

## Attachment 3 to CP 289: Draft instrument



**ASIC**

Australian Securities & Investments Commission

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# **ASIC Corporations (Financial Requirements for Crowd-Sourced Funding Intermediaries) Instrument 2017/XX**

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I, <insert name>, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Date 2017

[DRAFT ONLY—NOT FOR SIGNATURE]

<signature>

<insert name>

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## **Part 1—Preliminary**

### **1 Name of legislative instrument**

This is the *ASIC Corporations (Financial Requirements for Crowd-Sourced Funding Intermediaries) Instrument 2017/XX*.

### **2 Commencement**

This instrument commences on the day after it is registered on the Federal Register of Legislation.

Note: The register may be accessed at [www.legislation.gov.au](http://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 crowd-sourced funding intermediaries

Part 7.6 (other than Divisions 4 and 8) of the Act applies in relation to financial services licensees as if that Part were modified or varied by, after subsection 912AGA (as notionally inserted by ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968)), inserting:

#### **“Section 912AH Adequate financial resources for crowd-sourced funding intermediaries**

- (1) This section applies to a financial services licensee that:
  - (a) holds an Australian financial services licence that authorises it to provide a crowd-funding service; 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; 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
    - (vii) 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 based on the licensee’s

- reasonable estimate of what is likely to happen over this period; and
- (b) have the projection approved 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 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
    - (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 (i) and (ii) of paragraph (3)(e); 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 term of at least the next 12 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 (3)(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, adjusted to produce a 12-month average where the projected period is longer than 12 months; and
    - (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 term of at least the next 12 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:
  - (a) current assets valued at the amount of money for which they can be expected to be exchanged within 5 business days; or
  - (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 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.

**cash flow** means the licensee's own cash flow and of a trust where substantially all of the financial services business carried on by the licensee is carried on as trustee of the trust but does not include any cash flow of any other trust.

Note: The definition of cash 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 complies with the operating rules of ASX Clear that impose

financial requirements, taking into account any waiver of those requirements by ASX Clear.

**IDPS** has the same meaning as in ASIC Class Order [CO 13/763].

**market participant** means 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 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; or
- (b) in the licensed financial market operated by Chi-X Australia Pty Limited that 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.