



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Credit (Notice Requirements for Unlicensed Carried Over Instrument Lenders) Instrument 2020/834

ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835

ASIC Credit (Repeal) Instrument 2020/836

This Explanatory Statement covers the following three legislative instruments:

- (a) *ASIC Credit (Notice Requirements for Unlicensed Carried Over Instrument Lenders) Instrument 2020/834* (the **Unlicensed COI Lenders Instrument**);
- (b) *ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835* (the **Electronic Precontractual Disclosure Instrument**); and
- (c) *ASIC Credit (Repeal) Instrument 2020/836* (the **Repeal Instrument**).

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

Glossary

The following definitions of primary and delegated legislation are used:

Credit Act means the *National Consumer Credit Protection Act 2009*.

Credit Code means the National Credit Code set out in Schedule 1 to the Credit Act.

Credit Regulations means the *National Consumer Credit Protection Regulations 2010*.

Transitional Credit Act means the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*.

Transitional Credit Regulations means the *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010*.

Summary

1. The Unlicensed COI Lenders Instrument ensures carried over instrument lenders must continue to notify ASIC if they become unlicensed. This allows ASIC to maintain an up-to-date register of unlicensed COI lenders as required by the Credit Act, the Credit Regulations and the Transitional Credit Act.
2. The Electronic Precontractual Disclosure Instrument allows credit licensees and representatives to give pre-contractual disclosure to consumers in the same electronic manner that applies to other credit disclosure documents.
3. The Repeal Instrument repeals ASIC Class Order [CO 10/381] and [CO 10/1230], which are class orders that currently implement the policy underlying the Unlicensed COI Lenders Instrument and the Electronic Precontractual Disclosure Instrument, but which will soon expire. The class orders will be repealed before their expiry. The two legislative instruments will take effect on the same day as the repeal of the class orders.

Purpose

Unlicensed COI Lenders Instrument

4. Carried over instruments (*COIs*) are essentially credit contracts or consumer leases that existed at the time of the commencement of the Credit Act. Lenders or lessors with such existing loan or lease portfolios were not required to obtain credit licences unless they entered into new loans or new leases on or after the commencement of the Credit Act. However, such lenders or lessors were required to notify ASIC of their unlicensed status.
5. The purpose of the Unlicensed COI Lenders Instrument is to preserve the effect of ASIC Class Order [CO 10/381] which is due to sunset on 1 October 2020. The class order fixed the problematic application of item 39A of Schedule 2 to the Transitional Credit Act as in force on 24 May 2010.
6. Item 39A of Schedule 2 to the Transitional Credit Act was repealed as a consequence of the repeal of the Transitional Credit Regulations. However, the notification obligation is still required to enable ASIC to comply with its obligation to maintain an up-to-date register of unlicensed COI lenders under section 213 of the Credit Act and regulation 30A of the Credit Regulations.
7. Item 39A imposed an obligation on an unlicensed COI lender to give the following notifications to ASIC:
 - (a) notification of their intention to be an unlicensed COI lender in the period starting 24 May 2010 and ending 30 June 2010; and
 - (b) notification on becoming an unlicensed COI lender on or after 1 July (for example, if a person became a licensee after 1 July 2010 but subsequently ceased to be a licensee).

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8. “Unlicensed carried over instrument lender” has the meaning given by section 5A of the Credit Act as modified by item 2.4 of Schedule 2 to the Credit Regulations, being a credit provider or lessor who:
 - (a) was a credit provider or lessor in relation to a carried over instrument (i.e. an existing credit contract or consumer lease) immediately before 1 July 2010; and
 - (b) on and after 1 July 2010 has been the credit provider or lessor in relation to the carried over instrument on a continuous basis; and
 - (c) is not any of the following persons:
 - (i) a licensee;
 - (ii) a registered person;
 - (iii) a person exempt from the requirement to hold a licence under the Credit Act or to be a registered person under the Transitional Credit Act.
 9. Paragraph (b) of the definition of “unlicensed carried over instrument lender” had the effect that no person could fall within the definition until on or after 1 July 2010. As a consequence, item 39A to the Transitional Credit Act had no operation to the extent that it purported to impose an obligation before 1 July 2010 on a person as an “unlicensed carried over instrument lender”.
 10. Item 39A also did not impose an obligation on a person to notify ASIC of the person becoming an unlicensed COI lender on or after 1 July 2010.

Electronic Precontractual Disclosure Instrument

11. The purpose of the Electronic Precontractual Disclosure Instrument is to preserve the effect of ASIC Class Order [CO 10/1230] which is due to sunset on 1 April 2021. The class order fixed the problematic interaction between regulations 26 and 28L of the Credit Regulations.
12. Regulation 28L of the Credit Regulations permits licensees and credit representatives to give “disclosure documents” electronically to consumers if the conditions in the regulation are met. “Disclosure document” is defined in regulation 26 to include credit guides, proposal documents and quotes required to be given under Chapter 3 of the Credit Act and pre-contractual statements required to be given under section 16 of the Credit Code. Subregulation 28L(1) lists the provisions of the Credit Act under which the regulation is purportedly made. The list includes section 18 of the Credit Code (credit provider’s contract document) but does not refer to pre-contractual disclosure.
13. The interaction between regulations 26 and 28L is problematic because:
 - (a) regulation 28L (which sets out a manner of electronic disclosure) has no effect in relation to section 16 (pre-contractual disclosure) of the

Credit Code because, unlike the other sections of the Credit Act mentioned in regulation 28L which contemplate regulations determining the manner in which the document is to be given (e.g. subsections 113(4) and 114(3) of the Credit Act), section 16 of the Credit Code does not contemplate such a scenario;

- (b) as a consequence, regulation 28L had no operation in relation to pre-contractual disclosure under the Credit Code, and inadvertently referred to the credit provider's contract document, to which regulation 28L does not apply.
14. ASIC Class Order [CO 10/1230] was also required to fix a drafting error in regulation 28N of the Credit Regulations. This regulation ceased to have effect on 1 October 2011 and, as such, the Electronic Precontractual Disclosure Instrument does not address regulation 28N.

Consultation

15. ASIC released *Consultation Paper 331: Remaking ASIC class orders on unlicensed COI lenders and credit disclosure obligations (CP 331)* as a part of its review of ASIC Class Orders [CO 10/381] and [CO 10/1230]. ASIC did not receive any submissions in response to CP 331.

Operation of the instruments

Unlicensed COI Lenders Instrument

16. The Unlicensed COI Lenders Instrument substantially reproduces the effect of ASIC Class Order [CO 10/381], except for consequential changes that are no longer required because of the expiry of the transitional period.
17. The declaration has the effect that a person (*lender*) who is a credit provider or lessor in relation to a carried over instrument immediately before 1 July 2010 must lodge a notice with ASIC containing certain information where the lender:
- (a) is a credit provider or lessor in relation to the carried over instrument at any time after 30 June 2010; and
 - (b) is not a licensee or a person exempt from the requirement to hold a licence under the Credit Act.
18. The requirement to lodge the notice with ASIC arises as soon as paragraph (a) and (b) both apply. The information required to be contained in the notice must be current as at the date the notice is lodged. A lender may satisfy the requirement to lodge the notice by the required time by lodging the notice with ASIC up to six weeks before it must otherwise be lodged. A failure to lodge the notice will be an offence.
19. The current effect of the declaration is that a lender in relation to a COI from 1 July 2010 who is a credit licensee, but subsequently ceases to be a licensee, is obliged to lodge the notice with ASIC on the day that the lender ceases to be a

licensee. However, if the lender had already lodged the notice with ASIC up to six weeks before the obligation arises the lender will have satisfied the obligation.

20. The declaration substantially reproduces the effect that item 39A of Schedule 2 to the Transitional Credit Act (as notionally inserted by regulation 16E of the Transitional Credit Regulations as in force on 24 May 2010) would have had but for some drafting anomalies. The declaration reproduces the civil and criminal offences that item 39A purported to create for a failure to comply with the obligation to give notice.
21. The instrument commences on the day after it is registered on the Federal Register of Legislation. The duration of the instrument is the maximum of 10 years as permitted by the *Legislation Act 2003*. A shorter duration is not appropriate because the original source of the problem was a regulation within the Transitional Credit Regulations, which are no longer in force.

Electronic Precontractual Disclosure Instrument

22. The declaration and exemption in the Electronic Precontractual Disclosure Instrument substantially reproduces the effect of ASIC Class Order [CO 10/1230]. The paragraphs in the declaration in the class order that refer to regulation 28N of the Credit Regulations have not been reproduced because they are no longer required.
23. The effect of the declaration and exemption is that a credit provider may give pre-contractual disclosure in a manner consistent with their other disclosure obligations under regulation 28L of the Credit Regulations.
24. If a credit provider chooses not to rely on the exemption in the Electronic Precontractual Disclosure Instrument in relation to pre-contractual disclosure under section 16 of the Credit Code, it may instead rely on the *Electronic Transactions Act 1999* and the *Electronic Transactions Regulations 2000* in accordance with section 187 of the Credit Code.
25. Potential doubt about the operation which regulation 28L has of its own force is removed by removing the misleading reference to the credit provider's contract in paragraph 28L(1)(m) and to pre-contractual statements in paragraph 26(e) of the definition of "disclosure document" in the Credit Regulations.
26. The instrument commences on the day after it is registered on the Federal Register of Legislation. The duration of the instrument is 3 years. This duration is considered appropriate to enable amendments to be made to regulations 26 and 28L of the Credit Regulations.

Repeal Instrument

27. The Repeal Instrument repeals ASIC Class Orders [CO 10/381] and [CO 10/1230].

Legislative authority

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28. The Unlicensed COI Lenders Instrument is made under item 41 of Schedule 2 to the Transitional Credit Act, which provides that ASIC may declare that provisions contained in Part 3 of Schedule 2 to that Act apply in relation to a class of persons as if the provisions were omitted, modified or varied in a specified way.
 29. The Electronic Precontractual Disclosure Instrument is made under paragraph 163(3)(d) of the Credit Act and subsection 203A(3) of the Credit Code. Paragraph 163(3)(d) of the Credit Act provides that ASIC may declare the provisions to which Part 3-7 of that Act applies (including instruments made for the purposes of Chapter 3 of that Act), apply in relation to a class of persons as if the provisions were omitted, modified or varied in a specified way. Subsections 203A(3) and (4) of the Credit Code provide that ASIC may exempt a class of persons from all or specified provisions of the Code, subject to specified conditions.
 30. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.
 31. The Repeal Instrument is made under item 41 of Schedule 2 to the Transitional Credit Act, paragraph 163(3)(d) of the Credit Act and subsection 203A(3) of the Credit Code. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make an instrument, the power is to be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal any such instrument.

Legislative instrument and primary legislation

32. The subject matter and policy implemented by the Unlicensed COI Lenders Instrument is considered more appropriate for a legislative instrument rather than primary legislation. The problematic item 39A of Schedule 2 to the Transitional Credit Act, which is remedied by the Unlicensed COI Lenders Instrument, was itself inserted by a legislative instrument, namely regulation 16E of the Transitional Credit Regulations.
33. The subject matter and policy implemented by the Electronic Precontractual Disclosure Instrument is also considered more appropriate for a legislative instrument rather than primary legislation. The problematic regulations 26 and 28L of the Credit Regulations, which is remedied by the Electronic Precontractual Disclosure Instrument, are legislative instruments themselves.
34. All three legislative instruments are disallowable legislative instruments.

Statement of Compatibility with Human Rights

35. 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 Credit (Notice Requirements for Unlicensed Carried Over Instrument Lenders) Instrument 2020/834

ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835

ASIC Credit (Repeal) Instrument 2020/836

Overview

1. The *ASIC Credit (Notice Requirements for Unlicensed Carried Over Instrument Lenders) Instrument 2020/834* fixes technical defects in the transitional operation of the consumer credit legislation, which requires unlicensed carried over instrument lenders to lodge a form with ASIC containing certain specified information to enable ASIC to maintain an up-to-date register of unlicensed carried over instrument lenders.
2. The *ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835* allows credit providers to give pre-contractual disclosure to consumers in the same electronic manner that applies to other credit disclosure documents.
3. The *ASIC Credit (Repeal) Instrument 2020/836* repeals two ASIC class orders which currently implement the policy underlying the two legislative instruments mentioned in paragraphs 1 and 2 above, but which will soon expire. The class orders will be repealed before their expiry. The two legislative instruments will take effect on the same day as the repeal of the class orders.

Assessment of human rights implications

4. These instruments do not engage any of the applicable rights or freedoms.

Conclusion

5. These instruments are 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*.