



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Disclosure of Lack of Independence) Instrument 2021/125

This is the Explanatory Statement for ASIC Corporations (Disclosure of Lack of Independence) Instrument 2021/125 (the **Instrument**).

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

Summary

1. Where a providing entity would contravene subsection 923A(1) of the *Corporations Act 2001* (the **Act**) by assuming or using the terms ‘independent’, ‘impartial’ or ‘unbiased’, or any other word or expression of like import, in relation to personal advice, they must include a statement in their Financial Services Guide (**FSG**) that sets out that the providing entity is not independent, impartial or unbiased, and explain the reasons why (**Lack of Independence Disclosure**) (paragraphs 942B(2)(fa) and 942C(2)(ga) of the Act).
2. Subsections 942B(7A) and 942C(7A) of the Act provides ASIC with the power to determine the requirements for the Lack of Independence Disclosure.
3. The Instrument prescribes the requirements for the Lack of Independence Disclosure that must be included in an FSG by providing entities.

Purpose of the instrument

4. The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**) identified that there were no requirements for financial advisers that are not ‘independent’ to explain this to clients. Commissioner Hayne considered that this was not satisfactory, and that an adviser’s lack of independence should be brought to the client’s attention in a prominent, clear and concise manner.
5. In light of this, the Royal Commission made the following recommendation to ensure it is clear to clients whether their financial adviser is independent (Recommendation 2.2):

The law should be amended to require that a financial adviser who would contravene section 923A of the Corporations Act by assuming or using any of the restricted words or expressions identified in section 923A(5) (including

‘independent’, ‘impartial’ and ‘unbiased’) must, before providing personal advice to a retail client, give to the client a written statement (in or to the effect of a form to be prescribed) explaining simply and concisely why the adviser is not independent, impartial and unbiased.

6. The Act was amended by the *Financial Sector Reform (Hayne Royal Commission Response No. 2) Act 2021* to implement Recommendation 2.2 of the Royal Commission by requiring a Lack of Independence Disclosure in an FSG, where applicable.
7. Section 923A of the Act prohibits a person from using certain restricted words and expressions (including ‘independent’, ‘impartial’, and ‘unbiased’, or any other words or expressions of like import) in relation to a financial services business or the provision of a financial service unless certain conditions are met in relation to remuneration and conflicts of interests.
8. An FSG is designed to give retail clients sufficient information to enable them to decide whether to obtain financial services from a providing entity. A ‘providing entity’ is an Australian financial services (AFS) licensee or an authorised representative of an AFS licensee, that provides financial services to a retail client.
9. The Lack of Independence Disclosure must meet the requirements (if any) determined by ASIC in a legislative instrument (paragraphs 942B(2)(fa) and 942C(2)(ga) of the Act). This Instrument prescribes those requirements.
10. The intent of Recommendation 2.2 is to improve the disclosure of conflicts of interest and ensure that a providing entity’s lack of independence is brought to the client’s attention through prominent, clear and concise disclosure. The requirements prescribed in the Instrument are aimed at ensuring that a providing entity’s lack of independence is explained prominently, clearly and concisely to clients and removing the risk that providing entities will ‘bury’ the disclosure among other content in the FSG.

Consultation

11. ASIC released Consultation Paper 329 *Implementing the Royal Commission recommendations: Advice fee consents and independence disclosure* (CP 329) on 10 March 2020, seeking feedback on ASIC’s proposed approach to implementing aspects of law reform arising from Royal Commission Recommendations 2.1, 2.2 and 3.3 relating to advice fee consents and independence disclosure. CP 329 was open for submissions for a period of four weeks. Submissions were also accepted after this time due to the impacts of the COVID-19 pandemic.
12. Report 687 *Response to submissions on CP 329 on advice fee consents and independence disclosure* (REP 687) sets out the key issues that arose out of the submissions received on CP 329 and ASIC’s response to those issues.
13. The Office of Best Practice Regulation has confirmed that the Government has undertaken a process equivalent to a Regulation Impact Statement (RIS) in

relation to implementation of the Royal Commission recommendations, which also covers implementation by ASIC of Recommendation 2.2 in the Instrument.

Operation of the instrument

14. Failure to provide the Lack of Independence Disclosure in an FSG, where applicable, is an offence (subsection 1311(1) of the Act). The disclosure must comply with any requirements set by ASIC in the Instrument.

Part 1 - Preliminary

15. Section 2 provides that the Instrument commences on the later of 1 July 2021 and day after it is registered on the Federal Register of Legislation.
16. Section 3 provides that the Instrument is made under subsections 942B(7A) and 942C(7A) of the Act. These subsections have been enacted and will come into operation on 1 July 2021. Even though the subsections that confer power on ASIC to make the Instrument have not yet come into operation, ASIC can make the instrument as if it had come into operation in reliance on subsection 4(1) of the *Acts Interpretation Act 1901* (as in force on 1 January 2005).
17. Section 4 sets out a definition and contains an interpretation provision. The interpretation provision clarifies that a reference in the Instrument to an FSG includes a reference to a Supplementary Financial Services Guide (SFSG). The clarification is made so as to remove any doubt about the interaction between the Instrument and the ordinary operation of section 943D of the Act (effect of giving a person an SFSG).

Part 2 – Determination

18. Section 5 sets out the requirements for the Lack of Independence Disclosure. These requirements include that the disclosure:
 - (a) must appear on the first substantive page of the FSG;
 - (b) must appear within a box under a bold heading that includes the phrase “**Not Independent**”, “**Lack of Independence**”, or another phrase of like import;
 - (c) must be in a font size that is at least the same font size as that predominantly used for other text (if any) in the FSG; and
 - (d) must not appear in a footnote.
19. This Instrument requires that a bold heading that includes the phrase “**Not Independent**”, “**Lack of Independence**”, or another phrase of like import be used for the disclosure.
20. Headings such as “Statement on the independence of our firm”, “Statement of Independence” or “Independence” would be considered neither of like import nor in the spirit of the Royal Commission recommendation because they imply that the firm is, in fact, independent.

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21. ASIC has also not prescribed the detail that must be included in the Lack of Independence Disclosure. The reasons why a providing entity is not independent, impartial or unbiased will depend on the nature of the remuneration being received by the entity and relationships in place. Examples of why a providing entity is not able to use the words ‘independent’, ‘impartial’ or ‘unbiased’ under section 923A include the following:
- (a) the providing entity is receiving commissions in relation to the sale of life risk insurance products that are not rebated in full to clients;
 - (b) the providing entity is wholly owned by an issuer of financial products that the providing entity gives personal advice on to retail clients; or
 - (c) the providing entity’s AFS licensee or another authorised representative that is authorised by the same AFS licensee, receives commissions, volume-based payments or other gifts or benefits.
22. Financial advice businesses should conduct their own consumer testing to ensure they develop a statement that accurately reflects their circumstances and will be easily understood by their clients.

Legislative authority

23. This instrument is made under subsections 942B(7A) and 942C(7A) of the Act and is a disallowable legislative instrument.

Incorporation by reference

24. The Instrument does not incorporate any matter by reference for the purposes of section 14 of the *Legislation Act 2003*.

Statement of Compatibility with Human Rights

25. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the Attachment.

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

ASIC Corporations (Disclosure of Lack of Independence) Instrument 2021/125

Overview

1. The *ASIC Corporations (Disclosure of Lack of Independence) Instrument 2021/125* is made to enable the implementation of Recommendation 2.2 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.
2. The intent of Recommendation 2.2 is to improve the disclosure of conflicts of interest and ensure that a financial adviser's lack of independence is brought to the client's attention through prominent, clear and concise disclosure.

Assessment of human rights implications

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

Conclusion

4. This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.