
EXPLANATORY STATEMENT for
ASIC Corporations (Factoring Arrangements) Instrument 2017/794

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes the ASIC Corporations (Factoring Arrangements) Instrument 2017/794 (the Instrument) under paragraphs 926A(2)(a), 992B(1)(a) and 1020F(1)(a) of the *Corporations Act 2001* (the Act).

Paragraph 926A(2)(a) of the Act provides that ASIC may exempt a person or a financial product or class of persons or financial products from all or specified provisions of Part 7.6 of the Act (other than Divisions 4 and 8).

Paragraph 992B(1)(a) of the Act provides that ASIC may exempt a person or a financial product or class of persons or financial products from all or specified provisions of Part 7.8 of the Act.

Paragraph 1020F(1)(a) of the Act provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.9 of the Act.

1. Background

Factoring involves the sale of the accounts receivable of a business to a factor company. By selling debts (represented by invoices for future payment) to a factor company, the business generates immediate cash flow. The factor company takes title to the debts and collects them when they are due. The debts are purchased at a discount to compensate the factor company for the risk and effort involved in providing the service.

Some factoring arrangements may technically be derivatives under s761D of the Corporations Act. This is because factor companies may have an obligation to pay their clients amounts at some future date, under the factoring arrangement, where the amount of the payment is determined by reference to the value of the relevant debts. The number and amount of the debts is not known at the time the factoring arrangement is entered into.

Generally, persons providing financial services in relation to derivatives must:

- (a) hold an AFS licence and comply with general licensee obligations under Pt 7.6 of the Corporations Act;
- (b) comply with disclosure requirements in Pt 7.7 of the Corporations Act, including the requirements to give a Financial Services Guide and Statement of Advice to retail clients;

(c) comply with conduct requirements in Pt 7.8 of the Corporations Act, specifically s992A relating to the hawking of financial products; and

(d) comply with the disclosure requirements in Pt 7.9 of the Corporations Act, including the requirements to prepare and issue a Product Disclosure Statement, to confirm transactions (s1017F) and to provide ongoing disclosure of material or significant changes (s1017B).

We considered that these requirements were not intended to apply to factoring arrangements. As a result, we made *Class Order [CO 04/239] Factoring arrangements: licensing, hawking and disclosure relief* ([CO 04/239]), which exempts persons providing, or advising on, debt factoring arrangements that are derivatives from the requirement to hold an AFS licence, and from the product disclosure and hawking provisions of Chapter 7 of the Corporations Act.

The exemption is conditional on persons maintaining internal dispute resolution processes, which minimise the risk of consumer detriment by ensuring that consumers have a mechanism to resolve any disputes arising from the financial services they receive in relation to factoring arrangements.

The exemption is also conditional on persons providing retail clients with a written copy of the terms and conditions of the factoring arrangement. This minimises the risk of consumer detriment arising from both the factoring company and the seller of the debt no longer having to comply with financial services disclosure requirements in Pt 7.7 of the Corporations Act.

Under the *Legislation Act 2003*, [CO 04/239] was due to sunset on 1 October 2017.

2. Purpose of the instrument

The ASIC Corporations (Factoring Arrangements) Instrument 2017/794 remakes [CO 04/239] to preserve its effect beyond 1 October 2017.

We have reached the view that [CO 04/239] is operating effectively and efficiently, and continues to form a useful part of the legislative framework.

3. Operation of the instrument

Section 5 exempts an eligible person providing certain financial services in relation to derivatives that are factoring arrangements from the requirement to hold an Australian financial services licence, the prohibition on hawking certain financial products and provisions relating to financial product disclosure. Eligible person is defined to include a person who sells a debt obligation under the terms of a factoring arrangement (an 'eligible seller'), a purchaser of debt obligations under the terms of a factoring arrangement (e.g. a factoring company) as well as other persons providing advice on, or dealing in a factoring arrangement (e.g. a person issuing a derivative).

Section 6 provides that, unless the eligible person is an eligible seller, the exemption is only available where the eligible person provides a retail client with a written copy of the factoring

arrangement and establishes and maintains an internal dispute resolution system. Since [CO 04/239] was made, the Australian Standard on complaints handling has been updated. The Instrument incorporates the updated Standard.

4. Documents incorporated by reference

Clause 6 refers to Australian Standard AS ISO 10002-2006 *Customer satisfaction – Guidelines for complaints handling in organizations (ISO 10002:2004 MOD)* which was developed by Standards Australia and is published by SAI Global Limited.

5. Consultation

ASIC consulted on its proposal to remake [CO 04/239] in Consultation Paper 286 *Remaking ASIC class orders on mortgage offset accounts and factoring arrangements*. The consultation period closed on 6 July 2017. No submissions were received.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

ASIC Corporations (Factoring Arrangements) Instrument 2017/794

ASIC Corporations (Factoring Arrangements) Instrument 2017/794 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*.

Overview

ASIC Corporations (Factoring Arrangements) Instrument 2017/794 provides relief to eligible persons from licensing, disclosure and hawking provisions in relation to factoring arrangements that are derivatives.

Human rights implications

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

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

Australian Securities and Investments Commission