Explanatory Statement

ASIC Credit (Mandatory Credit Reporting) Instrument 2021/541

This is the Explanatory Statement for the *ASIC Credit (Mandatory Credit Reporting) Instrument 2021/541* (***legislative instrument***).

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

Summary

1. The legislative instrument determines certain kinds of account as not being eligible credit accounts for the purposes of section 133CO of the *National Consumer Credit Protection Act 2009* (the ***Credit Act***). This means that eligible licensees will not need to supply mandatory credit information for these accounts to credit reporting bodies.

Purpose of the instrument

2. By making this legislative instrument, ASIC has determined that five kinds of accounts are not eligible credit accounts for which an eligible licensee must supply mandatory credit information to credit reporting bodies.

3. Section 133CO of the Credit Act sets out the definition of an eligible credit account. Subsection 133CO(2) of the Credit Act provides that ASIC may, by legislative instrument, determine one or more kinds of account which are not eligible credit accounts.

4. In determining these exemptions, ASIC has considered the Explanatory Memorandum to the National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Bill 2019 (the ***2019 Bill***) which sets out the Government's expectations for how ASIC would use this power. The Explanatory Memorandum describes the Government's expectations with reference to specific examples of accounts. These are accounts for which credit information does not need to be supplied under the *Principles of Reciprocity and Data Exchange*. These are the kinds of accounts that this legislative instrument determines. The accounts are:

    a. ***Margin lending facilities***

    Also known in the sector as margin loans, these are defined in section 761A of the *Corporations Act 2001*. Under a margin lending facility, an investor is able to borrow to invest in shares or a managed fund and the shares or managed fund is used as security.

Margin loans are excluded as they do not lend themselves to regular monthly reporting. This is because transactions depend on the purchase and sale of shares making reporting on margin loans difficult and complicated.

b. ***Accounts without formal overdrafts***

Deposit accounts which provide credit or could provide credit without the consumer's consent are not eligible credit accounts. An example of this type of account would be a savings account where the provider allows the customer to withdraw more than is in the account for a short period of time.

It does not include a savings or transactions account where the customer was offered and accepted an overdraft facility on the account.

c. ***Accounts that are being 'run down'***

An account where the type of credit is no longer offered, the number of accounts is less than 10,000 and the total number of accounts is less than 3 percent of the total credit accounts held by the banking group of which the eligible licensee is a part.

d. ***Novated leases***

An account that provides a novated lease is characterised by the existence of a deed of novation between the employee, the employer and the credit provider.

A typical example of a novated lease is where the employee leases a vehicle from a finance company and the employer agrees with the financier to take on the employee's obligations under the lease. The employee's wages would be reduced for the duration of the lease to cover the repayments.

The determination continues to apply in circumstances where an account is created to give effect to a deed of novation and the novation ceases before the term of the lease ends.

e. ***Charge cards***

Charge card contracts are defined in subregulation 62(2) of the *National Consumer Credit Protection Regulations 2010* (the ***Credit Regulations***). The determination only applies to charge card contracts that are entered into by those credit providers specified in subregulation 62(1) of the Credit Regulations.

Under these contracts, debtors are not charged interest on the amount borrowed but instead are required to pay the balance on the charge card account in full when the statement is received. A late fee is payable if the debtor does not repay the amount of credit by the due date.

Regular repayments are not required for charge cards, making it difficult to report the regular repayment obligations of an individual.

Consultation

5. Treasury conducted extensive consultation with stakeholders (including ASIC, industry bodies and consumer advocates) as part of developing the *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021* (the Amending Act), which amended the Credit Act to introduce the mandatory comprehensive credit reporting regime and hardship information as a new category of information within credit reporting.

6. The exposure draft of the National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018 had proposed to enable regulations to prescribe accounts which are not eligible credit accounts. In 2018, Treasury consulted on the exposure draft of the National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Regulations 2018, which included a draft regulation that proposed to prescribe the kinds of account listed above as not being eligible credit accounts.

7. The Amending Act ultimately gave ASIC the power to determine one or more types of account which are not an eligible credit account. As noted above, the Explanatory Memorandum to the 2019 Bill included the five accounts determined in this instrument as examples of those which may be excluded.

8. ASIC has consulted with Treasury, the Office of the Australian Information Commissioner (the ***OAIC***), industry bodies, affected entities and consumer advocates about whether ASIC should determine that these five kinds of accounts should not be eligible credit accounts. Feedback received in response to consultation supported the proposed exemptions and was largely technical in nature.

Operation of the instrument

9. This legislative instrument relieves eligible licensees of the obligation to supply mandatory credit information to credit reporting bodies in relation to the types of accounts specified in the instrument.

10. The determination in this legislative instrument commences on the day after it is registered on the Federal Register of Legislation. The instrument is repealed five years after the date it commences.

<u>Legislative instrument and primary legislation</u>

11. 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 powers given by Parliament to ASIC that allow ASIC to modify or affect supply obligations under the mandatory comprehensive credit reporting regime to provide a tailored and flexible regulatory environment that is fit for purpose.

b. The matters contained in the instrument are appropriately used to deal with specific, technical and machinery issues and are designed to ensure that the application of primary legislation remains flexible to keep pace with future technological developments. As a consequence, if the matters in the instrument were to be inserted into the primary legislation, they would insert, into an already complex statutory framework, a set of exclusions that are highly specific in nature and may become redundant over time.

12. This instrument is repealed five years after it commences. A five-year duration is appropriate as it provides ASIC with the flexibility to respond to new and emerging products and offerings and sufficient certainty to industry regarding the operation of the mandatory comprehensive credit reporting regime. ASIC will review the instrument ahead of its repeal and consult on options for amending or remaking it as appropriate. As part of this consultation, ASIC will engage with Government to ensure determinations made for the purposes of section 133CO remain appropriate for delegated legislation.

Legislative authority

13. ASIC makes this legislative instrument under subsection 133CO(2) of the Credit Act. Under subsection 133CO(2), ASIC may, by legislative instrument, determine one or more kinds of account which are not eligible credit accounts.

14. The instrument is a disallowable legislative instrument.

Statement of Compatibility with Human Rights

15. 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.

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*.

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Overview

1. This legislative instrument determines certain kinds of accounts as not being eligible credit accounts for the purposes of section 133CO of the *National Consumer Credit Protection Act 2009*. This means that eligible licensees will not need to supply mandatory credit information for these accounts to credit reporting bodies.

Assessment of human rights implications

2. This instrument engages with the right to protection from arbitrary or unlawful interference with privacy under article 17 of the International Covenant on Civil and Political Rights (ICCPR) in a way that is protective of that right.

3. Article 17 of the ICCPR prohibits unlawful or arbitrary interference with a person's privacy, family, home or correspondence, nor to unlawful attacks on a person's honour and reputation. It also provides that everyone has the right to the protection of the law against such interference or attacks.

4. The right to privacy encompasses respect for informational privacy, including the right to respect for private information and private life, particularly the storing, use and sharing of personal and confidential information.

5. This instrument engages the right to privacy by reducing the types of consumer credit accounts that eligible licensees are required to supply mandatory credit information in relation to. Mandatory credit information is personal information about individual bank customers. By reducing the amount of credit information that is required to be supplied, this instrument engages with the right to privacy in a way that is protective of that right.

Conclusion

6. 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*.