

EXPOSURE DRAFT

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Inserts for
**Corporations Amendment (Asia Region
Funds Passport) Bill 2017: Chapter 8A**

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Schedule 1—Amendment inserting Chapter 8A

Corporations Act 2001

1 After Chapter 8

Insert:

Chapter 8A—Asia Region Funds Passport

Part 8A.1—Preliminary

1210 Definitions

In this Chapter:

APFRN: see *Australian Passport Fund Registration Number*.

Australian passport fund means a registered scheme that is also registered as a passport fund under Part 8A.3.

Australian Passport Fund Registration Number or *APFRN* means the number assigned to an Australian passport fund under paragraph 1212A(2)(a).

consideration period for a notice of intention to offer interests in a foreign passport fund to a person in this jurisdiction: see section 1213D.

foreign passport fund means a passport fund the home economy for which is not Australia.

home economy, for a passport fund, means:

- (a) if the passport fund is a regulated CIS, or a sub-fund of a regulated CIS, in only one participating economy—that participating economy; and
- (b) if the passport fund is a regulated CIS, or a sub-fund of a regulated CIS, in more than one participating economy—the participating economy in which the fund is first registered or approved as a regulated CIS (however that registration or approval is described).

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1 **home regulator**, for a passport fund, means the entity that is the
2 Passport Regulator for the home economy for the passport fund
3 under the Passport Rules for this jurisdiction.

4 **host economy**: a participating economy is a **host economy** for a
5 passport fund if:

- 6 (a) the participating economy is not the home economy for the
7 fund; and
8 (b) either:
9 (i) it is permitted under the law of the participating
10 economy to offer interests in the fund in that economy,
11 on the basis that the fund is a passport fund; or
12 (ii) an application has been made under the law of the
13 participating economy for permission to offer interests
14 in the fund in that economy, on the basis that the fund is
15 a passport fund.

16 **host regulator**, for a passport fund, means the entity that is the
17 Passport Regulator for a host economy for the passport fund under
18 the Passport Rules for this jurisdiction.

19 **Memorandum of Cooperation** means the Memorandum of
20 Cooperation on the Establishment and Implementation of the Asia
21 Region Funds Passport signed on behalf of Australia on 28 April
22 2016, as it applies in relation to Australia from time to time.

23 **operator**, of a passport fund, means the entity that is the operator of
24 the fund under the Passport Rules for this jurisdiction.

25 **participating economy**: a Participant, within the meaning of the
26 Memorandum of Cooperation, is a **participating economy** at a
27 particular time if:

- 28 (a) the Asia Region Funds Passport Joint Committee established
29 under the Memorandum of Cooperation has published
30 notification on the Passport website under subparagraph 5.6
31 of the Memorandum, at or before that time, that the
32 Participant has effected implementation; and
33 (b) at that time:
34 (i) the Memorandum of Cooperation has not been
35 terminated; and
36 (ii) the Participant has not withdrawn from the
37 Memorandum of Cooperation.

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1 *passport fund* means a regulated CIS, or a sub-fund of a regulated
2 CIS, registered as a passport fund in a participating economy.

3 *Register of Passport Funds*: see section 1214.

4 *regulated CIS* has the same meaning as in the Passport Rules for
5 this jurisdiction.

6 *sub-fund*, in relation to a regulated CIS, has the same meaning as
7 in the Passport Rules for this jurisdiction.

8 **1210A List of participating economies**

- 9 (1) The Minister must, by notifiable instrument, publish a list of
10 participating economies.
- 11 (2) The Minister must:
- 12 (a) include in the instrument the date on which each Participant,
13 within the meaning of the Memorandum of Cooperation,
14 became a participating economy; and
- 15 (b) if a Participant, within the meaning of the Memorandum of
16 Cooperation, ceases to be a participating economy—include
17 in the instrument the date on which that Participant ceases to
18 be a participating economy; and
- 19 (c) ensure that the instrument is updated as soon as is reasonably
20 practicable after a Participant, within the meaning of the
21 Memorandum of Cooperation, becomes, or ceases to be, a
22 participating economy.

23 **1210B Minister may determine that funds not to offer interests in 24 this jurisdiction**

- 25 (1) The Minister may, by legislative instrument, determine that the
26 operators of passport funds, or a class of passport funds, the home
27 economy for which is specified in the determination, must not offer
28 interests in the funds in this jurisdiction.
- 29 (2) The Minister may only make a determination under subsection (1),
30 if:
- 31 (a) the Minister is satisfied that:
- 32 (i) under the Memorandum of Cooperation, there are
33 grounds for requiring the operators of the funds to

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- 1 which the determination applies not to offer interests in
2 the funds in this jurisdiction; and
- 3 (ii) the processes that, under the Memorandum of
4 Cooperation, are to be followed before requiring the
5 operators of the funds to which the determination
6 applies not to offer interests in the funds in this
7 jurisdiction, have been complied with; or
- 8 (b) the Memorandum of Cooperation has been terminated; or
- 9 (c) Australia or the home economy for the funds to which the
10 determination applies withdraws from the Memorandum of
11 Cooperation.
- 12 (3) If the Minister makes a determination under this section, the
13 regulations may deal with matters of a transitional nature relating
14 to the movement of funds to which the determination applies from
15 participation in this jurisdiction under this Chapter to participation
16 in this jurisdiction under the other provisions of the Corporations
17 legislation dealing with collective investment vehicles.

1 **Part 8A.2—Passport Rules**

2 **1211 Minister may make Passport Rules for this jurisdiction**

- 3 (1) The Minister may, by legislative instrument, make rules that
4 provide for matters relating to passport funds, or entities connected
5 with passport funds.
- 6 (2) The rules made by the Minister under subsection (1) must be
7 substantially the same as the Passport Rules set out in Annex 3 to
8 the Memorandum of Cooperation.

9 **1211A Definition of *Passport Rules***

10 *Passport Rules for this jurisdiction*

- 11 (1) ***Passport Rules*** for this jurisdiction, means rules made by the
12 Minister under section 1211 as in force from time to time.

13 *Passport Rules for a participating economy other than Australia*

- 14 (2) ***Passport Rules*** for a participating economy other than Australia,
15 means rules that are:
16 (a) substantially the same as the Passport Rules set out in Annex
17 3 to the Memorandum of Cooperation; and
18 (b) in force from time to time in that participating economy.

19 **1211C Compliance with the Passport Rules**

- 20 (1) A person contravenes this subsection if:
21 (a) an obligation is imposed on the person in relation to an
22 Australian passport fund under the Passport Rules for this
23 jurisdiction; and
24 (b) the person does not comply with the obligation.
- 25 (2) A person contravenes this subsection if:
26 (a) an obligation is imposed on the person in relation to a
27 notified foreign passport fund under the Passport Rules for
28 this jurisdiction; and
29 (b) the person does not comply with the obligation; and

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- 1 (c) the failure to comply results, or is likely to result, in a person
2 in this jurisdiction who holds an interest in the fund suffering
3 financial or other disadvantage.
- 4 (3) A person commits an offence if the person contravenes
5 subsection (1) or (2).
- 6 Penalty: 2,000 penalty units or imprisonment for 5 years, or both.
- 7 (4) A person commits an offence of strict liability if the person
8 contravenes subsection (1) or (2).
- 9 Penalty: 60 penalty units.
- 10 (5) Section 15.1 of the Criminal Code (extended geographical
11 jurisdiction—category A) applies to an offence against
12 subsection (3) or (4).

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1 **Part 8A.3—Australian passport funds**

2 **1212 Application for registration**

- 3 (1) A person may lodge an application with ASIC to have a managed
4 investment scheme registered as a passport fund if:
- 5 (a) the scheme is a registered scheme and the person is the
6 responsible entity for the scheme, or acting on behalf of the
7 responsible entity for the scheme; or
 - 8 (b) an application has been made for the scheme to be registered
9 under section 601EB, and the person is the proposed
10 responsible entity for the scheme, or acting on behalf of the
11 proposed responsible entity for the scheme.
- 12 (2) The application must:
- 13 (a) be in the prescribed form; and
 - 14 (b) include a copy of the Product Disclosure Statement that the
15 responsible entity for the scheme would be required to
16 prepare if:
 - 17 (i) the responsible entity were a regulated person required
18 to give a Product Disclosure Statement to a retail client
19 under subsection 1012B(3); and
 - 20 (ii) the scheme were registered as a passport fund.
- 21 (3) ASIC may, by legislative instrument, determine that information
22 that is lodged with ASIC under this section will not be available for
23 inspection or copying from ASIC if it is of a kind specified in the
24 determination.

25 *[Note: The provisions currently allow for registered schemes to be*
26 *registered as Australian passport funds. It is intended that corporate*
27 *collective investment vehicles will be given the same option.]*

28 **1212A Registration of registered scheme as a passport fund**

- 29 (1) ASIC must register a registered scheme as a passport fund if ASIC
30 is of the opinion that:
- 31 (a) the responsible entity for the scheme is an eligible entity,
32 within the meaning of section 3 of Annex 2 of the
33 Memorandum of Cooperation; and
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- 1 (b) each of the following is likely to be complied with in relation
2 to the scheme:
3 (i) this Act (including the Passport Rules for this
4 jurisdiction);
5 (ii) the ASIC Act.
- 6 (2) A registered scheme is registered as a passport fund by ASIC:
7 (a) assigning a unique number to the passport fund (the
8 *Australian Passport Fund Registration Number* or *APFRN*
9 for the passport fund); and
10 (b) ensuring that details of the fund are entered on the Register of
11 Passport Funds.

12 **1212B All documents etc. lodged with ASIC to bear APFRN**

13 After a registered scheme is registered as a passport fund, all
14 documents relating to the fund that are lodged with ASIC must set
15 out the scheme's APFRN.

16 **1212C Notifying ASIC if offering interests in another participating** 17 **economy in another name**

- 18 (1) The operator of an Australian passport fund must notify ASIC in
19 accordance with this section if:
20 (a) the operator of the fund offers interests in the fund in a
21 participating economy other than Australia; and
22 (b) the name of the fund in the other participating economy is not
23 the same as the name of the Australian passport fund.
- 24 Note: Failure to comply with this subsection is an offence: see
25 subsection 1311(1).
- 26 (2) The notice must be given:
27 (a) in writing; and
28 (b) as soon as practicable after interests in the fund begin to be
29 offered under that name.
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1 **Part 8A.4—Notified foreign passport funds**

2 **Division 1—Becoming a notified foreign passport fund**

3 **1213 Notice of intention to offer interests in a foreign passport fund**

- 4 (1) A person may lodge with ASIC a notice of intention to offer
5 interests in a foreign passport fund to persons in this jurisdiction if:
6 (a) the person is:
7 (i) a registered foreign company; and
8 (ii) the operator of the fund; or
9 (b) the person is acting on behalf of a person mentioned in
10 paragraph (a).
- 11 (2) The notice must:
12 (a) be in the prescribed form; and
13 (b) include a copy of the Product Disclosure Statement that the
14 operator of the foreign passport fund would be required to
15 prepare if:
16 (i) the operator were a regulated person required to give a
17 Product Disclosure Statement to a retail client under
18 subsection 1012B(3); and
19 (ii) the fund were a notified foreign passport fund.
- 20 (3) ASIC may, by legislative instrument, determine that information
21 that is lodged with ASIC under this section will not be available for
22 inspection or copying from ASIC if it is of a kind specified in the
23 determination.

24 **1213A ASIC may notify operator that notice of intention lacks 25 information required**

- 26 (1) ASIC may, within the consideration period for the notice of
27 intention, notify the operator of the foreign passport fund that
28 ASIC is of the opinion that information required under the
29 prescribed form has not been provided.
- 30 (2) ASIC's notification must be given in writing.

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1213B Rejecting a notice of intention

Circumstances in which ASIC may reject a notice of intention

- (1) ASIC may, within the consideration period for the notice of intention, reject the notice if:
- (a) ASIC is of the opinion that one or more of the following has not been, is not being or is not likely to be complied with in relation to the fund:
 - (i) this Act (other than the Passport Rules for this jurisdiction);
 - (ii) the ASIC Act;
 - (iii) the law of the home economy for the fund, to the extent that the law is administered by the home regulator for the fund (including the Passport Rules for the home economy for the fund); or
 - (b) ASIC is of the opinion that it is not in the public interest in this jurisdiction for the operator to offer interests in the passport fund in this jurisdiction; or
 - (c) both of the following are satisfied:
 - (i) an exemption has been given, or a modification made, to the Passport Rules for the home economy for the passport fund that affects the fund or entities connected with the fund; and
 - (ii) ASIC does not consent to the exemption or modification; or
 - (d) the name of the passport fund in relation to which the operator has given notice is unavailable because it is:
 - (i) identical (under rules set out in the regulations) to a name that is reserved or registered under this Act for another body; or
 - (ii) identical (under rules set out in the regulations) to a name of a managed investment scheme that is the subject of an application for registration that has been lodged under section 601EA but not yet determined; or
 - (iii) identical (under rules set out in the regulations) to a name that is held or registered on the Business Names Register in respect of another individual or body who is not the operator; or
 - (iv) unacceptable for registration under the regulations;

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- 1 and the operator of the fund has not notified ASIC and the
2 home regulator for the fund in writing that it will adopt an
3 available alternative name for the fund in this jurisdiction.
- 4 (2) In determining its opinion in relation to a matter mentioned in
5 subparagraph (1)(a)(iii), ASIC must:
- 6 (a) make a request, in writing, to the home regulator for the fund
7 for the opinion of the home regulator on the matter; and
8 (b) specify in the request the basis for ASIC's concerns about
9 compliance with the law of the home economy; and
10 (c) state a reasonable period during which ASIC will wait for a
11 reply before acting; and
12 (d) if the home regulator replies to the request within that
13 period—give effect to the opinion of the home regulator on
14 the matter.
- 15 (3) In paragraph (1)(b), *public interest* does not include any benefit in
16 this jurisdiction that may arise from limiting competition for
17 managed investment schemes operating principally in this
18 jurisdiction.
- 19 (4) Nothing in this section requires ASIC to conduct an assessment of
20 the public interest in this jurisdiction in each case.
- 21 *Circumstances in which ASIC must reject a notice of intention*
- 22 (5) ASIC must, within the consideration period for the notice of
23 intention, reject the notice if:
- 24 (a) the Minister has made a determination under
25 subsection 1210B(1) that the operators of passport funds, or a
26 class of passport funds, the home economy for which is
27 specified in the determination, must not offer interests in the
28 fund in this jurisdiction; and
29 (b) the determination applies to the passport fund.
- 30 *ASIC must notify operator of decision to reject*
- 31 (6) The notice of intention is rejected by ASIC giving the operator of
32 the foreign passport fund notification in writing of the rejection.
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1213C Authority to offer interests in foreign passport funds in this jurisdiction through the notification process

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- 3 (1) The operator of a foreign passport fund may offer interests in the
4 fund to persons in this jurisdiction if:
- 5 (a) the operator of the fund has lodged notice of intention to do
6 so with ASIC under section 1213; and
- 7 (b) within the consideration period for the notice of intention,
8 ASIC has not given the operator:
- 9 (i) notification under section 1213A that ASIC is of the
10 opinion that information required under the prescribed
11 form has not been provided; or
- 12 (ii) notification under section 1213B that the notice of
13 intention has been rejected.
- 14 (2) If the operator of a foreign passport fund may, under
15 subsection (1), offer interests in the fund to persons in this
16 jurisdiction, the fund is a *notified foreign passport fund*.

17 1213D Definition of *consideration period*

- 18 (1) The *consideration period*, for a notice of intention to offer interests
19 in a foreign passport fund in this jurisdiction, is:
- 20 (a) a period of 21 days beginning on the day after the notice is
21 lodged with ASIC; or
- 22 (b) if ASIC and the operator agree that the period is to be
23 extended under subsection (2)—the extended period.
- 24 (2) ASIC and the operator of the foreign passport fund may agree, in
25 writing, to one or more extensions of the consideration period.
26 However, each extension must be for no more than 7 days.

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1 **Division 2—Treatment of notified foreign passport funds**

2 **1213E Treatment of notified foreign passport funds**

3 *[Treasury is considering the treatment of notified foreign passport funds*
4 *as follows:*

5 *If the fund is constituted as a body corporate, on becoming a*
6 *notified foreign passport fund the fund will be treated as a*
7 *corporate collective investment vehicle for the purposes of*
8 *Australian law.*

9 *Otherwise, the fund will be treated as a managed investment*
10 *scheme, and subject to Australian law as such (many of the funds*
11 *may fall within this definition in any case).*

12 *In the future, it is likely that legislation will be introduced to*
13 *recognise limited partnership CIVs under Australian law. At that*
14 *time, any notified foreign passport funds constituted as limited*
15 *partnerships in their home economy will be treated as limited*
16 *partnership CIVs for the purposes of Australian law.]*

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1 **Division 3—Providing key information to members of a**
2 **notified foreign passport fund in this jurisdiction**

3 **1213F Constitution—right to obtain a copy**

4 *Right to a copy of the constitution*

- 5 (1) The operator of a notified foreign passport fund commits an
6 offence of strict liability if:
- 7 (a) a person makes an application to the operator in accordance
8 with subsection (2) for a copy of the constitution of the fund;
9 and
 - 10 (b) the person is a member, or former member, of the fund who
11 acquired an interest in the fund in this jurisdiction; and
 - 12 (c) the person pays the reasonable costs of the operator up to a
13 prescribed amount in providing a copy of the constitution;
14 and
 - 15 (d) the operator fails, or refuses, to give the person a copy of the
16 constitution in accordance with this section; and
 - 17 (e) as a result, the person does not obtain a copy of the
18 constitution of the fund in accordance with this section.

19 Penalty: 60 penalty units.

20 *Application for a copy of the constitution*

- 21 (2) An application to the operator of a notified foreign passport fund is
22 in accordance with this subsection if the application is in writing.

23 *Manner in which constitution must be provided*

- 24 (3) If, in the application, the applicant requests a paper copy of the
25 constitution, the operator must post the applicant a copy of the
26 constitution within 7 days after the application is made.
- 27 (4) Otherwise, the operator must give the applicant a copy of the
28 constitution electronically, within 7 days after the application is
29 made.
- 30 (5) ASIC may allow a longer period for the operator to give the
31 applicant a copy of the constitution.

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Language in which constitution must be provided

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- 2 (6) If, in the application, the applicant requests that the copy of the
3 constitution be in an official language of the home economy of the
4 fund (other than English), the copy of the constitution given to the
5 applicant must be in that language.
- 6 (7) Otherwise, the copy of the constitution given to the applicant must
7 be in English.

8 *Geographical jurisdiction*

- 9 (8) Section 15.1 of the *Criminal Code* (extended geographical
10 jurisdiction—category A) applies to an offence against
11 subsection (1).

12 **1213G Register of members—right to obtain a copy**

13 *Right to a copy of the register of members of a fund*

- 14 (1) The operator of a notified foreign passport fund commits an
15 offence of strict liability if:
- 16 (a) a person makes an application to the operator in accordance
17 with subsection (2) for a copy of the register of members for
18 the fund; and
- 19 (b) the person is:
- 20 (i) in this jurisdiction; or
- 21 (ii) a member, or former member, of the fund who acquired
22 an interest in the fund in this jurisdiction; and
- 23 (c) the person pays the reasonable costs of the operator, up to a
24 prescribed amount, in providing a copy of the register; and
- 25 (d) the operator fails, or refuses, to give the person a copy of the
26 register in accordance with this section; and
- 27 (e) as a result, the person does not obtain a copy of the register
28 of the fund in accordance with this section.

29 Penalty: 60 penalty units.

30 *Application for a copy of the register*

- 31 (2) An application to the operator of a notified foreign passport fund is
32 in accordance with this subsection if:
- 33 (a) the application is in writing; and

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- 1 (b) the application states each purpose for which the applicant
2 wishes to obtain a copy of the register; and
3 (c) none of those purposes is a prescribed purpose.

4 *Manner in which register must be provided*

- 5 (3) If, in the application, the applicant requests a paper copy of the
6 register, the operator must post the applicant a copy of the register
7 within 7 days after the application is made.
- 8 (4) Otherwise, the operator must give the applicant a copy of the
9 register electronically, within 7 days after the application is made.
- 10 (5) ASIC may allow a longer period for the operator to give the
11 applicant a copy of the register.

12 *Language in which register must be provided*

- 13 (6) If, in the application, the applicant requests that the copy of the
14 register be in an official language of the home economy of the fund
15 (other than English), the copy of the register given to the applicant
16 must be in that language.
- 17 (7) Otherwise, the copy of the register given to the applicant must be
18 in English.

19 *Geographical jurisdiction*

- 20 (8) Section 15.1 of the *Criminal Code* (extended geographical
21 jurisdiction—category A) applies to an offence against
22 subsection (1).

23 **1213H Use of information on register of members**

24 *Offence—using information obtained from the register to contact*
25 *members*

- 26 (1) A person who obtains a copy of a register of members of a notified
27 foreign passport fund under section 1213G must not:
- 28 (a) use information about a person (the *other member*) obtained
29 from the register to contact or send material to the person; or
30 (b) disclose information of that kind knowing that the
31 information is likely to be used to contact or send material to
32 the other member.

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1 Penalty: 60 penalty units.

2 Note: An example of using information to send material to a person is
3 putting a person's name and address on a mailing list for advertising
4 material.

5 *Exception*

6 (2) Subsection (1) does not apply if the use or disclosure of the
7 information is:

- 8 (a) relevant to the holding of the interests recorded in the register
9 or the exercise of the rights attaching to them; or
10 (b) approved by the operator of the fund.

11 Note: A defendant bears an evidential burden in relation to the matter in
12 subsection (2), see subsection 13.3(3) of the *Criminal Code*.

13 *Offence—using information obtained from the register for a*
14 *prescribed purpose*

15 (3) A person who obtains a copy of a register of members of a notified
16 foreign passport fund under section 1213G must not:

- 17 (a) use information obtained from the register for any purpose
18 prescribed by regulations made for the purposes of
19 paragraph 1213G(2)(c); or
20 (b) disclose information of that kind knowing that the
21 information is likely to be used for any such purpose.

22 Penalty: 60 penalty units.

23 *Strict liability*

24 (4) An offence based on subsection (1) or (3) is an offence of strict
25 liability.

26 *Geographical jurisdiction*

27 (5) Section 15.1 of the *Criminal Code* (extended geographical
28 jurisdiction—category A) applies to an offence against
29 subsection (1) or (3).

30 *Liability to pay compensation*

31 (6) A person who contravenes subsection (1) or (3) is liable to
32 compensate anyone else who suffers loss or damage because of the
33 contravention.

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Returning profits made by contravening subsection (1) or (3)

- (7) A person who makes a profit by contravening subsection (1) or (3) owes a debt to the fund. The amount of the debt is the amount of the profit.
- (8) If a person owes a debt under subsection (7) to the fund:
 - (a) the debt may be recovered by the operator of the fund as a debt due to it; and
 - (b) any amount paid or recovered in respect of the debt forms part of the property of the fund.

1 **Part 8A.5—Register of passport funds**

2 **1214 Register of Passport Funds**

3 (1) ASIC must either:

- 4 (a) establish and maintain a Register of Passport Funds; or
5 (b) ensure that a Register of Passport Funds is established and
6 maintained.

7 (2) If the Register of Passport Funds is kept by ASIC, ASIC may do so
8 in any form that ASIC considers appropriate.

9 (3) The Register of Passport Funds:

- 10 (a) must include the prescribed details of Australian passport
11 funds and notified foreign passport funds; and
12 (b) may include details of other passport funds.

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1 **Part 8A.6—Stop orders**

2 **1215 Stop order—Australian passport funds**

3 *ASIC may make stop orders*

- 4 (1) ASIC may, by written instrument, order the operator of an
5 Australian passport fund to do one or more of the following:
6 (a) cease to offer, or not to begin offering, interests in the fund to
7 persons in this jurisdiction either indefinitely or for a period
8 specified in the order;
9 (b) cease to offer, or not to begin offering, interests in the fund to
10 persons in another participating economy either indefinitely
11 or for a period specified in the order;
12 (c) take other action specified in the order;
13 (d) cease to take other action specified in the order.

14 The order is a **stop order**.

- 15 (2) A stop order may include a statement that specified conduct
16 engaged in contrary to the order will be regarded as not complying
17 with the requirements of a specified provision of this Act.

18 *Basis on which stop orders may be made*

- 19 (3) However, ASIC may only make a stop order under this section if
20 ASIC is of the opinion that:
21 (a) one or more of the following has not been, is not being or is
22 not likely to be complied with in relation to the fund (whether
23 in this jurisdiction or in any other place):
24 (i) this Act (including the Passport Rules for this
25 jurisdiction);
26 (ii) the ASIC Act; or
27 (b) if the order is made under paragraph (1)(c)—taking the action
28 specified in the order is reasonably necessary to ensure that
29 an order made under paragraph (1)(a) or (b) is complied with;
30 or
31 (c) if the order is made under paragraph (1)(d)—not taking the
32 action specified in the order is reasonably necessary to ensure
33 that an order made under paragraph (1)(a) or (b) is complied
34 with.
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Hearing before stop order made

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- 2 (4) Before making a stop order, ASIC must:
- 3 (a) hold a hearing; and
- 4 (b) give a reasonable opportunity to any interested people to
- 5 make oral or written submissions to ASIC on whether an
- 6 order should be made.

7 *ASIC must give notice if stop order made*

- 8 (5) If ASIC makes a stop order under this section, ASIC must give the
- 9 operator of the fund a copy of the order as soon as reasonably
- 10 practicable after it is made.

11 **1215A Stop order—notified foreign passport fund**

12 *ASIC may make stop orders*

- 13 (1) ASIC may, by written instrument, order the operator of a notified
- 14 foreign passport fund to do one or more of the following:
- 15 (a) cease to offer, or not to begin offering, interests in the fund to
- 16 persons in this jurisdiction either indefinitely or for a period
- 17 specified in the order;
- 18 (b) take other action specified in the order;
- 19 (c) cease to take other action specified in the order.

20 The order is a ***stop order***.

- 21 (2) A stop order may include a statement that specified conduct
- 22 engaged in contrary to the order will be regarded as not complying
- 23 with the requirements of a specified provision of this Act.

24 *Basis on which stop orders may be made*

- 25 (3) However, ASIC may only make a stop order under this section if:
- 26 (a) subsection (4) and (6) are satisfied; or
- 27 (b) the operator of the fund has ceased to be a registered foreign
- 28 company; or
- 29 (c) the operator of the fund has not had a local agent for more
- 30 than 21 days; or
- 31 (d) both of the following are satisfied:
- 32 (i) the Minister has made a determination under
- 33 subsection 1210B(1) that the operators of passport

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- 1 funds, or a class of passport funds, the home economy
2 for which is specified in the determination, must not
3 offer interests in the fund in this jurisdiction;
- 4 (ii) the determination applies to the passport fund;
- 5 (e) if the order is made under paragraph (1)(b)—taking the
6 action specified in the order is reasonably necessary to ensure
7 that an order made under paragraph (1)(a) is complied with;
8 or
- 9 (f) if the order is made under paragraph (1)(c)—not taking the
10 action specified in the order is reasonably necessary to ensure
11 that an order made under paragraph (1)(a) is complied with.
- 12 (4) For the purposes of paragraph (3)(a), this subsection is satisfied if
13 ASIC is of the opinion that one or more of the following has not
14 been, is not being or is not likely to be complied with in relation to
15 the fund (whether in this jurisdiction or in any other place):
- 16 (a) this Act (including the Passport Rules for this jurisdiction);
17 (b) the ASIC Act;
18 (c) the law of the home economy for the fund, to the extent that
19 the law is administered by the home regulator for the fund
20 (including the Passport Rules for the home economy of the
21 fund).
- 22 (5) In determining its opinion in relation to a matter mentioned in
23 paragraph (4)(c), ASIC must:
- 24 (a) make a request, in writing, to the home regulator for the fund
25 for the opinion of the home regulator on the matter; and
26 (b) specify in the request the basis for ASIC’s concerns about
27 compliance with the law of the home economy; and
28 (c) state a reasonable period during which ASIC will wait for a
29 reply before acting; and
30 (d) if the home regulator replies to the request within that
31 period—give effect to the opinion of the home regulator on
32 the matter.
- 33 (6) For the purposes of paragraph (3)(a), this subsection is satisfied if
34 ASIC is of the opinion that the stop order is necessary, having
35 regard to:
- 36 (a) the impact on the members and prospective members of the
37 fund of the failure, or potential failure, to comply with a law
38 mentioned in subsection (4); and
-

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- 1 (b) any action taken, or that may be taken, by the home regulator
2 for the fund.

3 *Hearings before certain stop orders made*

- 4 (7) Before making a stop order on the basis of subsections (4) and (6),
5 ASIC must:
6 (a) hold a hearing; and
7 (b) give a reasonable opportunity to any interested people to
8 make oral or written submissions to ASIC on whether an
9 order should be made.

10 *ASIC must give notice if stop order made*

- 11 (8) If ASIC makes a stop order under this section, ASIC must give the
12 operator of the fund a copy of the order as soon as reasonably
13 practicable after it is made.

14 **1215B Interim stop orders**

- 15 (1) ASIC may make an interim stop order, if ASIC is of the opinion
16 that:
17 (a) any delay in making a stop order under section 1215 or
18 1215A would be prejudicial to the public interest; and
19 (b) either:
20 (i) in the case of an order that is to be made in relation to
21 an Australian passport fund—one or more of the
22 circumstances mentioned in subsection 1215(3) exists;
23 or
24 (ii) in the case of an order that is to be made in relation to a
25 notified foreign passport fund—one or more of the
26 circumstances mentioned in subsection 1215A(3) exists.
- 27 (2) An interim stop order under subsection (1):
28 (a) may be made without holding a hearing, or during a hearing;
29 and
30 (b) must be in writing; and
31 (c) lasts:
32 (i) if the stop order is made during a hearing—until ASIC
33 makes a stop order after the conclusion of the hearing,
34 or the interim stop order is revoked; and

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(ii) otherwise—for 21 days after the day on which it is made, unless sooner revoked.

(3) If ASIC makes an interim stop order, ASIC must give the operator of the fund a copy of the order as soon as reasonably practicable after it is made.

1215C Revocation of stop orders

(1) The operator of an Australian passport fund may make an application to ASIC, in accordance with this section, to have a stop order that is in force in relation to the fund revoked on the basis that there are no longer grounds for the order under subsection 1215(3).

(2) The operator of a notified foreign passport fund may make an application to ASIC, in accordance with this section, to have a stop order that is in force in relation to the fund revoked on the basis that there are no longer grounds for the order under subsection 1215A(3).

(3) An application under subsection (1) or (2) must:

- (a) be in the prescribed form; and
- (b) without limiting paragraph (a), set out the basis on which the operator of the fund believes that there are no longer grounds for the stop order.

(4) ASIC must:

- (a) revoke a stop order made under section 1215 in relation to an Australian passport fund if:
 - (i) an application is made under subsection (1); and
 - (ii) ASIC is of the opinion that there are no longer grounds for the stop order; and
- (b) revoke a stop order made under section 1215A in relation to a notified foreign passport fund if:
 - (i) an application is made under subsection (2); and
 - (ii) ASIC is of the opinion that there are no longer grounds for the stop order.

(5) Nothing in this section limits the circumstances in which ASIC may revoke or vary a stop order made under section 1215 or 1215A.

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1215D Compliance with stop orders

1
2 (1) This section applies if:

3 (a) ASIC gives the operator of an Australian passport fund a
4 copy of a stop order under subsection 1215(5) or an interim
5 stop order under subsection 1215B(3); or

6 (b) ASIC gives the operator of a notified foreign passport fund a
7 stop order under subsection 1215A(8) or an interim stop
8 order under subsection 1215B(3).

9 (2) The operator must not contravene the order.

10 Note: Failure to comply with this subsection is an offence (see
11 subsection 1311(1)).

12 (3) The operator must take reasonable steps to ensure that any other
13 person who might engage in conduct that is contrary to the order, is
14 aware of the order.

15 Note: Failure to comply with this subsection is an offence (see
16 subsection 1311(1)).

17 (4) A person who is aware of the order must not engage in conduct
18 that is contrary to the order.

19 Note: Failure to comply with this subsection is an offence (see
20 subsection 1311(1)).

1 **Part 8A.7 Infringement notices**

2 **1216 Infringement notices for failure to comply with the Passport** 3 **Rules or this Chapter**

4 *Provisions subject to an infringement notice*

- 5 (1) A strict liability offence against one of the following provisions is
6 subject to an infringement notice under Part 5 of the Regulatory
7 Powers Act:
- 8 (a) subsection 1211C(1) or (2);
 - 9 (b) subsection 1213F(1);
 - 10 (c) subsection 1213G(1);
 - 11 (d) subsection 1213H(1) or (3).

12
13 Note: Part 5 of the Regulatory Powers Act creates a framework for using
14 infringement notices in relation to provisions.

15 *Infringement officer*

- 16 (2) For the purposes of Part 5 of the Regulatory Powers Act, ASIC is
17 the infringement officer in relation to the provisions mentioned in
18 subsection (1).

19 Note: ASIC may delegate any or all of its functions and powers under
20 section 102 of the ASIC Act.

21 *Relevant chief executive*

- 22 (3) For the purposes of Part 5 of the Regulatory Powers Act, ASIC is
23 the relevant chief executive in relation to the provisions mentioned
24 in subsection (1).

25 Note: ASIC may delegate any or all of its functions and powers under
26 section 102 of the ASIC Act.

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1 **Part 8A.8—Exemptions and modifications**

2 **1217 ASIC’s power to make exemptions and declare modifications** 3 **etc. in relation to this Chapter**

4 *Exemptions and declarations on application of this Chapter*

5 (1) ASIC may:

- 6 (a) exempt an entity from a provision of this Chapter; or
- 7 (b) declare that this Chapter applies to an entity as if specified
8 provisions were omitted, modified or varied as specified in
9 the declaration.

10 (2) The exemption or declaration may:

- 11 (a) apply to all or specified provisions of this Chapter; and
- 12 (b) apply to all entities, a specified class of entities or a specified
13 entity; and
- 14 (c) apply to all passport funds, a specified class of passport funds
15 or a specified passport fund; and
- 16 (d) relate to any other matter generally or as specified.

17 *Imposition of conditions on exemption*

18 (3) An exemption may apply unconditionally or subject to specified 19 conditions.

20 (4) An entity to whom a condition specified in an exemption applies 21 must comply with the condition.

22 (5) The Court may order the entity to comply with the condition in a 23 specified way. Only ASIC may apply to the Court for the order.

24 *Exemptions and declarations relating to all or a class of entities or 25 passport funds*

26 (6) An exemption or declaration that relates to all entities, a specified 27 class of entities, all passport funds or a specified class of passport 28 funds, must be made by legislative instrument.

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Exemptions and declarations relating to specified entities or passport funds

(7) An exemption or declaration that relates to a specified entity or a specified passport fund must be made by notifiable instrument.

(8) ASIC must also:

(a) give a copy of an exemption or declaration that relates to a specified entity to the entity; and

(b) give a copy of an exemption or declaration that relates to a specified passport fund to the operator of the fund.

ASIC must do so as soon as is reasonably practicable after the exemption or declaration is made.

Definitions

(9) In this section:

provisions of this Chapter include:

(a) regulations made for the purposes of this Chapter; and

(b) definitions in this Act or the regulations as they apply to references in:

(i) this Chapter; or

(ii) regulations made for the purposes of this Chapter.

1217A ASIC's power to make exemptions and declare modifications etc. in relation to the Passport Rules

Exemptions and declaration on Passport Rules

(1) ASIC may:

(a) exempt an entity from a provision of the Passport Rules for this jurisdiction; or

(b) declare that the Passport Rules for this jurisdiction apply to an entity as if specified provisions were omitted, modified or varied as specified in the declaration.

(2) The exemption or declaration may:

(a) apply to all or specified provisions of the Passport Rules for this jurisdiction; and

(b) apply to all entities, a specified class of entities or a specified entity; and

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- 1 (c) apply to all passport funds, a specified class of passport funds
2 or a specified passport fund; and
3 (d) relate to any other matter generally or as specified.

4 (3) However:

- 5 (a) ASIC may only give an exemption or make a declaration
6 under subsection (1) in relation to an Australian passport
7 fund if each host regulator for the fund has agreed to the
8 exemption being given or the declaration being made; and
9 (b) ASIC may only give an exemption or make a declaration
10 under subsection (1) in relation to a foreign passport fund if
11 the home regulator for the fund has granted an equivalent
12 exemption or made a similar omission, modification or
13 variation of the Passport Rules for the home economy for the
14 fund.

15 *Imposition of conditions on exemption*

- 16 (4) An exemption may apply unconditionally or subject to specified
17 conditions.
18 (5) An entity to whom a condition specified in an exemption applies
19 must comply with the condition.
20 (6) The Court may order the entity to comply with the condition in a
21 specified way. Only ASIC may apply to the Court for the order.

22 *Exemptions and declarations relating to all or a class of entities or
23 passport funds*

- 24 (7) An exemption or declaration that relates to all entities, a specified
25 class of entities, all passport funds or a specified class of passport
26 funds, must be made by legislative instrument.

27 *Exemptions and declarations relating to specified entities or
28 passport funds*

- 29 (8) An exemption or declaration that relates to a specified entity or a
30 specified passport fund must be made by notifiable instrument.

31 (9) ASIC must also:

- 32 (a) give a copy of an exemption or declaration that relates to a
33 specified entity to the entity; and

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-
- 1 (b) give a copy of an exemption or declaration that relates to a
2 specified passport fund to the operator of the fund.
3 ASIC must do so as soon as is reasonably practicable after the
4 exemption or declaration is made.

5 **1217B Exemptions and modification by regulations**

6 The regulations may:

- 7 (a) exempt from all or specified provisions of the Corporations
8 legislation (which includes this Chapter and the Passport
9 Rules for this jurisdiction):
10 (i) a passport fund, all passport funds of a specified class or
11 all passport funds; or
12 (ii) an entity, all entities of a specified class or all entities,
13 in relation to a passport fund, all passport funds of a
14 specified class or all passport funds;
15 (b) provide that the Corporations legislation (which includes this
16 Chapter and the Passport Rules for this jurisdiction) applies
17 in relation to:
18 (i) a passport fund, all passport funds of a specified class or
19 all passport funds; or
20 (ii) an entity, all entities of a specified class or all entities,
21 in relation to a passport fund, all passport funds of a
22 specified class or all passport funds;
23 as if specified provisions of the Corporations legislation were
24 omitted, modified or varied as specified in the regulations.
25

EXPOSURE DRAFT

Schedule 2—Consequential amendments relating to insertion of Chapter 8A and the enforcement of the Passport Rules

Australian Securities and Investments Commission Act 2001

Corporations Act 2001

1 Section 9

Insert:

Australian passport fund: see section 1210.

2 Section 9 (paragraph (c) of the definition of *civil penalty order*)

Omit “or 1317HB”, substitute “, 1317HB or 1317HC”.

3 Section 9 (note at the end of the definition of *constitution*)

Omit “Note”, substitute “Note 1”.

4 Section 9 (at the end of the definition of *constitution*)

Add:

Note 2: The constituent document (as defined in the Passport Rules for this jurisdiction) for a notified foreign passport fund is taken to be the constitution of the fund as a managed investment scheme.

5 Section 9 (definition of *entity*)

Omit “Chapter 2E”, substitute “Chapters 2E and 8A”.

6 Section 9

Insert:

home economy: see section 1210.

home regulator: see section 1210.

host economy: see section 1210.

host regulator: see section 1210.

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1 **7 Section 9 (note at the end of the definition of *managed***
2 ***investment scheme*)**

3 Omit “Note”, substitute “Note 1”.

4 **8 Section 9 (at the end of the definition of *managed***
5 ***investment scheme*)**

6 Add:

7 Note 2: A notified foreign passport fund is taken to be a managed investment
8 scheme for the purposes of this Act.

9 **9 Section 9**

10 Insert:

11 ***notified foreign passport fund***: see subsection 1213C(2).

12 ***operator*** of a passport fund: see section 1210.

13 ***Passport Rules***: see section 1211A.

14 **10 Section 9**

15 Insert:

16 ***Regulatory Powers Act*** means the *Regulatory Powers (Standard*
17 *Provisions) Act 2014*.

18 **11 Section 9 (definition of *this Act*)**

19 Omit “and the Insolvency Practice Rules”, substitute “, the Insolvency
20 Practice Rules and the Passport Rules for this jurisdiction”.

21 **12 Section 64A**

22 Omit “Chapter 2E”, substitute “Chapters 2E and 8A”.

23 **13 Paragraph 199A(2)(b)**

24 Omit “or 1317HB”, substitute “, 1317HB or 1317HC”.

25 **14 Section 761A (after paragraph (b) of the definition of**
26 ***financial services law*)**

27 Insert:

28 (ba) a provision of the Passport Rules for this jurisdiction; or

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15 After paragraph 912A(1)(ca)

Insert:

- (cb) if the licensee is the operator of an Australian passport fund—comply with the law of each host economy for the fund; and

16 Subparagraph 912D(1)(a)(ii)

Omit “paragraphs (a), (b) and (c)”, substitute “paragraphs (a), (b), (ba) and (c)”.

17 After paragraph 915B(3)(c)

Insert:

- (caa) is an operator of a notified foreign passport fund whose members have suffered, or are likely to suffer, loss or damage because the body has breached this Act; or

18 At the end of subsection 920A(1)

Add:

- ; or (i) the person is the operator of, or another person connected with, an Australian passport fund, and each of the following is satisfied:
- (i) a host regulator for the fund has notified ASIC in writing that it is not of the opinion that the person or the fund complies, or is likely to comply, with the law of that host economy;
 - (ii) ASIC is of the opinion that it should make the banning order, given the potential impact of the failure, or potential failure, to comply on members or potential members of the fund.

19 Before subparagraph 1274(2)(a)(ii)

Insert:

- (iac) information of the kind specified under subsection 1212(3) or 1213(3) (information included in, or accompanying, applications in relation to passport funds); or

20 After paragraph 1311(1A)(dc)

Insert:

- (dd) Chapter 8A;
-

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21 After section 1317HB

Insert:

1317HC Compensation orders—Passport Rules

(1) A Court may order a person (the *liable person*) to compensate another person (other than a passport fund) for damage suffered by the other person if:

(a) the liable person has contravened subsection 1211C(1) or (2) (failure to comply with the Passport Rules for this jurisdiction); and

(b) the damage resulted from the contravention.

The order must specify the amount of compensation.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 1317E.

(2) A Court may order a person to compensate a passport fund for damage suffered by the fund if:

(a) the person has contravened subsection 1211C(1) or (2) (failure to comply with the Passport Rules for this jurisdiction); and

(b) the damage resulted from the contravention.

The order must specify the amount of compensation.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 1317E.

(3) In determining the damage suffered by a person or passport fund for the purposes of making a compensation order, include profits made by any person resulting from the contravention.

(4) In determining the damage suffered by a passport fund for the purposes of making a compensation order, include any diminution in value of the property of the fund.

(5) A compensation order may be enforced as if it were a judgment of the Court.

22 Subsection 1317J(2)

After “a compensation order”, insert “under section 1317H, 1317HA or 1317HB”.

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1 **23 After subsection 1317J(2) (before the note)**

2 Insert:

3 (2A) Each of the following may apply for a compensation order under
4 section 1317HC:

5 (a) any person who has suffered damage as a result of a
6 contravention;

7 (b) the operator of any passport fund that has suffered damage as
8 a result of the contravention.

9 **24 Subsection 1317S(1) (paragraphs (a) and (b) of the**
10 **definition of *eligible proceedings*)**

11 Omit “or 1317HB”, substitute “, 1317HB or 1317HC”.

12 **25 Schedule 3 (after table item 328)**

13 Insert:

328A	Subsection 1212C(1)	60 penalty units.
328B	Subsection 1215D(2)	100 penalty units or imprisonment for 2 years, or both.
328C	Subsection 1215D(3)	100 penalty units or imprisonment for 2 years, or both.
328D	Subsection 1215D(4)	100 penalty units or imprisonment for 2 years, or both.

14