



ASIC

Australian Securities & Investments Commission

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

I, Anthony Graham, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Date 19 September 2017

Anthony Graham

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Part 1—Preliminary

1 Name of legislative instrument

This is the *ASIC Corporations (Financial Requirements for CSF Intermediaries) Instrument 2017/339*.

2 Commencement

This 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*.

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

3 Authority

This instrument is made under paragraph 926A(2)(c) of the *Corporations Act 2001*.

4 Definitions

In this instrument:

Act means the *Corporations Act 2001*.

Part 2—Declaration

5 Adequate financial resources for CSF intermediaries

Part 7.6 (other than Divisions 4 and 8) of the Act applies in relation to a financial services licensee as if that Part were modified or varied by, in the appropriate position in Division 3 of that Part, inserting:

“912AH Adequate financial resources for CSF intermediaries

- (1) This section applies to a financial services licensee that:
- (a) is a CSF intermediary ; and
 - (b) is not:
 - (i) a body regulated by APRA that is not required to comply with paragraph 912A(1)(d); or
 - (ii) a market participant; or
 - (iii) a clearing participant; or
 - (iv) a financial services licensee that holds an Australian financial services licence authorising it to:
 - (A) operate a registered scheme as a responsible entity; or
 - (B) operate an IDPS (as defined in ASIC Class Order [CO 13/763]); or
 - (C) provide a custodial or depository service, unless subsection 912AC(5) (as notionally inserted by ASIC Class Order [CO 13/761]) applies to it; or
 - (v) a licensee to which section 912AB (as notionally inserted by ASIC Class Order [CO 12/752]) applies.

Cash needs requirement

- (2) The licensee must:
- (a) prepare a projection of the licensee’s cash flows over at least the next 12 months or, on or before 30 June 2020, 3 months, based on the licensee’s reasonable estimate of what is likely to happen over this period; and

- (b) have the projection approved in writing at least quarterly by the following persons as satisfying the requirements of paragraph (a):
 - (i) if the licensee is a body corporate—the directors of the licensee; and
 - (ii) if the licensee is a partnership or the trustees of a trust—the partners of the licensee or the trustees; and
 - (iii) if the licensee is a natural person—the person; and
- (c) document the calculations and assumptions used in preparing the projection, and describe in writing why the assumptions are appropriate; and
- (d) update the projection of the licensee’s cash flows if:
 - (i) the projection 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 updated projection would differ materially from the current projection or show that the licensee was not meeting the requirements in subparagraphs (e)(i) and (e)(ii); and
- (e) document whether, based on the projection of the licensee’s cash flows, the licensee:
 - (i) will 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 paragraph (f);
- (f) hold in cash an amount of at least 5% of the greater of:
 - (i) 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

Note: For example, if the cash outflow for a projected period of 3 months were \$100,000, the cash outflow for a 12 month period would be \$400,000.

- (ii) 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

- (3) The licensee must lodge with ASIC a report (the **audit opinion**) by a registered company auditor addressed to the licensee and ASIC for each financial year of the licensee and any other period that ASIC directs in writing that states whether, during any part of the period for which the licensee was authorised to provide a crowd-funding service:

- (a) in the auditor’s opinion, the licensee:

- (i) complied with paragraphs (2)(b) and (2)(f) and other financial requirements in conditions on its licence; and
- (ii) had at all times a projection that purports to, and appears on its face to, comply with paragraph (2)(a); and
- (iii) correctly calculated the projection in paragraph (2)(a) on the basis of the assumptions the licensee used for the projection; and

- (b) following an examination of the calculations, assumptions and description prepared under paragraph (2)(c) and relied on by the licensee in complying with paragraph (2)(a), the projections prepared under paragraph (2)(a) and the document prepared under paragraph (2)(e), the auditor has no reason to believe that:

- (i) the licensee did not have adequate systems for managing the risk of having insufficient financial resources to comply with paragraph (2)(f) and other financial requirements in conditions on its licence; or

Note: Paragraph 912A(1)(h) requires a licensee (other than a body regulated by APRA that is not the responsible entity of a registered scheme) to have adequate risk management systems.

- (ii) the licensee failed to comply with paragraph (2)(c); or
- (iii) the licensee will not 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;
or

- (iv) the licensee will not hold at all times during the period to which the projection relates in cash, an amount equal to or greater than the current amount the licensee is required to hold in cash under paragraph (2)(f); or
 - (v) the assumptions the licensee adopted for its projection in paragraph 2(a) were unreasonable.
- (4) The audit opinion must be lodged:
- (a) for each financial year of the licensee—with the balance sheet that the licensee is required to lodge under section 989B; and
 - (b) for any period of time that ASIC directs—by no later than the date ASIC directs in writing the audit opinion to be lodged.
- (5) A licensee to whom subsection 912AC(5) (as notionally inserted by ASIC Class Order [CO 13/761]) applies is taken to comply with section 912AC (as notionally inserted by ASIC Class Order [CO 13/761]) while the licensee complies with this section.
- (6) In paragraph (2)(f) and subparagraphs (2)(e)(ii) and (3)(b)(iv), **cash** includes the following:
- (a) current assets valued at the amount of money for which they can be expected to be exchanged within 5 business days;
 - (b) a commitment to provide money from an Australian ADI or an entity approved by ASIC in writing for the purpose of this paragraph that can be drawn down within 5 business days and when paid is not repayable for at least a month;

held by the licensee and where held as trustee of a trust, includes such an amount if the licensee has no reason to believe that the amount will not be available to meet all of the projected cash outflows of the licensee.

- (7) In this section:

cash flow means, in relation to a licensee:

- (a) the licensee's own cash flow; and

- (b) if substantially all of the financial services business carried on by the licensee is carried on as trustee of a trust, the cash flow of the trust;

but does not include any cash flow of any other trust.

Note: The definition of *cash* in subsection (6) does not apply for the purposes of this definition.

clearing participant means a participant (as defined in section 761A in relation to a clearing and settlement facility) in the licensed CS facility operated by ASX Clear Pty Limited (***ASX Clear***) that reasonably believes it complies with the operating rules of ASX Clear that impose financial requirements, taking into account any waiver of those requirements by ASX Clear (each as in force from time to time).

market participant means a participant (as defined in section 761A in relation to a financial market):

- (a) in the licensed financial market operated by ASX Limited that reasonably believes it complies with the rules of the *ASIC Market Integrity Rules (ASX Market-Capital) 2014* that impose financial requirements, taking into account any waiver by ASIC (each as in force from time to time); or
- (b) in the licensed financial market operated by Chi-X Australia Pty Limited that reasonably believes it complies with the rules of the *ASIC Market Integrity Rules (Chi-X Australia Market-Capital) 2014* that impose financial requirements, taking into account any waiver by ASIC (each as in force from time to time).”.