



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2022/647

This is the Explanatory Statement for ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2022/647 (the *instrument*).

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

Summary

1. This instrument is a product intervention order made under Part 7.9A of the *Corporations Act 2001* (the *Act*). The instrument prohibits short term credit providers, directors of short term credit providers and their associates from causing, authorising or providing credit to a retail client, and imposing or providing for certain fees, interest and charges paid or payable by a retail client, in relation to a class of financial products (as set out in paragraph 10 below) that ASIC is satisfied:
 - (a) is, and is likely to be, available for acquisition by issue to persons as retail clients; and
 - (b) has resulted in, and is likely to result in, significant detriment to retail clients.

Legislative authority

2. The instrument is made under subsection 1023D(3) of the Act, with the Minister's written approval under paragraph 1023M(b) of the Act.
3. Under subsection 1023D(3) of the Act, if ASIC is satisfied that a class of financial products:
 - (a) is, or is likely to be, available for acquisition by issue, or for regulated sale, to persons as retail clients (whether or not it also is, or is likely to be, available for acquisition by persons as wholesale clients); and
 - (b) has resulted in, or will or is likely to result in, significant detriment to retail clients;

ASIC may, by legislative instrument, order that a person must not engage in specified conduct in relation to the class of financial products, either entirely or except in accordance with conditions specified in the order.

4. ASIC is satisfied that the class of financial products to which the instrument applies:
 - (a) is, and is likely to be, available for acquisition by issue, to persons as retail clients; and
 - (b) has resulted in, and is likely to result in, significant detriment to retail clients.
5. A description of the significant detriment is set out in Attachment A, the Product Intervention Order Notice.
6. Under paragraph 1023M(b) of the Act, if a product intervention order ceases to be in force or is revoked, ASIC must not remake the order, or make an order in substantially the same terms, unless the Minister approves, in writing, the remaking or making of the order.
7. The instrument is made in substantially the same terms as *ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2019/917 (the 2019 instrument)*.
8. On 4 July 2022 ASIC received written approval from the Minister to make the instrument, being an instrument in substantially the same terms as the 2019 instrument.
9. The instrument is a disallowable legislative instrument.

Purpose of the instrument

10. The purpose of this instrument is to reduce the risk of significant detriment to retail clients resulting from a class of financial products that consists of short term credit facilities where the short term credit facility is provided:
 - (a) by the short term credit provider to a retail client; and
 - (b) in conjunction with a separate collateral contract between the retail client and an associate of the credit provider, pursuant to which the associate charges the retail client significant fees or other charges.

Operation of the instrument

Name

11. Section 1 of the instrument provides that the instrument is *ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2022/647*.

Commencement

12. Section 2 of the instrument provides that the instrument commences on a day that is the second day after the instrument is registered on the Federal Register of Legislation.

Duration of the product intervention order

13. Subsection 1023G(2) of the Act provides that a product intervention order remains in force for 18 months or any shorter period specified by the regulations or any shorter period specified in the order. No relevant shorter period has been specified in the regulations or order.
14. The instrument remains in force for 18 months. The duration of the instrument may be extended beyond 18 months but only in accordance with section 1023H of the Act (which requires a declaration, by legislative instrument, and written approval by the Minister).

Legislative instrument and primary legislation

15. The subject matter and policy implemented by this instrument is more appropriate for a legislative instrument rather than primary legislation because:
 - (a) the instrument utilises specific powers given to ASIC by Parliament that are intended to be used proactively to reduce the risk of significant detriment to retail clients resulting from a class of financial products. Commencing in April 2019, Part 7.9A of the Act sets out a framework and the procedural requirements for ASIC to make, amend, extend, remake and revoke product intervention orders;
 - (b) the instrument is a timely way of reducing the risk of significant detriment to retail clients resulting from a class of financial products that ASIC has identified. A product intervention order may remain in force for up to 18 months and can only be extended by ASIC with the Minister's written approval, following a report to the Minister from ASIC on whether the extension should be made;
 - (c) following public consultation and after ASIC assessed that the 2019 instrument operated efficiently and effectively to reduce the risk of significant detriment resulting from the class of financial products, ASIC considers it is appropriate for the instrument to be made in substantially the same terms as the 2019 instrument;
 - (d) the Minister has considered and approved the making of the instrument in substantially the same terms as the 2019 instrument; and
 - (e) the product intervention powers in Part 7.9A of the Act allow ASIC to amend a product intervention order, should the need arise, to respond in a flexible and timely way to changes to product features, issuance and sales practices, and significant detriment to retail clients.

Authority

16. Section 3 of the instrument provides that the instrument is made under subsection 1023D(3) of the Act.

Interpretation

17. The instrument defines the following key terms:

the Act

associate

collateral contract

contract

credit fees and charges

interest charges

National Credit Code

short term credit facility

short term credit provider

Application of the conditional prohibitions

18. The instrument prohibits short term credit providers and their directors, and associates of the short term credit providers and their directors, from causing or authorising prohibited conduct.
19. The condition in section 5 of the instrument prohibits the amount of credit fees and charges that may be imposed or provided for under the short term credit facility and the fees and charges (excluding interest charges) that may be imposed or provided for under a collateral contract (or a contract, arrangement or understanding belonging to a series or combination that constitutes the short term credit facility) exceeding the maximum amount of credit fees and charges permitted under subsection 6(1) of the National Credit Code (the ***Code***).
20. The condition in section 6 of the instrument prohibits the amount of interest charges that may be imposed or provided for under the short term credit facility and the amount of interest charges that may be imposed or provided for under a collateral contract (or a contract, arrangement or understanding belonging to a series or combination that constitutes the short term credit facility) exceeding the maximum amount of interest charges permitted under subsection 6(1) of the Code.
21. “Associate” is defined by reference to sections 11 and 15 of the Act. This will ensure that the coverage is broad and will extend to a related body corporate as well as a person who is acting in concert with the primary person, or a person

who is or proposes to become associated, whether formally or informally, in any other way in respect of the provision of short term credit. The exclusions in section 16 of the Act do not apply. The purpose of the broad coverage is to ensure that avoidance opportunities through phoenixing are minimised.

22. The instrument relates to short term credit facilities and collateral contracts between a retail client and the short term credit provider and/or associate, where the fees, charges and interest are paid or payable by the retail client. If the retail client is not a party to a particular contract (for example a contract between a short term credit provider and a third party) the contract will not be considered a short term credit facility or collateral contract for the purpose of the instrument.
23. The instrument does not prohibit persons from providing short term credit facilities relying on the exemption in subsection 6(1) of the Code, rather it simply limits the total fees, charges and interest that can be charged under the short term credit facility and collateral contract to not exceed the limits prescribed in subsection 6(1) of the Code. Where a short term credit provider does not purport to rely on subsection 6(1) of the Code in relation to a short term credit facility, the prohibitions contained in subsections 5(1)–(4) of the instrument do not apply to the facility.
24. The instrument only applies in relation to short term credit facilities entered into on or after the commencement of the instrument.

Consultation

25. ASIC has conducted consultation in accordance with section 1023F of the Act, as section 17 of the *Legislation Act 2003* does not apply.
26. On 9 December 2021 ASIC published Consultation Paper 355: *Product intervention orders – Short term credit and continuing credit contracts (CP 355)* proposing to make the short term credit product intervention order (in substantially the same terms as the 2019 instrument) and the continuing credit contracts product intervention order.
27. In response to CP 355 ASIC received nine submissions.
28. The submissions to CP 355 were taken into account when making the instrument. The submissions are publicly available on ASIC’s website, excluding confidential submissions.

Statement of Compatibility with Human Rights

29. 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 Attachment B.

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 (Product Intervention Order—Short Term Credit) Instrument 2022/647.

Overview

1. The instrument is a product intervention order made under Part 7.9A of the *Corporations Act 2001*, which prohibits specified conduct in relation to the provision of short term credit except in accordance with certain conditions.
2. The purpose of this instrument is to reduce the risk of significant detriment to retail clients resulting from a class of financial products that consists of short term credit facilities where the short term credit facility is provided:
 - (a) by the short term credit provider to a retail client; and
 - (b) in conjunction with a separate collateral contract between the retail client and an associate of the credit provider, pursuant to which the associate charges the retail client significant fees or other charges.

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*.