

Attachment to CP 374: Draft instrument



ASIC
Australian Securities &
Investments Commission

ASIC Corporations (Relief to Facilitate Admission of Exchange Traded Funds) Instrument 2024/XX

I, <insert name>, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Date 2024

[DRAFT ONLY – NOT FOR SIGNATURE]

<signature>

<insert name>

Contents

Part 1—Preliminary	3
1 Name of legislative instrument.....	3
2 Commencement	3
3 Authority.....	3
4 Definitions	3
Part 2—Exemption	6
5 Unequal treatment in withdrawal from an ETF	6
6 Unequal treatment in provision of information to authorised participants.....	7
7 Ongoing disclosure for ETFs.....	8
Part 3—Declaration	9
8 Relevant Interest	9
9 Substantial Interest and Beneficial Tracing.....	12
Part 4—Repeal	13
10 Repeal	13

Part 1—Preliminary

1 Name of legislative instrument

This is the *ASIC Corporations (Relief to Facilitate Admission of Exchange Traded Funds) Instrument 2024/XX*.

2 Commencement

This instrument commences on the day after it is registered on the Federal Register of Legislation.

Note: The register may be accessed at www.legislation.gov.au.

3 Authority

This instrument is made under subsections 601QA(1), 655A(1), 673(1), 1020F(1) and 1243(2) of the *Corporations Act 2001*.

4 Definitions

In this instrument:

Act means the *Corporations Act 2001*.

ASX means ASX Limited ACN 008 624 691.

authorised participant means, in relation to an ETF, a person who:

- (a) has an agreement with:
 - (i) in the case of an ETF that is a registered scheme—the responsible entity of the scheme; and
 - (ii) in the case of an ETF that is a sub-fund of a CCIV—the CCIV (in respect of the sub-fund);

in relation to making applications to acquire and withdraw interests in the scheme or shares in the sub-fund; and

- (b) is, or has engaged to act on its behalf, a participant in relation to a financial market, to acquire and dispose of interests in the scheme or shares in the sub-fund.

Cboe means CBOE Australia Pty Ltd ACN 129 584 667.

constitution means:

- (a) in relation to an ETF that is a registered scheme—the constitution of the scheme; and

- (b) in relation to an ETF that is a sub-fund of a CCIV—the constitution of the CCIV.

corporate director, in relation to a sub-fund of a CCIV (including a sub-fund that is an ETF), means the corporate director of the CCIV.

ETF (short for exchange traded fund) means a registered scheme or a sub-fund of a CCIV in relation to which all of the following are satisfied:

- (a) interests in the scheme or shares in the sub-fund are in a class that is able to be traded on a financial market operated by ASX or Cboe, but the scheme or sub-fund is not listed on either of those markets;
- (b) the responsible entity or CCIV has the power and approval to issue interests or shares in that class on any day that those interests or shares are able to be traded on the relevant financial market;
- (c) the responsible entity or CCIV allows applications for, and redemptions of, interests or shares in that class on any day that those interests or shares are able to be traded on the relevant financial market;
- (e) the responsible entity or CCIV does not make a market (within the meaning of subsection 766D(1), but ignoring subsection 766D(2), of the Act) for those interests or shares.

indicative net asset value per security means:

- (a) for an ETF that is a registered scheme, the total assets of the ETF less the total liabilities of the ETF (disregarding any liability to a member of the ETF as a member), divided by the number of interests in the ETF; and
- (b) for a class of interests in an ETF that is a registered scheme, the total assets attributable to that class of interests less the total liabilities attributable to that class of interests (disregarding any liability to a member of the ETF as a member), divided by the number of interests in that class; and
- (c) for an ETF that is a sub-fund of a CCIV, the total assets of the ETF less the total liabilities of the ETF (disregarding any liability to a member of the ETF as a member), divided by the number of shares in the ETF; and
- (d) for a class of shares in an ETF that is a sub-fund of a CCIV, the total assets attributable to that class of shares less the total liabilities attributable to that class of shares (disregarding any liability to a member of the ETF as a member), divided by the number of shares in that class.

minimum parcel means the smallest number or value of interests or shares in an ETF that are generally permitted to be withdrawn from the ETF by an authorised participant while interests or shares in the ETF are quoted.

withdrawal fee per security means:

- (a) in relation an ETF that is a registered scheme, the fee that is payable in relation to a withdrawal from the ETF divided by the number of interests in the ETF to which the withdrawal relates; and
- (b) in relation an ETF that is a sub-fund of a CCIV, the fee that is payable in relation to a withdrawal from the ETF divided by the number of shares in the ETF to which the withdrawal relates.

Part 2—Exemption

5 Unequal treatment in withdrawal from an ETF

- (1) The responsible entity of an ETF that is a registered scheme and the corporate director of an ETF that is a sub-fund of a CCIV do not have to comply with paragraph 601FC(1)(d) or 1224D(2)(b) of the Act (as applicable) to the extent that it would prevent the responsible entity or the corporate director from permitting only authorised participants to withdraw from the ETF.
- (2) The exemption in subsection (1) applies where both the following are satisfied:
 - (a) there is a Product Disclosure Statement in relation to interests or shares in the ETF that are or will be able to be traded on a financial market operated by ASX or Cboe that contains statements to the effect that:
 - (i) the responsible entity or corporate director will not treat members of the same class equally to the extent that it restricts withdrawal from the ETF to authorised participants; and
 - (ii) except in exceptional circumstances, only authorised participants may withdraw from the ETF, but other members may sell their interests or shares on the financial market operated by ASX or Cboe; and
 - (iii) when interests or shares in the ETF are suspended from trading on the financial market operated by ASX or Cboe for more than 5 consecutive trading days, members have a right to withdraw from the ETF and receive payment for their interests or shares in money within a reasonable time of a request unless any of the following apply:
 - (A) the ETF is being wound-up;
 - (B) the ETF is not liquid;
 - (C) the responsible entity or the CCIV suspends withdrawals in accordance with the constitution of the ETF;
 - (b) the constitution of the ETF does not permit a withdrawal fee per security to be payable by a member who is not an authorised participant that is greater than the withdrawal fee per security that would generally be payable by an authorised participant receiving redemption proceeds in cash while interests or shares in the ETF are quoted when withdrawing the minimum parcel.

Note: Paragraph 5(2)(b) applies regardless of whether the withdrawal fees for the ETF are calculated on a per interest or a per share basis or otherwise.

6 Unequal treatment in provision of information to authorised participants

- (1) The responsible entity of an ETF that is a registered scheme and the corporate director of an ETF that is a sub-fund of a CCIV does not have to comply with paragraph 601FC(1)(d) or 1224D(2)(b) of the Act (as applicable) to the extent that it would prevent the responsible entity or the corporate director from providing information to authorised participants before other members about:
 - (a) the price or value of any financial product, index, currency, commodity or other thing that the ETF invests in or, in the case of an index, refers to as part of its investment strategy; and
 - (b) the number and class of securities and any other property required to acquire an interest or share in the ETF by authorised participants on the trading day that first ends after the information is provided; and
 - (c) the number and class of securities and any other property transferred on withdrawal from an interest or share in the ETF by authorised participants on the trading day that first ends after the information is provided.

Where the exemption applies

- (2) The exemption in subsection (1) applies where there is a Product Disclosure Statement in relation to interests or shares in the ETF that are or will be able to be traded on a financial market operated by ASX or Cboe that contains a statement to the effect that the responsible entity or the corporate director will provide information about the matters referred to in paragraphs (1)(a) to (c) to authorised participants before other members.

Conditions

- (3) A responsible entity or corporate director that relies on the exemption in subsection (1) must:
 - (a) publicly disclose any information which has been disclosed to authorised participants as permitted by the exemption before the commencement of the trading day after the day on which such disclosure was made to authorised participants; and
 - (b) take reasonable steps to ensure that the following information is publicly available and updated every 15 minutes during each trading day:
 - (i) where the ETF has only one class of interests or shares—the indicative net asset value per security in the ETF; or
 - (ii) otherwise—the indicative net asset value per security for each class of interests or shares.

7 Ongoing disclosure for ETFs

- (1) Neither of the following has to comply with section 1017B of the Act:
 - (a) the responsible entity of an ETF that is a registered scheme;
 - (b) a CCIV (in respect of a sub-fund of the CCIV that is an ETF).
- (2) The exemption in subsection (1) applies where the responsible entity or CCIV (in respect of the sub-fund):
 - (a) complies with section 675 of the Act as if the scheme or CCIV were an unlisted disclosing entity; and
 - (b) includes statements in any Product Disclosure Statement for interests or shares in the ETF to the effect that the responsible entity or CCIV (in respect of the sub-fund) will comply with the continuous disclosure requirements of the Act as if the scheme or CCIV were an unlisted disclosing entity.

Note 1: Section 1017B of the Act applies to a CCIV subject to the modifications set out in Division 4 of Part 8B.7: see sections 1241 and 1241Z of the Act.

Note 2: Section 675 of the Act has a modified operation in relation to securities in a CCIV: see section 1240F of the Act.

Part 3—Declaration

8 Relevant Interest

- (1) Chapters 6 and 6C of the Act apply to all persons as if section 609 were modified or varied by, in the appropriate position in section 609, inserting:

“*ETFs*

(10A) A member of an ETF who is an authorised participant in relation to the ETF does not have a relevant interest in securities that form part of ETF property merely because the ETF has an acquisition and withdrawal facility, provided that:

- (a) the current PDS contains a statement to the effect that the investment strategy for the ETF is to make investments that are expected to result in the value of an interest or share (as applicable) in the ETF changing in proportion to the value of a published index of securities, ignoring the effect of fees and other costs (including taxes) in relation to the ETF; and
 - (b) the current PDS contains a statement to the effect that at the time the investment strategy for the ETF disclosed in the current PDS was first published in a Product Disclosure Statement for interests or shares (as applicable) in the ETF, there were reasonable grounds to believe that implementation of the investment strategy would not be likely to lead to ETF property including securities in a class of securities that:
 - (i) would represent more than 10% by value of ETF property; and
 - (ii) were, or would result in the responsible entity or CCIV having a relevant interest in, securities in:
 - (A) a listed company; or
 - (B) an unlisted company, other than a CCIV, with more than 50 members; or
- Note: The prohibitions in subsections 606(1) and (2) only apply to the acquisition of a relevant interest in an issued voting share in a CCIV if the CCIV is a listed company: see section 1240A.
- (C) a listed body that is formed or incorporated in Australia; or
 - (D) a listed scheme.

Note: The responsible entity or CCIV may have a relevant interest in securities that do not form part of ETF property because of paragraph 608(3)(b).

(10B) If subsection (10A) applies in relation to a member and the member makes a withdrawal request under the acquisition and withdrawal facility:

- (a) subsection (10A) stops applying in relation to any securities that the member would receive if the responsible entity or CCIV transferred securities to the member in accordance with the withdrawal request; and
- (b) the member is taken to acquire a relevant interest in those securities at that time through a transaction in relation to the securities entered into by the member.

Note: If the member makes a withdrawal request only in relation to some of the member's interests or shares in the ETF, subsection (10A) may still apply in relation to the member's remaining interests or shares.

(10C) If:

- (a) other than because of subsection (10B), a member has a relevant interest in securities that form part of ETF property because subsection (10A) has stopped applying in relation to the scheme or sub-fund; and

Note: The circumstances in which subsection (10A) will stop applying include where the scheme or sub-fund ceases to be an ETF.

- (b) the member makes a withdrawal request in relation to the interests in the registered scheme or the shares in the sub-fund;

then for the purposes of section 606, at the time of the withdrawal request:

- (c) the member is taken to acquire a relevant interest in any securities that the member would receive if the responsible entity or CCIV transferred securities to the member in accordance with the withdrawal request; and
- (d) the member is taken to have acquired the relevant interest through a transaction entered into by the member in relation to those securities; and
- (e) the member's voting power is taken to have increased from what it would have been before the withdrawal request if the votes attached to those securities were disregarded to what it was after the withdrawal request (taking the votes attached to those securities into account).

(10D) If, in the previous 6 months:

- (a) a member's voting power has increased because subsection (10A) stopped applying in relation to securities; and

- (b) the member has not been taken to acquire a relevant interest in the securities under subsection (10B) or (10C);

the increase in voting power is to be disregarded in determining the voting power of the member or any other person for the purposes of item 9 of the table in section 611.

(10E) In subsections (10A) to (10D) and in this subsection:

acquisition and withdrawal facility means, in relation to an ETF, a facility that:

- (a) the responsible entity or CCIV (as the case may be) has stated in the current PDS that it intends to offer on each trading day on which interests or shares in the ETF are traded on the relevant financial market operated by ASX or Cboe; and
- (b) allows:
 - (i) a person who is an authorised participant to acquire an interest or a share in the ETF by contributing to the ETF; and
 - (ii) a member who is an authorised participant to request that the responsible entity or CCIV satisfy a withdrawal request in relation to an interest or a share in the ETF by transferring to the member;

consideration that predominantly comprises a parcel of securities, the composition of which in relation to an acquisition and a withdrawal is published by or on behalf of the responsible entity from time to time.

Note: The composition of the parcel of securities may be different for an acquisition and a withdrawal.

ASX means ASX Limited ACN 008 624 691.

authorised participant has the same meaning as in *ASIC Corporations (Relief to Facilitate Admission of Exchange Traded Funds) Instrument 2024/XX*.

Cboe means CBOE Australia Pty Ltd ACN 129 584 667.

current PDS, in relation to an ETF, means the most recently lodged Product Disclosure Statement relating to interests or shares in the ETF.

ETF has the same meaning as in *ASIC Corporations (Relief to Facilitate Admission of Exchange Traded Funds) Instrument 2024/XX*.

ETF property means:

- (a) in relation to an ETF that is a registered scheme—scheme property of the scheme; and
- (b) in relation to an ETF that is a sub-fund of a CCIV—the assets of the sub-fund.

Note: Chapter 6 applies to a CCIV subject to the modifications set out in Part 8B.7: see section 1240.”.

9 Substantial Interest and Beneficial Tracing

- (1) Chapters 6C of the Act applies to all persons as if provisions of that Chapter were modified or varied as follows:

- (a) by inserting after section 671A:

“671AA Substantial holdings and relevant interests in relation to exchange traded funds

- (1) For the purposes of this Chapter and the definition of **substantial holding** in section 9:
 - (a) subsection 609(10A) applies as if paragraph 609(10A)(b) were omitted; and
 - (b) if a member of an ETF that has an acquisition and withdrawal facility does not have a relevant interest in securities that form part of ETF property because of subsection 609(10A) (as affected by paragraph (a)), then the member is taken to have a relevant interest in the securities that would be transferred to the member if:
 - (i) the member made a withdrawal request under the acquisition and withdrawal facility for all their interests or shares in the ETF, other than any interests or shares in relation to which the member has a relevant interest in securities that form part of ETF property because of subsection 609(10B); and

Note: Subsection 609(10B) may give a member a relevant interest in securities that form part of ETF property if the member has made a withdrawal request in relation to some or all of their interests or shares in the ETF.

- (ii) the numbers and classes of securities transferred to the member under the facility for each interest or share in the ETF were the same as the numbers and classes of securities most recently disclosed to the member by the responsible entity or CCIV in relation to a withdrawal request for an interest or share under the facility.

(2) In subsection (1):

acquisition and withdrawal facility has the same meaning as in subsection 609(10E).

ETF has the same meaning as in *ASIC Corporations (Relief to Facilitate Admission of Exchange Traded Funds) Instrument 2024/XX*.

ETF property has the same meaning as in subsection 609(10E).”;

(b) by inserting at the end of note 1 to subsection 671B(1):

“Section 671AA expands the normal concept of substantial holding and relevant interest in relation to exchange traded funds.”;

(c) by inserting at the end of subsection 672B(1):

“Note: Section 671AA expands the normal concept of relevant interest in relation to exchange traded funds.”.

Part 4—Repeal

10 Repeal

This instrument is repealed at the start of 1 April 2029.