



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Asia Region Funds Passport) Instrument 2019/75

This is the Explanatory Statement for *ASIC Corporations (Asia Region Funds Passport) Instrument 2019/75*.

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

Summary

1. The instrument is a determination in connection with an application for registration as an Australian passport fund or a notice of intention to offer interests in a foreign passport fund to persons in this jurisdiction under Chapter 8A of the *Corporations Act 2001* (the *Act*).
2. The determination has the effect that certain information lodged in connection with such an application or notice will not be available for inspection or copying from ASIC under subsection 1274(2) of the Act.
3. The information that will not be available for inspection or copying is of a kind that is personal, sensitive or confidential information.

Purpose of the instrument

4. The Asia Region Funds Passport provides a multilaterally agreed framework to facilitate the cross-border marketing of passport funds across participating economies in the Asia region. It is intended to support the development of an Asia-wide funds management industry through improved market access and regulatory harmonisation. This regime originated in Australian Financial Centre Forum's report *Australia as a financial centre: Building on our strengths*, released in November 2009.
5. The key objectives for the Asia Region Funds Passport include to:
 - (a) ensure investors receive the benefits of increased competition, for example, lower fees and greater fund choice;
 - (b) provide a high degree of investor protection—that is, to promote informed and confident investors by ensuring high standards for the operation and offer of passport funds;

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- (c) strengthen the capacity and competitiveness of the region's funds management industry;
 - (d) deepen the region's financial markets by improving liquidity and access to finance; and
 - (e) ensure economies can continue to maintain financial system stability and efficiency. Keeping capital flows within the Asia region could help to strengthen the region's resilience to external shocks and volatility.
 6. The purpose of the determination is to protect the confidentiality of personal, sensitive or confidential information that is lodged in connection with an application for registration as an Australian passport fund or a notice of intention to offer interests in a foreign passport fund.
 7. Subsection 1274(2) of the Act permits a person to inspect or obtain a copy of any document lodged with ASIC. An application for registration as an Australian passport fund and a notice of intention to offer interests in a foreign passport fund are lodged with ASIC under sections 1212 and 1213 respectively. These documents will contain personal, sensitive and confidential information.
 8. Section 1212A of the Act requires ASIC to register a registered scheme as an Australian passport fund if ASIC is of the opinion that:
 - (a) the responsible entity for the scheme is an eligible entity, within the meaning of section 3 of Annex 2 of the Memorandum of Cooperation; and
 - (b) the Act (including the Passport Rules for this jurisdiction) and the *Australian Securities and Investments Commission Act 2001* (the *ASIC Act*) are likely to be complied with in relation to the scheme.
 9. Annex 2 – Common Regulatory Arrangements of the Memorandum of Cooperation of the Establishment and Implementation of the Asia Region Funds Passport (*Annex 2 of the MoC*) – sets out the common regulatory arrangements that all participating economies have agreed to apply.
 10. Under section 7 of Annex 2 of the MoC, each passport regulator agreed to include on a public register of passport funds the Part A of the passport fund's registration application (excluding constituent documents and any portion of Part A marked confidential).
 11. On 4 October 2017, a joint committee of representatives from each participating economy agreed that the following information would be included in the Part A of the passport fund's registration application:
 - (a) name and details of the legal structure and type of the passport fund;
 - (c) details about the permitted investments, restrictions on portfolio allocation, limits on exposures and other restrictions of the passport fund;

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- (d) details about the offer in home economy being made in relation to the passport fund;
 - (e) details about fees payable in relation to the passport fund;
 - (f) details of the auditor of the passport fund;
 - (g) confirmation that constituent documents have been updated to reflect the Passport Rules;
 - (h) licensed operator name and business name and address of registered office and principal place of business;
 - (i) contact details for the individual completing the application;
 - (j) details about the eligibility of operator, including total assets under management, officer qualifications, financial resources, organisational arrangements, track record of operator or related party;
 - (k) details about the delegation of functions or sub-delegation to other entities (if any), including the names and economies of the delegated entities; and
 - (l) details of any relevant parties, including the contact information of the distributor, custodian, independent oversight entity and annual implementation reviewer.
12. To satisfy itself that the Act and ASIC Act are likely to be complied with, ASIC proposes to ask Australian passport fund operators a number of questions in addition to the information in Part A of the registration application. This is known as Part B of the registration application.
 13. Under section 1213B of the Act, ASIC may reject a notice of intention to offer interests in a foreign passport fund on similar grounds as section 1212A of the Act (amongst other grounds).

Consultation

14. ASIC engaged in limited consultation before making this determination. ASIC consulted with targeted stakeholders as part of testing the application for registration as an Australian passport fund and a notice of intention to issue interests in a foreign passport fund.
15. ASIC did not consult more broadly. The powers to make this determination were specifically given by Parliament to allow ASIC to determine which parts of the application or notice should not be made available for public inspection and copying: see paragraphs 3.24 and 3.37 of the Revised Explanatory Memorandum to the Corporations Amendment (Asia Region Funds Passport) Bill 2018 (the *amending Bill*).
16. ASIC notes that the Government consulted on the powers as part of its consultation on the amending Bill in August 2017 and March 2018.

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17. ASIC also notes that it is also required under section 127 of the ASIC Act, and under the *Privacy Act 1988*, to take reasonable steps to protect confidential and personal information respectively.

Operation of the instrument

18. Subsection 5(1) of the instrument has the effect that information lodged with ASIC in an application for registration as an Australian passport fund under section 1212 of the Act will not be available for inspection or copying from ASIC if the information is of a kind set out in Schedule 1 to the instrument. The lodged information includes attachments to the application as well as responses to enquiries or requisitions from ASIC in connection with the application.
19. Subsection 5(2) of the instrument has the effect that information lodged with ASIC in a notice of intention to offer interests in a foreign passport fund under section 1213 of the Act will not be available for inspection or copying from ASIC if the information is of a kind set out in Schedule 2 to the instrument. The lodged information includes attachments to the notice as well as responses to enquiries or requisitions from ASIC in connection with the notice.
20. The non-confidential parts of these lodged documents will be available for inspection and copying from ASIC under subsection 1274(2) of the Act.
21. Examples of parts of the application for registration as an Australian passport fund that are not covered by the determination will be available for public inspection and copying include:
- (a) details about the proposed operator;
 - (b) the website address for the passport fund;
 - (c) details about the types of assets held by the passport fund and how they meet the Passport Rules;
 - (d) whether a portfolio restriction or limit is exceeded;
 - (e) details about whether any short-selling, performance fees, borrowing, loans, guarantees and underwriting of interests meets the Passport Rules;
 - (f) details about whether redemption arrangements meet the Passport Rules;
 - (g) details about any functions of the proposed operator that are delegated;
 - (h) details about the annual reviews by the annual implementation reviewer and financial statements auditor;
 - (i) details about how the track record test in section 9 of the Passport Rules is met;
 - (j) details about how the adequacy of resources test in subsection 3(4) of Annex 2 of the MoC is met;

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- (k) details about the financial resources of the operator.
22. Examples of parts of the notice of intention to offer interests in a foreign passport fund that are not covered by the determination will be available for public inspection and copying include:
- (a) details about the proposed operator;
 - (b) the website address for the passport fund;
 - (c) details about the passport fund, including its home economy and any other host economies it has notified to offer interests;
 - (d) details about the distributors for the passport fund in Australia;
 - (e) its membership of an external dispute resolution service.
23. The instrument commences on the later of 1 February 2019 or the day it is registered on the Federal Register of Legislation.

Legislative authority

24. Subsections 1212(4) and 1213(4) of the Act provide the legislative authority for the instrument. There are no pre-conditions to the exercise of the power.
25. The instrument is a disallowable legislative instrument.

Statement of compatibility with human rights

26. 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*.
27. This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act.

Assessment of human rights implications

28. This legislative instrument does not engage any of the applicable rights or freedoms.
29. The instrument is a determination under subsections 1212(4) and 1213(4) of the Act in connection with the lodgment of an application for registration as an Australian passport fund or a lodgment of a notice of intention to offer interests in a foreign passport fund.
30. The determination has the effect that certain information lodged with ASIC in connection with such an application or notice will not be available for inspection or copying under subsection 1274(2) of the Act.