



**ASIC**  
Australian Securities &  
Investments Commission

# Explanatory Statement

## *ASIC Corporations (Amendment) Instrument 2024/554*

This is the Explanatory Statement for *ASIC Corporations (Amendment) Instrument 2024/554 (Amendment Instrument)*.

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

### Summary

1. Following the final response of the Federal Government to the Quality of Advice Review (**Review**) on 7 December 2023, the *Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Act 2024 (Act)* was made. The Act implements Government's response to several recommendations of the Review into the *Corporations Act 2001 (Corporations Act)*.
2. The Amendment Instrument amends three instruments in response to amendments to the Corporations Act that the Act makes.
3. The Amendment Instrument amends *ASIC Corporations (Disclosure of Lack of Independence) Instrument 2021/125 (LI 2021/125)* to clarify requirements for statements disclosing lack of independence in website disclosure information.
4. The Amendment Instrument also amends *ASIC Corporations and Credit (Breach Reporting—Reportable Situations) Instrument 2021/716 (LI 2021/716)* by removing a provision notionally inserted by that instrument, which the Act directly inserts into subsections 912D(3)(b) to (e) of the Corporations Act.
5. The Amendment Instrument substitutes notional sections 952BA and 953BA of *ASIC Corporations (Investor Directed Portfolio Services) Instrument 2023/669 (LI 2023/669)*, which relate to the apportionment of liability for a defective Financial Services Guide (**FSG**) or Supplementary FSG, to ensure that their exemptions from liability apply in respect of defective information in website disclosure information, in addition to FSGs and Supplementary FSGs.

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## Purposes of the instrument

### *First Purpose*

6. Recommendation 10 of the Review recommended that relevant advice providers be permitted to make information publicly available on their website as an alternative to providing information to their clients in an FSG.
7. The Act inserts a new Division 2A in Part 7.7 of the Corporations Act, creating a website disclosure information option as an alternative to providing required information to a retail client through an FSG.
8. Sections 1–3 of Schedule 1 to the Amendment Instrument amend LI 2021/125 to specify requirements for statements disclosing lack of independence in website disclosure information. These requirements are equivalent to the requirements for disclosure of lack of independence in FSGs. The requirements ensure that equivalent lack of independence disclosure requirements apply irrespective of whether a providing entity provides clients with an FSG or makes available website disclosure information.

### *Second Purpose*

9. Section 4 of Schedule 1 to the Amendment Instrument amends LI 2021/716 to repeal former section 9.
10. Former section 9 was inserted after the *Treasury Laws Amendment (2023 Law Improvement Package No. 1) Act 2023 (2023 Act)* renumbered the paragraphs within the ‘financial services law’ definition in section 761A of the Corporations Act.
11. Paragraphs of the ‘financial services law’ definition in section 761A are cross-referenced in the list of ‘core obligations’ for the purposes of the reportable situations regime in paragraphs 912D(3)(b) to (e) of the Corporations Act. The 2023 Act did not make consequential amendments to align the references in subsection 912D(3) with the amended paragraphs of the ‘financial services law’ definition.
12. Former section 9 of LI 2021/716 notionally modified section 912D such that Part 7.6 of the Corporations Act applied in relation to financial service licensees as if subsections 912D(3)(b) to (e) were aligned with the amended definition.
13. As items 15 to 18 of Schedule 5 to the Act amend subsection 912D(3) to align it with the amended definition, the provisions notionally inserted by former section 9 of LI 2021/716 are no longer necessary and former section 9 can be repealed to avoid duplication.

### *Third Purpose*

14. Sections 5–6 of Schedule 1 to the Amendment Instrument facilitate the effective operation of the amendments that the Act makes by ensuring that financial services licensees and providing entities are entitled to the same exemptions

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from liability for particular defective information, irrespective of whether using FSGs or websites to provide information to clients.

### **Consultation**

15. Given the amendments that the Amendment Instrument makes are minor or clarifying, and consequential upon amendments that the Act makes, ASIC did not undertake consultation before making the Amendment Instrument.

### **Operation of the instrument**

16. The Amendment Instrument operates by specifying further requirements in LI 2021/125 and by amending notional sections of the Corporations Act inserted by LI 2021/716 and LI 2023/669.

### **LI 2021/125**

17. Paragraphs 942B(2)(fa) and 942C(2)(ga) of the Corporations Act require providing entities that would contravene subsection 923A(1) by assuming or using a ‘restricted word or expression’ (within the meaning of subsection 923A(5)) in relation to personal advice to include a statement setting out that they are not independent, impartial or unbiased in an FSG and explain the reasons why. Subsections 942B(7A) and 942C(7A) provide that ASIC may, by legislative instrument, determine requirements for this statement (**Lack of Independence Disclosure statement**).
18. LI 2021/125 is the ASIC instrument that determines requirements for the Lack of Independence Disclosure statement. These requirements include that the disclosure must:
  - (a) appear on the first substantive page of the FSG that contains it;
  - (b) appear within a box under a bold heading that includes the phrase “Not Independent”, “Lack of Independence”, or another phrase of like import;
  - (c) be in a font size that is at least the same font size as that predominantly used for other text (if any) in the FSG; and
  - (d) not appear in a footnote.
19. Section 1 to the Amendment Instrument amends section 3 of LI 2021/215 to include subsection 951B(1) which is the legislative power for the amendments that section 3 to the Amendment Instrument makes.
20. Section 2 of Schedule 1 to the Amendment Instrument amends the title of section 5 of LI 2021/125 to “Requirements for disclosure of lack of independence in a Financial Services Guide”, thereby clarifying that section 5 applies principally to statements made in FSGs.
21. Section 3 of Schedule 1 to the Amendment Instrument inserts a section 6 into LI 2021/125 that imposes requirements upon Lack of Independence Disclosure statements as part of website disclosure information. The requirements modify

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section 943J of the Corporations Act that the Act inserts to provide an alternative to meeting the requirements referred to in subparagraphs 942B(2)(fa)(iii) and 942C(2)(ga)(iii) of the Corporations Act for website disclosure information in a new notional section 943JA.

22. Notional section 943JA applies to any Lack of Independence statement that forms part of website disclosure information. Its requirements are equivalent to those required for FSGs and require that the statement must:
- (a) be in a prominent position;
  - (b) appear within a box under a bold heading that includes the phrase “Not Independent”, “Lack of Independence”, or another phrase of like import;
  - (c) be in a font size that is at least the same font size as that predominantly used for other text in the website disclosure information; and
  - (c) not appear in a footnote.
23. A Lack of Independence statement is not in a prominent position as part of website disclosure information if it is not readily accessible. A Lack of Independence statement should be near the top of the relevant webpage and users should not have to scroll down to view the statement on any device using standard settings.

***LI 2021/716***

24. Section 4 of Schedule 1 to the Amendment Instrument repeals section 9 of LI 2021/716 so that its notional amendments of subsection 912D(3) no longer apply.

***LI 2023/669***

25. Section 5 of LI 2023/669 inserts new notional sections 952BA and 953BA into the Corporations Act.
26. Former notional section 952BA provided that a financial services licensee did not commit an offence under section 952E and/or 952G of the Corporations Act if there was a defective FSG or Supplementary FSG provided certain conditions were met. Those conditions were that the FSG or Supplementary FSG was defective solely by reason of a statement in, or omission from, a part of it for which another financial services licensee stated it was responsible in the FSG or Supplementary FSG and that related to financial services that were or would likely be performed by that other licensee.
27. Former notional section 953BA provided that a providing entity was not liable under s953B for loss or damage from a defective FSG or Supplementary FSG where certain conditions were met. Those conditions were that the document was defective by reason only of a statement in or an omission from a part of the FSG or Supplementary FSG for which another financial services licensee stated

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it was responsible in the FSG or Supplementary FSG, and which related to financial services that were, or were likely to be, performed by that other licensee

28. Sections 5 and 6 of Schedule 1 to the Amendment Instrument insert new notional sections 952BA and 953BA into the Corporations Act that are in the same form as the former notional sections except that their relief extends to defective website disclosure information. This means that a financial services licensee or providing entity will not be liable for defective website disclosure information for which another financial services licensee stated it was responsible in the information and which related to financial services that were or were likely to be performed by that other licensee.

### ***Commencement***

29. The Amendment Instrument commences on the later of the day after it is registered on the Federal Register of Legislation and commencement of Parts 2 and 3 of Schedule 1 to the Act.

### **Legislative instrument and primary legislation**

30. The subject matter and policy implemented by the Amendment Instrument is more appropriate for a legislative instrument than primary legislation because it ensures consistency in the expectations for Lack of Independence statements between FSGs and website disclosure information that Parliament has permitted ASIC to determine under subsections 942B(7A) and 942C(7A) of the Corporations Act.
31. The amendments also amend provisions in legislative instruments that have no equivalent in primary legislation to ensure that LI 2021/125, LI 2021/716 and LI 2023/669 continue to align with the primary legislation (as amended by the Corporations Act).
32. ASIC understands that the Government will consider the merits of making future amendments to the primary legislation and regulations as part of the review process for LI 2021/125, LI 2021/716 and LI 2023/669 prior to their expiry dates.
33. It will be a matter for the Government and for Parliament as to whether the Corporations Act or Regulations may be amended in future to include the relief in LI 2021/125, LI 2021/716 and LI 2023/669.

### **Legislative authority**

34. The Amendment Instrument is made under subsections 926A(2) and 951B(1) of the Corporations Act.
35. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws), the power shall be construed as including a power

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exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

36. The Amendment Instrument is a disallowable legislative instrument.

**Statement of Compatibility with Human Rights**

37. 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 2024/554*

#### Overview

1. The instrument amends *ASIC Corporations (Disclosure of Lack of Independence) Instrument 2021/125* to clarify that requirements for lack of independence disclosure statements in website disclosure information are equivalent to the disclosure required in Financial Services Guides (FSGs).
2. The instrument amends *ASIC Corporations and Credit (Breach Reporting—Reportable Situations) Instrument 2021/716* to remove an item that has been made redundant by amendments of subsections 912D(3)(b) to (e) of the *Corporations Act 2001 (Corporations Act)* that Schedule 5 of the *Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Act 2024 (Act)* made.
3. The instrument also amends *ASIC Corporations (Investor Directed Portfolio Services) Instrument 2023/669* to ensure that exemptions from liability for providing entities and financial services licensees under sections 952E, 952G, and 953B of the *Corporations Act* apply in respect of website disclosure information, in addition to FSGs and Supplementary FSGs. Website disclosure information is permitted in lieu of FSGs following amendments that Schedule 1 of the Act made.

#### Assessment of human rights implications

4. This instrument does not engage any of the applicable rights or freedoms.

#### Conclusion

5. 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*.