

EXPOSURE DRAFT EXPLANATORY STATEMENT

Issued by authority of the Minister for Revenue and Financial Services

Corporations Act 2001

Australian Securities and Investments Commission Act 2001

Corporations (Fees) Act 2001

Corporations (Review Fees) Act 2003

National Consumer Credit Protection Act 2010

ASIC Supervisory Cost Recovery Levy Act 2017

Corporations Amendment (Asia Region Funds Passport) Regulations 2018

Section 1364 of the *Corporations Act 2001* (the Corporations Act), section 8 of the *Corporations (Fees) Act 2001* (the Fees Act), section 8 of the *Corporations (Review Fees) Act 2003* (the Review Fees Act), section 251 of the *Australian Securities and Investments Commission Act 2001* (the ASIC Act), section 13 of the *ASIC Supervisory Cost Recovery Levy Act* (the Levy Act), section 70-55 of the *Tax Agent Services Act* (the TAS Act) and section 329 of the *National Consumer Credit Protection Act 2010* (the Credit Act) provide that the Governor-General may make regulations prescribing matters required or permitted by the relevant Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the relevant Act. New section 1216L of the Corporations Act allows regulations to be made to continue the application of the Corporations Act in respect of a passport fund that has been deregistered or removed.¹

The purpose of the *Corporations Amendment (Asia Region Funds Passport) Regulations 2018* (the Regulations) is to make the amendments to the *Corporations Regulations 2001* (the Corporations Regulations) and other miscellaneous regulations which are necessary to implement the Asia Region Funds Passport (the Passport) in Australia. The Passport provides a multilateral framework that allows eligible funds to be marketed across participating economies with limited additional regulatory requirements.

The arrangements for the Passport agreed by the participating economies are set out in the *Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport* (the MOC).² Relevantly, Annex 1 of the MOC outlines the areas in which a participating country may impose obligations on foreign passport funds. Annex 2 sets out the common regulatory arrangements, while Annex 3 prescribes the obligations that apply to all operators of passport funds (the Passport Rules).

To give effect to the MOC, the *Corporations Amendment (Asia Region Funds Passport) Act 2018* (the ARFP Act) inserts a new Chapter 8A into the Corporations Act. This Chapter mainly implements the common regulatory

¹ This new regulation-making power is contained in the *Corporations Amendment (Asia Region Funds Passport) Act 2018*. Subsection 4(2) of the *Acts Interpretation Act 1901* (Cth) allows powers to be exercised after the enactment of an Act but before its commencement.

² The MOC is available at: <<http://fundspassport.apec.org>>.

arrangements in Annex 2 of the MOC. Among other things, it sets out the process for Australian funds to register as passport funds and the process for foreign funds to notify the Australian Securities and Investments Commission (ASIC) of their intention to offer interests to Australian investors. The ARFP Act also amends other parts of the Corporations Act to clarify how various obligations apply to notified foreign passport funds, as allowed under Annex 1 of the MOC. Key areas in which obligations apply to notified foreign passport funds include financial reporting, licensing and disclosure.

The Regulations make amendments to the Corporations Regulations and other miscellaneous regulations which are consequential to the ARFP Act. The potential benefits of the Regulations and the ARFP Act are that:

- Australian passport funds can market their interests to investors in participating economies more easily and access economies of scale;
- Australian investors can purchase interests in notified foreign passport funds and have greater choice;
- there are potential cost savings for funds and investors and enhanced competition; and
- the Australian economy is expected to benefit from increased financial services exports.

Details of the Regulations are set out in the Attachment.

The enabling Acts do not specify any conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations commence on the later of the day after they are registered on the Federal Register of Legislation and the day when the ARFP Act commences.

Details of the Corporations Amendment (Asia Region Funds Passport) Regulations 2018

Section 1 – Name of the Regulations

This section provides that the name of the Regulations is the *Corporations Amendment (Asia Region Funds Passport) Regulations 2018*.

Section 2 – Commencement

The Regulations commence on the later of the day after they are registered and the day when Schedule 1 of the ARFP Act commences (which is the earlier of a date set by proclamation or six months after Royal Assent). This ensures that all the amendments needed to implement the Passport regime commence at the same time. It also guards against retrospective commencement.

Section 3 – Authority

The Regulations are made under the Corporations Act, the ASIC Act, the Fees Act, the Review Fees Act, the Levy Act, the TAS Act and the Credit Act.

Section 4 – Schedules

Schedule 1 – Amendments to the Corporations Regulations 2001

Items 1 to 7 (definitions)

Items 1 to 7 update some of the definitions in the Corporations Regulations.

All references in the Attachment are to the Corporations Regulations if not otherwise stated.

Item 1 includes the terms ‘Australian Passport Fund Registration Number’ and ‘APFRN’ in the dictionary in existing regulation 1.0.02. These terms are defined in Chapter 8A of the Corporations Act and refer to the unique number assigned to an Australian passport fund by ASIC.

None of the other new terms inserted by the ARFP Act and used in the Regulation need to be defined in regulation 1.0.02. This is because the ARFP Act inserts the other new terms in section 9 of the Corporations Act and these automatically apply to the Corporations Regulations. On the other hand, ‘APFRN’ and ‘Australian Passport Fund Registration Number’ are only defined in the new Chapter 8A.

Item 4 inserts the terms ‘Notified Foreign Passport Fund Registration Number’ and ‘NFPFRN’ in the dictionary. This number refers to the unique registration code allocated to the fund by its home regulator.

Item 2 amends the definition of ‘income stream financial product’ to exempt foreign passport fund products. This is consistent with the ARFP Act which excludes foreign passport fund products from the definition of security that applies to Part 7.11.

Item 3 amends the definition of ‘investment-based financial product’ to include foreign passport fund products. This recognises that interests in a notified foreign passport fund (and other related rights and options) are financial products for the purposes of Chapter 7.

Item 5 amends the definition of ‘simple managed investment scheme’ by changing the references to a ‘registered management investment scheme’ to ‘registered scheme (other than a passport fund)’. This ensures that the shorter Product Disclosure Statement (PDS) regime does not apply to notified foreign passport funds or Australian passport funds.

Items 6 and 7 amend the definition of ‘warrant’ to include certain legal or equitable rights in a notified foreign passport fund that would have been a derivative if legal or equitable rights were not expressly excluded from the definition of a derivative. This ensures that interests in notified foreign passport funds (and other similar financial products) are ‘warrants’ in the same situations that interests in registered schemes are ‘warrants’.

Items 8 to 12 (requirements for lodging various documents)

Item 8 requires the operator of a notified foreign passport fund to use the prescribed form to lodge a copy of the register of members under subsection 1213P(4) of the ARFP Act. This is consistent with the requirement for other documents lodged by an operator with ASIC to be in the prescribed form in the ARFP Act (see, e.g., subsections 1212(2), 1213(2), 1216(2) and 1216E(2)).

Item 9 requires the unique registration code allocated to a notified foreign passport fund by the home regulator (the notified foreign passport fund registration number or NFPFRN) to be included on all documents lodged with ASIC. Notified foreign passport funds are also required to include any other unique number allocated to the fund by ASIC on all documents lodged with ASIC.

The existing law already requires documents lodged with ASIC to include the name of the fund and, in the case of Australian passport funds, the Australian Passport Fund Registration Number (APFRN) (see section 1212B of the Corporations Act and subparagraph 1.0.7(f)(ii) of the Corporations Regulations). Item 10 also inserts a note under existing regulation 1.0.7 to direct readers to the provisions in the Corporations Act which deal with Australian passport funds.

Items 11 and 12 require financial reports and auditor’s reports lodged with ASIC by notified foreign passport funds to be in the approved form. Reports also need to state the fund’s name, NFPFRN and any other unique number allocated by ASIC, the operator’s name, the date on which the financial year begins and ends, and a statement verifying the documents. This mirrors the existing requirements for Australian passport funds (see existing paragraph 1.08(c) of the Corporations Regulations and section 1212B of the Corporations Act).

Items 13 to 15 (certifying documents)

Item 15 requires certified and verified documents relating to a notified foreign passport fund to be in the approved form and signed by a director or secretary of the operator or the local agent or the local agent’s director or secretary. This is similar to the requirements for documents relating to registered schemes to be certified or verified by the director or secretary of the responsible entity or its agent.

A consequential amendment is also made to existing regulation 1.0.16 to disapply it to documents relating to notified foreign passport funds (items 13 and 14).

Items 16 and 17 (particulars requested by ASIC)

Items 16 and 17 remake the existing regulations relating to the particulars that ASIC may request, so that the particulars for each type of entity are set out in a different subsection. This improves the readability of the regulation.

The items do not change the particulars that ASIC may request for companies. They expand ASIC’s power to request particulars, in a return of particulars, from registered schemes (irrespective of whether they are Australian passport funds) by giving ASIC the power to request the name of the auditor of the scheme’s financial report and the name of the auditor of the scheme’s compliance plan.

Finally, items 16 and 17 allow ASIC to request for additional particulars relating to Australian passport funds and notified foreign passport funds in an extract of particulars or a return of particular. These additional particulars are shown in Table 1.1.

Table 1.1: Additional Particulars that ASIC May Request for Passport Funds

	<i>Particulars</i>	
	<i>Australian Passport Funds*</i>	<i>Notified Foreign Passport Funds</i>
<i>Extract of particulars</i>	<ul style="list-style-type: none"> the fund’s APFRN confirmation that the fund is an Australian passport fund any alternate name used by the fund, the name of the participating economy where the name is used, and the date when the fund started and stopped using that name the review date for the fund 	<ul style="list-style-type: none"> the fund’s NFPFRN any additional identifier assigned by ASIC the fund’s name confirmation that the fund is a notified foreign passport fund the home country of the fund the name and ARBN of the operator of the fund any alternate name used by the fund, the name of the participating economy where the name is used, and the date when the fund started and stopped using that name the review date for the fund
<i>Return of particulars</i>	<ul style="list-style-type: none"> the name of the annual implementation reviewer 	<ul style="list-style-type: none"> the date on which a new member’s name was entered in the register of members the new name of the operator certain financial information and information in the auditor’s report the name of the auditor of the financial statements the name of the annual implementation reviewer

* ASIC may also request any particular that is prescribed for a registered scheme under the existing law.

Items 18 to 21 (prohibited names for schemes)

Items 18 to 21 amend the prohibitions on using a name for a registered scheme that is already in use.

Item 19 prohibits a person from applying to register a scheme with a proposed name that was the same as the name of a notified foreign passport fund or a foreign passport fund whose notice of intention to offer interests in Australia was still being considered by ASIC (a name in use by a fund). The responsible entity of a registered scheme is also prohibited from applying to change the name of a registered scheme to a name in use by a fund (item 20). Finally, item 21 prohibits ASIC from registering a managed investment scheme which uses a name in use by a foreign passport fund.

These items ensure that a registered scheme does not share the same name as another passport fund. They mirror the prohibition on a scheme using the same name as a registered scheme (or another scheme that has lodged an application for registration that is still under determination).

A consequential amendment is also made to the provision that prohibits ASIC from registering a scheme which uses the same name as another scheme, to clarify that the prohibition only applies to the registration of schemes (item 18). There are different rules for naming notified foreign passport funds (see the discussion of item 60, new regulation 8A.4.10 below).

Items 22 to 24 (Chapter 7 definitions)

Items 22 and 23 ensure that a foreign passport fund product is captured by the definition of 'financial product'. Specifically, these items amend the definition of 'credit facility' so that it excludes interests in a notified foreign passport fund (and related rights and options). The definition of 'financial product' excludes products which are 'credit facilities' (see existing subparagraph 765A(1)(h)(i) of the Corporations Regulations).

Item 24 amends the definition of a 'clearing and settlement facility' so that it includes facilities that provide a regular mechanism for the parties to a transaction relating to interests in a notified foreign passport fund (and related rights and options) to meet their obligations.

Both of these amendments align the treatment of foreign passport fund products with the treatment of managed investment products.

Item 25 to 28 (exemptions from the definition of providing a financial service)

The Corporations Regulations carve out certain activities from the definition of providing a financial service.

Existing regulation 7.1.29 provides that a person is not taken to be providing a financial service if, in the course of providing an exempt service, the person provides a service which would ordinarily be a financial service. The regulation also sets out what are the exempt services. The exempt services include providing advice on:

- financial products that are interests in a trust (other than a registered scheme or a scheme that should have been registered) if the trust is not carrying on a business; or
- the acquisition or disposal, administration, due diligence, establishment, structuring or valuation of an entity in certain circumstances. This exemption is confined to financial product advice on a decision about securities of a body corporate that carries on the entity's business or certain interests in a trust (apart from a registered scheme or a scheme that should have been registered).

Item 25 amends the exempt services in regulation 7.1.29 to align the treatment of interests in a notified foreign passport fund with a managed investment product. This means that there is no exemption for providing advice on:

- financial products that are interests in a notified foreign passport fund; or
- the acquisition or disposal, administration, due diligence, establishment, structuring or valuation of an entity where the advice is financial product advice on a decision about interests in a notified foreign passport fund.

Existing regulation 7.1.33A provides that a person is not providing a financial service if the person only makes a recommendation or expresses an opinion about how another person should allocate their funds between certain types of investments. Item 26 inserts foreign passport fund products as one of the types of investments.

Existing regulation 7.1.33E carves out from the definition of a financial service certain advice about a custodial or depositary service. Advice about a custodial or depositary service which is intended to influence a decision about an equitable right or interest in an interest in a registered scheme is given special treatment so that it may still fall within the carve out (if the other requirements are satisfied).

Item 27 gives the same special treatment to interests in a notified foreign passport fund as interests in a registered scheme. In other words, advice still falls within the carve out in existing regulation 7.1.33E if it only influences a decision about an equitable right or interest in an interest in a notified foreign passport fund (provided the other requirements of that regulation are satisfied). Item 28 updates the note to the regulation so that it reflects this amendment.

Items 29 and 30 (compensation arrangements)

Items 29 and 30 apply the compensation arrangements under Part 7.5 of the Corporations Regulations and the arrangements for unauthorised transfers in Subdivision 4 of the Corporations Regulations to interests in notified foreign passport funds that are quoted on the Australian Stock Exchange and rights to acquire, by way of issue, such an interest. This ensures that the compensation arrangements for foreign passport fund products mirror those that apply to managed investment products.

Items 31 to 33 (derivative transaction rules)

Items 31 and 32 amend the definition of 'representative capacity' to include the responsible holding party or the operator of the notified foreign passport fund for the

purposes of the derivative transaction rules in Subdivisions 2.1A and 2.1B of the Corporations Regulations. Item 33 allows the responsible holding party or operator for a notified foreign passport fund to access the existing exemptions from the derivative transaction rules.

Together, these items ensure that the responsible holding party for a notified foreign passport fund is treated the same as the responsible entity for a registered scheme.

Items 34 and 35 (licensing exemption for certain providers outside of Australia)

Existing subsection 911A(2D) (which is notionally inserted by the Corporations Regulations) provides a licensing exemption in certain situations where the provider of the service is outside of Australia and does not actively solicit persons in Australia.

Item 35 amends this exemption so that it does not apply to notified foreign passport funds or their operators. Instead, the principle circumstances where a notified foreign passport fund or its operator are exempt from holding a licence are set out in the ARFP Act (see paragraphs 911A(2)(eh), (ei) and (ej)).

Item 34 makes a technical amendment to replace the reference to a 'registered managed investment scheme' with the words 'registered scheme' (see the discussion of the technical amendments on page 15 below).

Items 37 and 38 (dealing with property)

Existing regulation 7.8.07 ensures that financial services licensees appropriately deal with securities or managed investment products given to them, for example, by registering them in the client's name. Items 37 and 38 extend these protections to foreign passport fund products.

Items 39 to 42 (exemption from disclosure requirements for stockbrokers)

Existing section 991E of the Corporations Act requires stockbrokers to disclose their own interest in transactions and recognises that stockbrokers and clients are in a fiduciary relationship. This section does not currently apply to managed investment products if they are made available in accordance with the safeguards in Chapters 5C and 7.

Items 42 states that the existing section 991E does not apply to interests in a notified foreign passport fund (and other similar products) where the products are made available in accordance with the requirements in Chapter 7 and Chapter 8A (the new chapter for passport funds).

Item 41 modifies the exemption for managed investment products in Australian passport funds so that it is only available where the products are made available in accordance with Chapters 5C, 7 and 8A.

Items 39 and 40 makes technical amendments to clarify that existing section 991E is in the Corporations Act.

Item 44 (exemption for small scale personal offers)

This item clarifies that the Product Disclosure Statement (PDS) exemption for small scale personal offers of prescribed financial products does not apply to interests in notified foreign passport funds (and various rights, interests and options that relate to

those interests). Notified foreign passport funds are required under the MOC and the ARFP Act to make a copy of their PDS available to ASIC at the time of lodging a notice of intention to offer interests in Australia. Accordingly, any additional work involved in providing the PDS would be comparatively small.

Item 45 (modifications to the PDS regime)

Item 45 ensures that the modifications to the PDS regime in the Corporations Regulations apply to foreign passport fund products. These modifications apply to managed investment products and include requirements for fees and other costs to be disclosed in PDSs.

Items 46 to 50, 59 and 86 to 117 (disclosure obligations)

These items amend the disclosure obligations for issuers of foreign passport fund products to align them with the reporting obligations for managed investment products. In particular, four amendments are made.

First, the ARFP Act requires issuers of foreign passport fund products to issue periodic statements to retail clients. Items 46, 47 and 59 amend regulations 7.9.60B and 7.9.75 to require issuers to include in the periodic statements a brief description of each transaction during the reporting period, the amount of the transaction inclusive of taxes and an explanation of fees and costs (in accordance with Schedule 10).

Second, items 86 to 116 apply Schedule 10 (which sets out additional requirements for the disclosure of fees and costs for managed investment products in PDSs and periodic statements) to foreign passport fund products. This is achieved by creating a new term, 'collective investment products' (which refers to both foreign passport fund products and managed investment products) and applying all of the requirements to 'collective investment products'. Amendments are also made to ensure that information about foreign taxes which are equivalent to GST and stamp duty are disclosed for foreign passport fund products in the same way that information about GST and stamp duty are disclosed for managed investment products.

Third, item 50 amends subregulation 7.9.62(4) to exempt issuers from confirming certain transactions which consist solely of the acquisition of management investment products where the holder has agreed to the timing and amount of the acquisition and certain other conditions are satisfied. Item 48 amends the heading to the regulation so that it does not refer to particular types of products. Item 49 also amends the reference to 'registered managed investment scheme' in another exemption in subregulation 7.9.62(4) so that it instead uses the defined term 'registered scheme' rather than 'registered managed investment scheme' (see the discussion of the technical amendments on page 15).

Finally, item 117 amends Part 3 of Schedule 10BA (Modifications of Part 7.9 of the Corporations Act) to make clear that the short-form PDS regime does not apply to Australian passport funds or notified foreign passport funds.

Items 51 to 58 (cooling-off period)

The ARFP Act requires issuers of foreign passport fund products to provide retail clients in this jurisdiction with a 14 day cooling-off period. This cooling-off period is designed to operate in the same way as for managed investment products.

Items 51 to 56 and 58 amend the Corporations Regulations to ensure that exemptions applying to managed investment products also apply to foreign passport fund products. In particular:

- Item 51 amends subregulation 7.9.64 to exempt certain foreign passport fund products which are to be tradeable on a financial market (as the return of a product would interfere with the normal operation of the financial market).
- Items 52 and 53 amend subregulation 7.9.65(1A) to prevent a person who acquired multiple foreign passport fund products in the same transaction from returning just one (and retaining the others).
- Items 54 to 56 amend regulation 7.9.67 to vary the amount that is to be repaid to prevent a person from using a right of return to avoid market losses.
- Item 58 amends subregulation 7.9.70 (which prohibits a person from returning a product if they have exercised a right or power relating to the product) so that it excludes rights relating to distributions.

Further, item 57 amends regulation 7.9.69 to imply certain terms relating to the return of products into a contract governing the issue and redemption of a foreign passport fund product. These terms are the same as those implied for managed investment products and include that:

- a product holder may have the right to return a financial product under the Corporations Act; and
- the product issuer does not contravene any terms of the contract or legal relationship by complying with a request to return a financial product made in accordance with the Corporations Act.

Items 60 and 77 to 79 (new regulations for Chapter 8A)

New regulation 8A.4.10 (item 60) and items 77 to 79 apply the same rules for ascertaining whether a name is unavailable for a foreign passport fund as the rules that currently apply to companies and other entities which register with ASIC. These rules are set out in Schedule 6 of the Corporations Regulations.

New regulation 8A.4.40 prohibits a person from using information on the register of members of a notified foreign passport fund to:

- solicit a donation from a member;
- solicit a member by a stockbroker;
- gather information about the member's wealth; or

- make certain unsolicited invitations or off-market offers to purchase a financial product.

The operator of a notified foreign passport is also permitted to refuse to provide a copy of the register of members if the application states that the information is being sought for one of the above purposes.

These rules relating to prohibited uses of information on the register of members of a notified foreign passport fund mirror those that apply to the register of members of Australian passport funds and registered schemes (see existing section 173 and existing regulation 2C.1.03). They are designed to protect members' privacy.

New regulation 8A.4.45 allows ASIC to destroy or otherwise dispose of certain documents after seven years. This period is the same as the length of time that ASIC must retain records lodged under Part 7.12 (see existing section 1101D and existing regulation 7.12.01).

New regulation 8A.5.10 provides that the details listed in Table 1.2 must be included on the Register of Passport Funds.

Table 1.2: Prescribed Details for the Register of Passport Funds

<i>Type of fund</i>	<i>Details</i>
Australian passport funds	<ul style="list-style-type: none"> • the fund's APFRN • the fund's name • that the fund is an Australian passport fund • the date the fund was registered as an Australian passport fund • any alternative name that the fund used, including the participating economy where it was used and the date when it started and ceased to use that name • the operator's name and ACN • any other name/ACN of an operator of that fund, including the date when it started and ceased to have that name or ACN • the fund's review date • the name of the auditor of the fund for each financial year • the name of each auditor of the fund's compliance plan, and the dates when the auditor started and ceased to be the fund's auditor • the name of the implementation reviewer for the fund for each review period
Deregistered Australian passport funds	<p>In addition to the details for Australian passport funds:</p> <ul style="list-style-type: none"> • the date on which the fund was deregistered • whether the deregistration was voluntary or initiated by ASIC

Notified foreign passport funds	<ul style="list-style-type: none"> • the fund's NPFRN • any other unique number allocated to the fund by ASIC • the fund's name • any alternative name used by fund, including the participating economy where the name was used and the date it started and ceased using that name • that the fund is a notified foreign passport fund • the fund's home economy • the date on which the fund became a notified foreign passport fund • the operator's name and ARBN • any other name/ARBN of an operator of that fund, including the date when it started and ceased to have that name or ARBN • the fund's review date • the name of the auditor of the fund's financial reports for each financial year • the name of the implementation reviewer for the fund for each review period
Denotified foreign passport funds	<p>In addition to the details for notified foreign passport funds:</p> <ul style="list-style-type: none"> • the date on which the fund was removed as a notified foreign passport fund • whether the denotification was voluntary or occurred because the fund was deregistered as a passport fund in its home economy

New Regulation to Continue the Application of the Corporations Act and ASIC Act

A new regulation to continue the application of certain provisions of the Corporations Act and ASIC Act after a fund is deregistered or de-notified is also under development. These provisions will only continue to apply until the point when the fund cease to have any members who acquired interests while the fund was a passport fund or on the expectation that the fund would be a passport fund. This new regulation is designed to give effect to the MOC and section 1216L of the Corporations Act.

The current policy intention is to continue the application of the following:

- the requirement for an Australian passport fund to keep a branch register of members of the fund outside Australia (see, in particular, section 178AA);
- certain provisions which disqualify a person from managing corporations if the person is disqualified from being a director of a passport fund or the fund's

operator under an order made by a court of a prescribed foreign jurisdiction (see, in particular, sections 206B, 206EAA and 206HAA);

- financial reporting obligations (see, in particular, sections 285, 314A, 315, 316AA, 319, 321, 322, 323DAA, 340A, 341A and 344);
- certain requirements relating to updating ASIC information (see, in particular, sections 45A, 345B, 345C, 346A, 346B, 346C, 348A, 348B and 348D);
- certain requirements relating to the form of documents lodged with ASIC (see sections 351 and 1212B);
- the requirements relating to takeovers (see, in particular, sections 602, 602A, 608, 637, 650D, 658C and 670B);
- the information and disclosure requirements applying to persons who hold interests in listed notified foreign passport funds (see, in particular, sections 671B, 672A, 672B, 672C, 672D, 672DA, 672E, 674 and 675);
- the provisions that apply when a notified foreign passport fund is a participant in an Australian licensed market (see, in particular, sections 793C, 798C and 798D);
- the licensing obligations and banning orders (see, in particular, sections 911A, 912A, 915B, 915C, 920A and 988E);
- the disclosure obligations, including the requirements to provide a Financial Services Guide, Statement of Advice and Product Disclosure Statement (see, in particular, sections 941C, 946B, 1010B, 1020AA);
- the prohibition on conflicted remuneration (see, in particular, section 964);
- the prohibition on hawking (see, in particular, sections 992A and 992AA);
- the provision of a cooling-off period (see, in particular, section 1019A);
- the restrictions on short-selling (see, in particular, section 1020B);
- the insider-trading provisions (see, in particular, sections 1043B, 1043C and 1043L);
- the Passport Rules for this jurisdiction and offences for breaches of the Passport Rules (see section 1211B)
- the prohibition on offering debentures (see section 1213H);
- the power for certain persons to request a copy of a notified foreign passport fund's register of members or constitution, or inspect their books (see, in particular, sections 1213J, 1213K, 1213L, 1213M, 1213N, 1213P and 1300)
- ASIC's exemption and modification power in relation to Chapter 8A (sections 1217 and 1217A);

- provisions relating to the civil consequences of contravening civil penalty provisions and ASIC's power to accept enforceable undertakings (see, in particular, sections 1317DAA, 1317E, 1317G, 1317H, 1317HA, 1317HB, 1317HE and 1317J of the Corporations Act and section 93B of the ASIC Act);
- the provisions relating to treating notified foreign passport funds as managed investment schemes (see sections 1213E and 1213F); and
- necessary definitions including those relating to financial services (see in particular sections 761E, 764A, 765A, 766D, 766E and 1212BAB) and those relating to disclosing entities and ED securities (see sections 11AE, 11AFB and 11AH).

An amendment to the *ASIC Supervisory Cost Recovery Levy Regulations 2017* which require these funds to continue to pay the supervisory cost recovery levy is also under development.

Items 61 to 64 (searches of registers)

Items 61 and 64 allow persons to inspect and search the Register of Passport Funds. ASIC also has the power to make regulations to prevent certain information from being made publicly available and are intending to prevent all private information from being released (see sections 1212(4) and 1213(4) inserted by the ARFP Act).

Items 62 and 63 make technical amendments to the provisions that apply to registered schemes to clarify that they refer to registrations, winding up and deregistration under Chapter 5C of the Corporations Act.

Items 65 to 67 (penalty for new strict liability offences)

Items 65 to 67 prescribe a penalty for the new offences in the ARFP Act that are subject to the penalty notice regime in section 1313 of the Corporations Act. The prescribed penalty is 12 penalty units for a natural person and 60 penalty units for a body corporate. This amount is consistent with the Australian Government's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* which states that the amount payable for a penalty notice provision should not exceed one fifth of the maximum penalty that a court may impose (60 penalty units as per subsection 1313(8)) and should be less than 50 penalty units for an individual.

Items 68 to 72 (updating registers)

The ARFP Act requires the operator of a listed notified foreign passport fund to keep a record of registered interests (see existing section 672DA). A register of members must also be retained for all notified foreign passport fund so that it can be made available to members or ASIC (see sections 1213K and 1213P). If these registers are stored by the operator or another corporation, items 68 to 72 require them to be maintained so that the registers are no more than 20 business days out of date.

Items 75 and 76 (obtaining copies)

The ARFP Act allows certain persons to request a copy of the constitution or the register of members of a notified foreign passport funds (see sections 1213J and 1213K).

Item 76 prescribes a maximum fee of \$10 for supplying a copy of the constitution. The prescribed fee for supplying a copy of a register of members of a notified foreign passport fund would be \$250 plus 5 cents for each member in the range from 5,000 to 20,000 and 1 cent for the 20,000th member and each additional member. This is the same as the amount currently prescribed for obtaining a copy of the register of a registered scheme in existing item 1AA of the table in Schedule 4.

Existing item 1AA is also remade so that it is in the same form as the new item for registers of members of a notified foreign passport fund and complies with the current drafting directions.

Items 79 to 85 (availability of names)

Items 79 to 85 amend the rules for determining the availability of names in Schedule 6. In particular, they prevent an entity using a name containing the phrase ‘passport fund’ if the entity is not a foreign passport fund.

Items 34, 36, 43, 73, 74 and 118 to 119 (technical amendments)

Items 34, 43, 73, 118 and 119 replace various references to a ‘registered managed investment scheme’ with ‘registered scheme’ (see the discussion of items 34 and 35 above). This ensures that a defined term is used rather than a term with an uncertain meaning. It also clarifies that notified foreign passport funds (which are treated as managed investment schemes) are not captured, where the term is used.

Item 36 makes a technical correction to amend the terminology in the second example in paragraph 7.7A.10(3)(a) so that it refers to a ‘registered scheme’ rather than a ‘managed investment scheme’. The term is used in the context of a scheme with a responsible entity and is intended to only apply to registered schemes because only registered schemes have responsible entities.

Item 74 repeals the item in Schedule 1 that purports to prescribe a form (Form 911) for annexures. The prescribed form no longer exists.

Schedule 2 – Other Amendments

Items 1 to 6 (amendments to the *ASIC Supervisory Cost Recovery Levy Regulations 2017*)

Items 1 and 2 amend section 5B of the *ASIC Supervisory Cost Recovery Levy Regulations 2017* to prescribe the operator of a notified foreign passport fund as a leviable entity for the purposes of those Regulations.

Items 3 and 5 make an amendment to the entity metric for the ‘responsible entities’ and ‘wholesale trustees’ sub-sectors. The entity metric is the mechanism used to calculate each entity’s share of activity within the subsector. For the ‘responsible entities’ subsector, the entity metric is the total value of all assets in a registered scheme operated by the entity at the end of the financial year. Certain assets are

disregarded including, if the entity also forms part of the ‘wholesale trustees’ sub-sector, any assets that are interests in an unregistered managed investment scheme. For the ‘wholesale trustees’ sub-sector, the entity metric is based on the total value of assets at the end of the financial year in all managed investment schemes issued by the trustee disregarding, inter alia, any assets in another unregistered managed investment scheme (see the *ASIC Supervisory Cost Recovery Levy Amendment (Enhancements) Regulations 2018*). Items 3 and 5 clarify that the references to an unregistered managed investment scheme do not include a notified foreign passport fund.

Items 4 and 6 create a new sub-sector covering operators of notified foreign passport funds. Operators automatically become part of the sub-sector if the fund was a notified foreign passport fund at any time during the financial year.

The levy for the new sub-sector is calculated in a similar way to the levy for the ‘wholesale sub-sector’ and consists of a minimum levy component (\$1,000) and a graduated levy component. When calculating the graduated levy component, the entity metric is the total value of Australian assets in all notified foreign passport funds operated by the entity at the end of the financial year, disregarding any Australian assets that are interests in another notified foreign passport fund. The total value of Australian assets is determined by using the redemption price of all interests in the fund held by Australian members at the end of the financial year (as per subsection 50(1) the Passport Rules). If the fund is only a notified foreign passport fund for part of the financial year, the entity metric is pro-rated to reflect the portion of the year that the fund was a notified fund.

Items 7 and 8 (amendments to the *ASIC Regulations 2001*)

ASIC, in its annual reports, is required to set out various details about its use of prescribed information gathering powers, including the number of times it used the power in the last financial year (see existing section 136 of the ASIC Act). The ARFP Act grants ASIC a new power to require an operator of a notified foreign passport fund to lodge its register of members (see section 1213P). Item 7 prescribes this new power so that ASIC must also include details about its use in its annual report.

Item 8 amends the meaning of ‘clearing and settlement facility’ to include transferring an interest in a notified foreign passport fund (and other similar financial products). This ensures that the definition of providing a ‘financial service’ for the purposes of the ASIC Act also captures transferring an interest in a notified foreign passport fund (and other similar financial products).

Items 9 to 20 (amendments to the *Corporations (Fees) Regulations 2001*)

Items 9 to 11 impose the new regulatory fees on notified foreign passport fund and Australian passport funds set out in Table 2.1.

Table 2.1: New ASIC Fees

Table Item	Chargeable Matter	Fee
<i>ASIC fees for only Australian passport funds</i>		
79A	Registering an Australian passport fund (including lodging the PDS) under section 1212	\$14,346
79B	Withdrawing an application to become an Australian passport fund under section 1212	no fee
79C	Lodging a notice that the name of the fund in another participating economy is not the same as the name of the fund in this jurisdiction under section 1212C	\$40
<i>ASIC fees for only notified foreign passport funds</i>		
79D	Notifying of the intention to offer interests in a foreign passport fund (including lodging the PDS) under section 1213	\$2,550
79E	Lodging a notice to withdraw a notice of intention to offer interests under section 1213	no fee
79G	Lodging a notice of a change of operator under the table in section 12 of the Passport Rules*	\$1,187
<i>ASIC fees for Australian passport funds and notified foreign passport funds</i>		
79F	Lodging a notice relating to the limits on portfolio allocation or exposure being exceeded or the Passport Rules being breached under subsections 12(1), (2) or (4) of the Passport Rules*	no fee
79H	Lodging a report of an annual implementation review under section 15 of the Passport Rules*	\$40
79J	Lodging a notice relating to exceptional market circumstances under subsection 33(3) of the Passport Rules*	\$1,540
80	Applying for exemptions, declarations etc. under Chapter 8A	\$3,487

* The Passport Rules for this jurisdiction are the rules made by the Minister under section 1211 of the Corporation Act. They must be substantially the same as Annex 3 of the MOC.

The ARFP Act extends the requirement to lodge an annual financial report to notified foreign passport funds (see Schedule 2, item 97, subsection 319(1AA)). Item 12 amends table item 146 of Schedule 1 to extend the existing exemption from paying a fee of \$1,217 (which applies to registered schemes) to notified foreign passport funds. This means that no fee is payable.

Items 13, 15, 16 and 20 impose the new registry fees on notified foreign passport fund and Australian passport funds set out in Table 2.2.

Table 2.2: New Registry Fees

Table Item	Chargeable Matter	Fee
<i>Registry fees for only Australian passport funds</i>		
12A	Applying to deregister an Australian passport fund as a registered scheme (see also item 12B)	no fee
12B	Applying to deregister an Australian passport fund as an Australian passport fund (see also item 12A)	\$889
23A	Lodgement of a notice that an Australian passport fund is using another name in another economy under section 1212C	\$40
<i>Registry fees for only notified foreign passport funds</i>		
7A	Application for the Minister to consent to a name being made available for a foreign passport fund	\$1,217
12C	Applying to remove a notified foreign passport fund	no fee
<i>Registry fees for both notified foreign passport funds and Australian passport funds</i>		
3 and 4	Approving a choice of review date under subsections 345B(1), (2) or (2A)	<ul style="list-style-type: none"> • \$397 (for an application relating to more than 10 entities with the same ultimate holding company); or • \$40 for each entity.
23A	Lodging another notice under Chapter 8A or the Passport Rules, e.g. a notice of: <ul style="list-style-type: none"> • an intention to wind up a fund, the commencement or wind-up or the completion of wind-up under the table in section 12 of the Passport Rules; or • a suspension of redemption of interests under section 12 of the Passport Rules.* 	\$40

Item 14 also amends table item 5 to provide an exemption for annual reports lodged by notified foreign passport funds.

Item 18 imposes a fee for inspecting the Register of Passport Funds (new table item 19A). The fee is \$17 if the documents are reproduced using a computer system for less than 10 pages. In all other cases the fee is \$40. This aligns the fees for inspecting the Register of Passport Funds with the fee for inspecting documents that are lodged in relation to corporations or registered schemes in existing table item 16.

Items 17 and 19 ensure that the existing fees for retrieving information from ASIC's registers relating to a company or registered scheme also apply to information relating to a notified foreign passport fund (see the proposed amendments to table items 15, 16 and 22).

Items 21 to 32 (amendments to the *Corporations (Review Fees) Regulations 2003*)

Items 21 to 32 impose the fees on notified foreign passport funds that are set out in Table 2.3.

Table 2.3: Review Fees for Notified Foreign Passport Funds

<i>Table Item</i>	<i>Type of fee</i>	<i>Amount</i>
Part 1- Annual Fees		
104	Notified foreign passport funds	\$1,069
105A	Notified foreign passport funds that are being removed	no fee
Part 1A - Upfront Fees		
104	Notified foreign passport funds	\$7,700

These fees are the same as the fees currently imposed on registered schemes.

Item 33 (amendments to the *National Consumer Credit Protection Regulations 2010*)

The definition of ‘a securitisation product’ in the *National Consumer Credit Protection Regulations 2010* (Credit Regulations) currently includes interests in a managed investment scheme ‘within the meaning of section 9 of the Corporations Act’.

Item 33 clarifies that the definition of ‘securitisation product’ includes interests in a notified foreign passport fund by removing the reference to section 9 of the Corporations Act. Interests in notified foreign passport funds are treated as managed investment schemes in the Corporations Act but this is achieved by inserting a new section, rather than by amending the definition in section 9.

The consequence of this proposed amendment is that the operator of a notified foreign passport fund may be a securitisation entity and able to take advantage of the licencing exemption that applies to other securitisation entities.

Item 34 (amendments to the *Tax Agent Services Regulations 2009*)

Item 34 provides that ‘tax agent services’ do not include services provided by the operator of a notified foreign passport fund (or a related entity) to the fund or one of its members in relation to the fund. This ensures that providers of these services do not need to comply with the regulatory and educational requirements that apply to persons providing tax agent services in the *Tax Agents Services Regulation 2009*. It also aligns the treatment of these services with similar services provided by a responsible entity of a registered scheme.