



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (COVID-19—Advice-related Relief) Instrument 2020/355

This is the Explanatory Statement for the *ASIC Corporations (COVID-19—Advice-related Relief) Instrument 2020/355 (Instrument)*.

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

Summary

1. This Instrument implements three temporary relief measures to facilitate retail clients receiving timely and affordable financial product advice because of the adverse economic effects of the coronavirus known as COVID-19 (**COVID-19 advice**).
2. The ‘*Urgent Advice*’ measure gives providing entities additional time to provide a Statement of Advice (**SOA**) to clients in relation to urgent, time-critical COVID-19 advice.
3. The ‘*Early Release of Superannuation*’ measure grants temporary relief to:
 - (a) allow a licensing exemption to registered tax agents when certain conditions are met, so they can provide financial product advice to their existing clients about the early release of the client’s superannuation product or retirement savings account (**RSA**) product (collectively referred to in this Explanatory Statement as **superannuation**), without the need to hold an Australian financial services (**AFS**) licence; and
 - (b) allow providing entities to give financial product advice to clients about the early release of their superannuation, without the obligation to provide an SOA when certain conditions are met.
4. The ‘*ROA for an Existing Client*’ measure facilitates access to timely and affordable COVID-19 advice for existing clients of providing entities. It allows a Record of Advice (**ROA**) to be provided, rather than an SOA, in relation to COVID-19 advice in certain circumstances.

5. A ‘providing entity’ is an AFS licensee or an authorised representative of an AFS licensee, that provides personal advice to a retail client. Many providing entities are known as ‘financial advisers’.
6. ASIC will continue to monitor the appropriateness of the Instrument, having regard to the ongoing impact of COVID-19. To provide some certainty to providing entities and registered tax agents that might seek to rely on the Instrument, ASIC’s present policy is to give 30 days’ notice before implementing any decision to repeal the exemptions and declarations in the Instrument.

Purpose of the Instrument

7. The Instrument facilitates the provision of affordable and timely financial product advice to clients and reduces the regulatory disclosure burden on providing entities during the COVID-19 pandemic period.
8. The measures in the Instrument primarily affect the disclosure obligations for providing entities when giving financial product advice to their clients. The conduct obligations for providing entities (for example, the best interests duty and related obligations in Division 2 of Part 7.7A of Chapter 7 of the *Corporations Act 2001 (Act)* and the record keeping requirements in ASIC Class Order [14/923] *Record-keeping obligations for Australian financial services licensees when giving personal advice*) continue to apply and are appropriate consumer protection requirements.
9. The Instrument allows an ROA, rather than an SOA, to be provided when financial product advice is given under the ‘*Early Release of Superannuation*’ and ‘*ROA for an Existing Client*’ measures. An ROA is generally shorter than an SOA, does not require as much information and is easier and cheaper to prepare. The Instrument specifies the required content of the ROAs and the timing of giving the ROA to the client. The ROA must be given by the registered tax agent or the providing entities when the financial product advice is provided, or as soon as practicable after the financial product advice is provided to the client.

Consultation

10. Before making this Instrument, ASIC engaged with a targeted range of stakeholders to invite feedback on the measures and the manner in which the temporary relief in the measures is granted. The stakeholders included relevant industry associations, consumer groups and related regulators.
11. The Prime Minister has granted an exemption from the need to complete regulatory impact analysis in the form of Regulation Impact Statements for all Australian Government measures made in response to COVID-19.

Operation of the Instrument

12. Section 2 of the Instrument specifies that the Instrument commences on the day after the Instrument is registered on the Federal Register of Legislation.

‘Urgent Advice’ measure

13. Section 5 of 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 30 business days after providing the COVID-19 advice to the client, instead of the 5 business days that is usually required by s946C of the Act.
14. The exemption from s946C of the Act applies where the following conditions are satisfied:
 - (a) the client expressly instructs the providing entity, and the providing entity reasonably considers, 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.
15. In addition to these conditions, the existing disclosure requirements in s946C 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.
16. The providing entity must give the client an SOA as soon as practicable after the COVID-19 advice is provided, and no later than 30 business days after the COVID-19 advice is provided.

‘Early Release of Superannuation’ measure

17. On 24 March 2020, the *Coronavirus Economic Response Package Omnibus Act 2020 (Omnibus Act)* received Royal Assent. The Omnibus Act allows individuals affected by the COVID-19 pandemic to release up to \$10,000 from their superannuation product or RSA product in the 2019-2020 financial year and a further \$10,000 in the 2020-2021 financial year (**COVID-19 early release scheme**).
18. The Instrument specifies that the ‘eligible ground’, in relation to the early release of benefits that are in a superannuation product or an RSA product, means the ground referred to in:
 - (a) subregulation 6.19B(1) of the *Superannuation Industry (Supervision) Regulations 1994*; or
 - (b) subregulation 4.22B(1) of the *Retirement Savings Accounts Regulations 1997*.

Registered Tax Agent Licensing Relief

19. Section 6 of the Instrument exempts registered tax agents from the obligation to hold an AFS licence under subsection 911A(1) of the Act. This is only to the extent that they carry on a financial services business comprising of the provision of COVID-19 advice to their existing clients in relation to the COVID-19 early release scheme.
20. The exemption applies where all of the conditions specified in Instrument are met. This includes:
 - (a) the client must be an existing client of the registered tax agent;
 - (b) the COVID-19 advice must be from unsolicited contact (for example, no cold calling);
 - (c) the maximum fee that can be charged for the COVID-19 advice is \$300;
 - (d) the registered tax agent must keep an ROA (the content requirements of which are specified in section 6(2)(d) of the Instrument);
 - (e) the registered tax agent must give this ROA to the client when the COVID-19 advice is provided, or as soon as practicable after. It must be provided before any further financial service is provided;
 - (f) the registered tax agent must disclose any actual or potential conflicts of interest, commissions and remuneration that might reasonably be expected to be, or have been capable of, influencing the registered tax agent in providing the COVID-19 advice.
21. This licensing exemption only applies to a registered tax agent who is neither an AFS licensee nor a representative of an AFS licensee, to the extent that they provide the COVID-19 advice in relation to the COVID-19 early release scheme. If the registered tax agent is already authorised under an AFS licence to provide this type of financial product advice, then they will be required to comply with the providing entity relief requirements in section 7 of the Instrument (that is, the ‘third situation’ below under the heading of ‘Financial Adviser Relief’).
22. An existing client of the registered tax agent is specified in the Instrument to be a person to whom the tax agent has provided a tax agent service before the commencement of this Instrument.

Financial Adviser Relief

23. Section 7 of the Instrument applies in relation to providing entities as if regulation 7.7.10AE of the *Corporations Regulations 2001 (Regulations)* were modified or varied by inserting at the end of section 946B of the Act a new situation where an SOA is not required.

24. This ‘third situation’ where an SOA is not required is where personal advice is in relation to the COVID-19 early release scheme.
25. An SOA is not required to be given where the following requirements in the Instrument are satisfied:
 - (a) the COVID-19 advice is in relation to the early release on an eligible ground of benefits that are in a client’s superannuation;
 - (b) the COVID-19 advice must be from unsolicited contact (for example, no cold calling);
 - (c) the maximum fee that can be charged for the COVID-19 advice is \$300;
 - (d) the providing entity must keep an ROA (the content requirements of which are specified in notional subsection 946B(9) in the Instrument);
 - (e) the providing entity must give this ROA to the client when the COVID-19 advice is provided, or as soon as practicable after. It must be provided before any further financial service arising out of, or connected with, the COVID-19 advice is provided; and
 - (f) the providing entity must disclose any actual or potential conflicts of interest and commissions and remuneration that might reasonably be expected to be, or have been capable of, influencing the providing entity in providing the COVID-19 advice.
26. With respect to ‘unsolicited contact’ by a providing entity or registered tax agent, any means of contact with a client will be unsolicited unless it takes place in response to a positive, clear and informed request from the client for financial product advice about the COVID-19 early release scheme.
27. The Instrument specifies the content requirements for the ROA that the providing entity or registered tax agent is required to keep and give to the client. If the early release of superannuation benefits is recommended, the ROA requirements include setting out the implications for the client. These implications would include, but are not limited to, any consequences the early release would have on the client’s insurance cover and the impact of the withdrawal on retirement benefits.
28. For the avoidance of doubt, the ‘third situation’ can generally be relied on when a providing entity is a superannuation trustee giving intra-fund COVID-19 advice to a member, or another entity providing this COVID-19 advice on behalf of the superannuation trustee.

‘ROA for an Existing Client’ measure

29. Section 7 of the Instrument applies in relation to providing entities as if regulation 7.7.10AE of the Regulations were modified or varied by inserting at the end of section 946B of the Act another new situation where an SOA is not required.

30. This ‘fourth situation’ is where an existing client of a providing entity, or associated providing entity, requires COVID-19 advice. This temporary relief measure allows an ROA to be provided when an SOA would usually be required.
31. This temporary relief aims to address situations where the existing client’s personal circumstances and the basis of the personal advice would have changed significantly. This is likely to be the case for many clients due to the adverse economic impact of COVID-19. It also facilitates advice practices to continue to provide timely personal advice to clients where the client is receiving personal advice from another financial adviser, for example another financial adviser in the practice or another financial adviser authorised by the AFS licensee who was the original providing entity (see the ‘associated providing entity’ definition in notional section 946B(18) of the Instrument).
32. Section 7 of the Instrument states that an SOA is not required to be provided where all of the following are satisfied:
 - (a) the client must expressly instruct, and the providing entity must reasonably consider, that the personal advice is required because of the adverse economic effects of COVID-19;
 - (b) the client must be an existing client who was previously given an SOA by the providing entity (or an associated providing entity); and
 - (c) the COVID-19 advice being provided must be in relation to one or more classes of financial product(s) in relation to which the client was previously given personal advice by the providing entity (or associated providing entity). For example, if the client was previously only given personal advice about managed investment products, they cannot now be given personal advice about risk insurance products in an ROA under this relief measure.
33. The Instrument specifies in notional subsection 946B(18) that an ‘associated providing entity’ means:
 - (a) where the providing entity is an AFS licensee—any person who is an authorised representative of the AFS licensee;
 - (b) where the providing entity is an authorised representative of an AFS licensee—the authorising AFS licensee or any person who is an authorised representative of the authorising AFS licensee.
34. The ‘associated providing entity’ requirement is to allow flexibility for financial advice businesses to meet the needs of existing clients in an efficient and cost-effective manner, while ensuring there is a reasonable nexus to the previous providing entity. For example, limiting it to financial advisers from the same AFS licensee or the same authorised representative practice.
35. The providing entity must keep a record of the COVID-19 advice. The content requirements of this ROA is specified in notional subsection 946B(15) in the

Instrument. It must include a brief explanation of the changes in the client's relevant personal circumstances since the previous personal advice.

36. The providing entity must give this ROA to the client when the COVID-19 advice is provided, or as soon as practicable after the COVID-19 advice is provided. It must be provided before any further financial service is provided.
37. When giving the COVID-19 advice the providing entity must disclose any actual or potential conflicts of interest, commissions and remuneration that might influence the providing entity in providing the COVID-19 advice, and if applicable, any replacement financial product disclosures.
38. Section 7(2) of the Instrument makes consequential amendments to regulation 7.7.10AG of the Regulations.

Legislative Authority

39. This Instrument is made under subsections 951B(1) and 926A(2) of the Act.
40. Subsection 951B(1) provides that ASIC may exempt a class of persons from all or specified provisions of Part 7.7 of the Act. It also 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.
41. Subsection 926A(2) of the Act provides that ASIC may exempt a class of persons from all or specified provisions of Part 7.6 of the Act (other than Divisions 4 and 8).
42. This Instrument is a disallowable legislative instrument.

Legislative instrument and primary legislation

43. The subject matter and policy implemented by the Instrument is more appropriate for a legislative instrument rather than primary legislation. The Instrument uses powers given by Parliament to ASIC, which allow ASIC to affect the operation of Chapter 7, and specifically Parts 7.6 and 7.7, of the Act to respond quickly and temporarily to issues with financial product advice in connection with or arising from COVID-19.

Statement of Compatibility with Human Rights

44. 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

The ***ASIC Corporations (COVID-19—Advice-related Relief) Instrument 2020/355*** implements three temporary measures to facilitate the provision of timely and affordable financial product advice to retail clients that is being sought due to the adverse economic impact of the coronavirus known as COVID-19. The measures in the Instrument are also intended to reduce the regulatory disclosure burden on providing entities that give personal advice to retail clients about financial products during this time. It also grants a limited Australian financial services licensing exemption to registered tax agents.

Assessment of human rights implications

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

Conclusion

6. 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*.