016/10/ATTACHMENT-CFR-advice-financial-benchmarks-regulatory-reform.pdf [↑](#footnote-ref-2)
2. http://sjm.ministers.treasury.gov.au/files/2016/10/ATTACHMENT-CFR-advice-financial-benchmarks-regulatory-reform.pdf [↑](#footnote-ref-3)