
EXPLANATORY STATEMENT for
ASIC Corporations (Financial Requirements for CSF Intermediaries)
Instrument 2017/339

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes *ASIC Corporations (Financial Requirements for CSF Intermediaries) Instrument 2017/339* (**the instrument**) under paragraph 926A(2)(c) of the *Corporations Act 2001* (the Act). Paragraph 926A(2)(c) of the Act provides that ASIC may declare that Part 7.6 (other than Divisions 4 and 8) applies in relation to a person or financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.

1. Background

On 28 March 2017, Parliament enacted the *Corporations Amendment (Crowd-sourced Funding) Act 2017* (the CSF Act), which amends the *Corporations Act 2001* (the Act), and made minor amendments to the *Australian Securities and Investments Commission Act 2001* (ASIC Act), to provide a framework for crowd-sourced funding (CSF) in Australia.

From 29 September 2017, the CSF regime will come into effect. The CSF regime facilitates a new form of fundraising that allows a large number of individuals to make small equity investments in a company. To ensure investor protection, Parliament envisaged that public companies seeking to raise funds through CSF will need to do so through a platform operated by an intermediary (the CSF intermediary), who would be required to hold an Australian Financial Services (AFS) licence with authorisation to provide the new financial service, namely the crowd-funding service.

The obligations of an AFS licensee require the licensee to have adequate resources (including financial resources) to provide the financial services covered by the AFS licence and to carry out supervisory arrangements. Under Part 7.6 of the Act, CSF intermediaries must meet requirements relating to adequate financial resources.

2. Purpose of the instrument

The purpose of the instrument is to modify Part 7.6 of the Act, specifically to provide for financial resource requirements specific to AFS licensees providing a crowd-funding service.

3. Operation of the instrument

Section 5 of the instrument notionally inserts a new section 912AH of the Act that applies to CSF intermediaries, and requires those licensees to comply with provisions in the instrument as part of satisfying the obligation in paragraph 912A(1)(d) of the Act to have adequate financial resources.

Commencement

Section 2 of the instrument provides that the instrument commences on the later of:

- (a) the day after it is registered on the Federal Register of Legislation; and
- (b) the date of commencement of Schedule 1 to the *Corporations Amendment (Crowd-sourced Funding) Act 2017*, being 29 September 2017.

Requirements

The financial resource requirements that apply to CSF intermediaries under the instrument are contained in section 912AH, as inserted by section 5 of the instrument.

Application

Subsection 912AH(1) provides that the instrument applies to an AFS licensee that is a CSF intermediary, except where the licensee also falls within one of the categories in s912AH(1)(b), in which case they are subject to other requirements.

Cash needs requirements

Subsection 912AH(2) requires a CSF intermediary to prepare a cash flow projection covering at the least the next 12 months (or, on or before 30 June 2020, 3 months), based on what is likely to happen over this period. The CSF intermediary must also:

- (a) have the projection approved in writing at least quarterly as satisfying the requirements of s912AH(2)(a) (see s912AH(2)(b));
- (b) document the calculations and assumptions used in preparing the projection, and describe in writing why the assumptions are appropriate (see s912AH(2)(c));
- (c) update the projection if:
 - (i) it ceases to cover at least the next 12 months (or, on or before 30 June 2020, 3 months); or
 - (ii) there is reason to suspect that an update projection would differ materially from the current projection or show that the licensee was not

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- meeting the requirements in subparagraphs 912AH(2)(e)(i) or (e)(ii) (see s912AH(2)(d)); and
- (d) document whether, based on the projection, the CSF intermediary will:
- (i) have access when needed to enough financial resources to meet its liabilities over the projected period of at least the next 12 months (or, on or before 30 June 2020, 3 months); and
 - (ii) will hold at all times during the period to which the projection relates, the amount of cash that the licensee is required to hold under s912AH(2)(f) (see below);

Under s912AH(2)(f), the CSF intermediary must also hold in cash an amount of at least 5% of the greater of:

- (a) the cash outflow for the projected period of at least the next 12 months (or, on or before 30 June 2020, 3 months), adjusted pro rata to produce a cash outflow for a 12 month period if the projected period is not 12 months; and
- (b) the licensee's actual cash outflow for the most recent financial year of at least 360 days for which the licensee has prepared a profit and loss statement.

Audit opinion on financial requirements

Subsection 912AH(3) sets out the requirements for the contents of an opinion of a registered company auditor (audit opinion) covering the period during which the CSF intermediary was authorised to provide a crowd-funding service. The auditor is required to provide an audit opinion on a 'positive assurance' basis on the matters specified in paragraph 912AH(3)(a) and an opinion on a 'negative assurance' basis on the matters specified in paragraph 912AH(3)(b).

4. References to extrinsic documents

The requirements imposed by the instrument do not apply to a **clearing participant** or a **market participant**: notional subparagraphs 912AH(1)(b)(ii) and (iii) of the Act. These terms are defined in notional subsection 912AH(7). A person falls within the definitions if (among other matters) the person reasonably believes that the person complies with (as the case may be):

- (a) the operating rules of ASX Clear Pty Limited that impose financial requirements, taking into account any waiver of those requirements by ASX Clear Pty Limited; or
- (b) the rules of the *ASIC Market Integrity Rules (ASX Market-Capital) 2014* or the *ASIC Market Integrity Rules (Chi-X Australia Market-Capital) 2014* (together **the ASIC rules**) that impose financial requirements, taking into account any waiver by ASIC.

The operating rules of ASX Clear Pty Limited and waivers are available at www.asx.com.au/regulation/rules/asx-clear-operating-rules.htm. The ASIC rules and

class waivers are available on the Federal Register of Legislation. Notice of individual waivers is given on ASIC's website www.asic.gov.au.

The definitions refer to the rules and waivers as in force from time to time. However, the definitions do not apply, adopt or incorporate the content of the rules and waivers, but instead depend on whether a person has a reasonable belief as to their compliance.

5. Consultation

On 22 June 2017, ASIC released Consultation Paper 289 *Crowd-sourced funding: Guide for intermediaries* (CP 289) seeking feedback on the instrument. The public consultation period closed on 3 August 2017.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Financial Requirements for CSF Intermediaries) Instrument 2017/XX

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*.

Overview

The instrument sets out the financial resource requirements for Australian Financial Service licensees providing a crowd-funding service, by modifying Part 7.6 of the *Corporation Act 2001*.

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.