



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Margin Lending Relief for Exchange-Traded Instalment Warrants) Instrument 2021/194

This is the Explanatory Statement for *ASIC Corporations (Margin Lending Relief for Exchange-Traded Instalment Warrants) Instrument 2021/194*.

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

Summary

1. *ASIC Corporations (Margin Lending Relief for Exchange-Traded Instalment Warrants) Instrument 2021/194 (instrument)* exempts certain types of exchange-traded instalment warrants from the margin lending obligations, that are ordinarily applicable to traditional margin loans, that meet the terms of the instrument.

Purpose of the instrument

2. Under the *Legislation Act 2003*, legislative instruments cease automatically, or 'sunset', after 10 years, unless action is taken to exempt or preserve them. To preserve its effect, a legislative instrument must be remade before the sunset date. The purpose of sunsetting is to ensure that instruments are kept up to date and only remain in force while they are fit for purpose, necessary and relevant.
3. ASIC Class Order [10/1034] *Margin lending relief for ASX-Traded instalment warrants (ASIC Class Order [10/1034])* expires or 'sunset' on 1 April 2021.
4. ASIC Class Order [10/1034] exempts certain types of instalment warrants from the additional obligations imposed on margin lenders, in particular, in Division 4A of Part 7.8 of the Act. This ensured that issuers of ASX and Chi-X-traded instalment warrants would be able to continue issuing ASX and Chi-X-traded instalment warrants to investors, including investors buying in the time-critical secondary trading market, without having to comply with the obligations.
5. The relief had initially been granted to ASX-traded instalment warrants but was extended to Chi-X traded-instalment warrants in November 2015. When first implementing ASIC Class Order [10/1034] ASIC had determined to grant the relief for the following reasons. Firstly, issuers would be unlikely to be able to comply with the additional margin lending obligations, particularly

where an investor is buying an instalment warrant on the secondary trading market where timing is critical. Secondly, Parliament's main focus in enacting the new margin lending provisions was to regulate traditional margin loans, rather than ASX-traded instalment warrants. Thirdly, ASX-traded instalment warrants are non-recourse and thus investors' liability is limited.

6. When extending the relief to Chi-X-traded instalment warrants in November 2015, ASIC determined that the policy rationale for providing the relief for ASX-traded instalment warrants was the same for providing the relief for Chi-X-traded instalment warrants.
7. ASIC has reviewed its policy underlying ASIC Class Order [CO 10/1034]. In light of this review and following targeted consultation, ASIC considers that this class order relief is operating efficiently and effectively and is necessary, fit-for-purpose and relevant.
8. As such, ASIC has decided to reissue the relief underlying the class order by making the instrument. In addition, the instrument makes the relief more market neutral so that it is applicable to certain types of instalment warrants traded on any financial market operated by an Australian domestic market licensee that is authorised under subsections 795B(1) or 1413(2) of the Act.

Consultation

9. In making the instrument, ASIC engaged in targeted consultation with the Australian Financial Markets Association (AFMA), ASX Limited and Chi-X Australia Pty Limited. Feedback received supported the remake of the relief underlying ASIC Class Order [10/1034].
10. AFMA provided feedback that in the interests of competitive neutrality, that ASIC consider remaking the relief so that it is applicable to defined instalment warrants that are traded on an Australian licensed financial market.
11. ASIC has certified that ASIC Class Order [CO 10/1034] is operating effectively and efficiently and is being remade without significant changes, and therefore a Regulatory Impact Statement is not required for the instrument.

Operation of the instrument

Name of legislative instrument

12. Section 1 of the instrument states that the name of the instrument is the *ASIC Corporations (Margin Lending Relief for Exchange-traded Instalment Warrants) Instrument 2021/194*.

Commencement

13. Section 2 of the instrument states that it commences on the later of:

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- (a) the day after it is registered on the Federal Register of Legislation; and
 - (b) 1 April 2021.

14. After section 2, there is a note that states that the register may be accessed at www.legislation.gov.au.

Authority

15. Section 3 of the instrument states that it is made under subsection 761EA(9) of the Act.

Definitions

16. Section 4 of the instrument provides that, in the instrument:

Australian domestic market licensee means a person who is a market licensee because of subsections 795B(1) or 1413(2) of the Act.

instalment warrant means a financial product that is a security or an interest in a managed investment product under the terms of which:

- (a) credit is provided by the issuer to the person (the ***client***) acquiring the financial product; and
- (b) the credit is applied to acquire one or more marketable securities (the ***underlying asset***), which may include applying the credit to pay for expenses incurred in connection with providing the credit or acquiring the underlying asset; and
- (c) the underlying asset is held on trust so that the client acquires a beneficial interest in the underlying asset; and
- (d) the client has a right to acquire legal ownership of the underlying asset by making one or more payments after acquiring the beneficial interest; and
- (e) the rights of the issuer, or any other person, against the client are limited to rights relating to the underlying asset.

17. The instrument limits the definition of ‘instalment warrant’ to a financial product that is a security or an interest in a managed investment product. This means that, notwithstanding the declaration that the product is not a margin lending facility, the product will remain regulated by Chapter 7 of the Act as a security or an interest in a managed investment product. In addition, the instrument limits the ‘instalment warrant’ definition so that if a client does not repay the credit to the issuer, the issuer cannot claim against the client’s other assets.

Terms of the Declaration

18. Section 5 in Part 2 of the instrument declares that a facility that is an instalment warrant:

- (a) that is in a class of financial products that are admitted to quotation on a licensed market operated by an Australian domestic market licensee; and
- (b) that is issued by a financial services licensee; and
- (c) that is a standard margin lending facility;

is not a margin lending facility.

19. After section 5(c), the instrument contains a note that provides that the declaration does not have the effect that an instalment warrant covered by the declaration is not a financial product.

Repeal

20. Section 6 in Part 3 of the instrument provides that it is repealed on 1 April 2026.

Legislative instrument and primary legislation

21. The subject matter and policy implemented by this instrument is more appropriate for a legislative instrument rather than primary legislation because:
 - (a) The matters contained in the instrument are a specific exemption designed to ensure the application of primary legislation remained flexible to adapt to market developments and applies in a way consistent with the intended policy of the Act and the enabling provisions in the primary legislation.
 - (b) The instrument provides administrative relief in circumstances where strict compliance with the primary legislation produces a significant regulatory burden of these entities. On this basis, it is appropriate for ASIC to provide relief through its exemption powers, as the matters contained in this particular instrument are of a highly specific nature which are more appropriate for legislative instrument rather than primary legislation.

Competition

22. Subsection 1(2A) of the *Australian Securities and Investments Commission Act 2001*, requires ASIC to consider the effects that the performance of its functions and the exercise of its powers will have on competition in the financial system.
23. Exempting certain instalment warrant products from the margin lending regime does not provide a competitive advantage to these products. While certain instalment warrants are technically caught by the margin lending regime, these are different products from those intended to be captured being traditional margin loans. These particular instalment warrants continue to be more appropriately regulated as a security or an interest in a managed investment product under Chapter 7 of the Act.
24. Making the relief market neutral encourages market competition amongst Australian domestic market licensees.

Legislative authority

25. Subsection 761EA(9) of the Act provides that ASIC may make a declaration that a particular kind of facility is not a margin lending facility.

Statement of Compatibility with Human Rights

26. 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 (Margin Lending Relief for Exchange-Traded Instalment Warrants) Instrument 2021/194

Overview

1. The Australian Securities and Investments Commission (*ASIC*) makes the *ASIC Corporations (Margin Lending Relief for Exchange-Traded Instalment Warrants) Instrument 2021/194* (the *Instrument*) under subsection 761EA(9) of the Corporations Act (the *Act*).
2. The Instrument grants an exemption for certain types of instalment warrants from the additional obligations imposed on margin lenders, in particular, in Division 4A of Part 7.8 of the Act. This will ensure that issuers of instalment warrants admitted to quotation on a financial market operated by an Australian domestic market licensee will be able to continue issuing the instalment warrants to investors, including investors buying in the time-critical secondary trading market, without having to comply with the additional obligations on margin lenders, that are ordinarily for traditional margin loans. The instalment warrants covered by the declaration will remain otherwise regulated as a financial product under Chapter 7 of the Act.

Assessment of human rights implications

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

Conclusion

4. The legislative 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*.