



ASIC
Australian Securities &
Investments Commission

Replacement Explanatory Statement

ASIC Corporations (Amendment) Instrument 2021/848

This is the Replacement Explanatory Statement for *ASIC Corporations (Amendment) Instrument 2021/848* (the **Instrument**).

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

Purpose of the Replacement Explanatory Statement

1. This Replacement Explanatory Statement replaces the initial explanatory statement for the Instrument in accordance with paragraph 15J(1)(b) of the *Legislation Act 2003*.
2. The purpose of this Replacement Explanatory Statement is to set out further details of the consultation undertaken prior to ASIC making the Instrument.

Summary

3. This Instrument amends *ASIC Corporations (COVID-19–Advice-related Relief) Instrument 2021/268* to give effect to two temporary relief measures that facilitate access to timely and affordable personal advice for existing clients of providing entities that is in connection with the adverse economic effects of COVID-19 (**COVID-19 advice**).
4. A ‘providing entity’ is an Australian financial services licensee (**AFS licensee**) or an authorised representative of an AFS licensee, that provides personal advice to a retail client.
5. The ‘*Situations in which Statement of Advice is not required*’ measure allows a Record of Advice (**ROA**) to be provided, rather than a Statement of Advice (**SOA**), in relation to COVID-19 advice in certain circumstances. This Instrument amends ASIC Instrument 2021/268 to:
 - a. extend the ‘*Situations in which Statement of Advice is not required*’ measure by an additional six months; and
 - b. clarify that providing entities must give the client information about any actual or potential conflicts of interest, commissions and remuneration, at the same time or as soon as practicable after the COVID-19 advice is

provided.

6. The ‘*Urgent Advice*’ measure gives providing entities additional time to provide an SOA to existing clients in relation to urgent, time-critical COVID-19 advice. This Instrument amends ASIC Instrument 2021/268 to re-introduce the ‘*Urgent Advice*’ measure (after the original relief expired on 15 April 2021).
7. The temporary relief measures in ASIC Instrument 2021/268 will expire on 15 April 2022. ASIC will continue to monitor the appropriateness of the Instrument, having regard to the ongoing impact of COVID-19. If appropriate, ASIC may end the relief before the six-month period. ASIC will give sufficient notice to industry before any early repeal is implemented.

Purpose of the Instrument

8. The purpose of this amending Instrument is to facilitate the provision of COVID-19 advice by continuing the ‘*Situations in which Statement of Advice is not required*’ measure in ASIC Corporations (COVID-19—Advice-related Relief) Instrument 2021/268 and by re-introducing the ‘*Urgent Advice*’ measure.
9. This Instrument primarily affects the disclosure obligations for providing entities when giving personal advice to their clients.
10. The conduct obligations for providing entities continue to apply and are appropriate consumer protection requirements. For example, these conduct obligations include the best interests duty and related obligations in Division 2 of Part 7.7A of the *Corporations Act 2001* (the **Act**).

Consultation

11. Before making this amending Instrument, ASIC engaged with a targeted range of stakeholders to invite feedback on extending the temporary relief measures. The stakeholders were industry associations in the financial advice sector. This process involved ASIC seeking and receiving submissions from the industry associations, all of which were supportive of the relief proposed. ASIC undertook a targeted consultation due to the interim nature of the relief provided. Given the original ‘*Situations in which Statement of Advice is not required*’ measure was only in place for a period of six months, ASIC did not have time to consult more widely via our usual consultation process in relation to the proposed remake of the relief.
12. This Instrument extends and remakes temporary relief measures originally provided by the *ASIC Corporations (COVID-19 – Advice-related Relief) Instrument 2020/355* (the original instrument). At the time the original instrument was made, ASIC was not required to complete regulatory impact analysis in the form of a Regulatory Impact Statement, due to a Prime Minister’s exemption relating to COVID-19 related measures. The Office of Best Practice Regulation has confirmed that a Regulatory Impact Statement is also not required for the relief measures remade or extended by this Instrument.

Operation of the instrument

13. The Instrument commences on the later of 14 October 2021 and the day after the Instrument is registered on the Federal Register of Legislation. The Instrument will be repealed on 15 April 2022. Therefore, the duration of the Instrument will be for a period of six months.

‘Situations in which Statement of Advice is not required’ measure

14. Section 2 of Schedule 1 of the Instrument modifies the disclosure requirements in notional paragraph 946B(12)(d) by inserting a new notional paragraph 946B(12)(e) to require that a providing entity must include any actual or potential conflicts of interest, commissions and remuneration consistent with sub-paragraphs 947B(2)(d) and (e), or 947C(2)(e) and (f), within the record of the COVID-19 advice.

‘Urgent Advice’ measure

15. Section 3 of Schedule 1 to the Instrument extends the timeframe for a providing entity to give an SOA for time-critical COVID-19 advice. It allows an SOA to be given within 20 business days after providing the COVID-19 advice to the client, instead of the 5 business days that is usually required by section 946C of the Act.
16. The exemption from section 946C of the Act applies where the following conditions are satisfied:
 - (a) the providing entity reasonably considers, and the client expressly instructs the providing entity, that the client requires the COVID-19 advice on an urgent basis because of the adverse economic effects of COVID-19; and
 - (b) where the COVID-19 advice relates to a financial product that is subject to a cooling off period for return of the product—the providing entity gives the client a written statement explaining the nature of the cooling off rights and that the client may not receive the SOA until after the cooling off rights have expired. This written warning should be given at the time the COVID-19 advice is provided.
17. The requirement for the client's express instruction may be met, for example, by the client agreeing with the providing entity that they require COVID-19 advice on an urgent basis.
18. The following is an example of a situation in which the relief may be used. A 60-year-old client has lost their job and is unable to find work again in the short term because of the temporary impact of the COVID-19 pandemic. They wish to keep working when this again becomes possible. Until they can find employment, they do not have sufficient funds to meet their living costs. The client seeks advice about whether they can access their superannuation to help them meet their living costs until they can find further employment. The adviser considers that the advice is required on an urgent basis due to the adverse economic effects of COVID-19 and the client instructs the adviser that they

require the advice on this basis.

19. In addition to these conditions, the existing disclosure requirements in section 946C of the Act still apply. For example, as required by subsection 946C(2) of the Act, the disclosure about any actual or potential conflicts of interest, commissions and remuneration, as well as disclosures about financial product replacement advice if applicable, must be provided at the time the COVID-19 advice is provided to the client.
20. The providing entity must give the client an SOA as soon as practicable after the COVID-19 advice is provided, and no later than 20 business days after the COVID-19 advice is provided.

Legislative authority

21. This Instrument is made under subsection 951B(1) of the Act.
22. Subsection 951B(1) provides that ASIC may declare that Part 7.7 applies in relation to a class of persons as if specified provisions of Part 7.7 were omitted, modified or varied as specified in the declaration.
23. This Instrument is a disallowable legislative instrument.

Legislative instrument and primary legislation

24. The policy and measures implemented by the Instrument are more appropriate for a legislative instrument rather than primary legislation because the measures are not required on a permanent basis, but have been implemented to respond quickly and temporarily to issues with financial product advice in connection with or arising from COVID-19.
25. As of the date of commencement of this Instrument, the impact of the COVID-19 pandemic on the provision of financial product advice is still ongoing. It is appropriate to extend the temporary relief measures to provide certainty to affected clients and providing entities for a further period of 6 months given it is currently unknown when the impact of the COVID-19 pandemic on the provision of financial product advice will cease. This Instrument also addresses a range of issues of which ASIC is aware that make the advice process more difficult and time consuming during the current environment where restrictions and lockdowns are in place in different parts of Australia. For example, the inability to provide face-to-face advice can increase the time needed to obtain information from clients. Further, advisers often need to meet client preferences for different forms of communication – some clients are comfortable communicating electronically, others prefer hard copy, paper-based communication.
26. ASIC will continue to monitor the appropriateness of these temporary relief measures in light of the impact of the COVID-19 pandemic on the demand for financial advice. If appropriate, ASIC may end the relief before the six-month period. ASIC will give sufficient notice to industry before any early repeal is implemented.

Statement of Compatibility with Human Rights

20. 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*.

ASIC Corporations (Amendment) Instrument 2021/848.

Overview

1. *ASIC Corporations (Amendment) Instrument 2021/848* extends an existing temporary deregulatory measure, and introduces a new deregulatory measure in *ASIC Corporations (COVID-19 – Advice-related Relief) Instrument 2021/268* to facilitate the provision of timely and affordable financial product advice to retail clients because of the adverse economic impact of COVID-19.
2. The Instrument also clarifies the disclosure obligations in relation to the extended temporary deregulation measure.

Assessment of human rights implications

3. This Instrument does not engage any of the applicable rights or freedoms.

Conclusion

4. This 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*.