

Attachment to CP 246: Draft instrument



ASIC

Australian Securities & Investments Commission

ASIC Corporations (Securitisation Special Purpose Vehicles) Instrument 2016/XX

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

Date 2016

<signature>

<insert name>

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Part 1—Preliminary

1 Name of legislative instrument

This instrument is the *ASIC Corporations (Securitisation Special Purpose Vehicles) Instrument 2016/XX*.

2 Commencement

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

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

3 Authority

This instrument is made under s926A(2)(a) of the Act.

4 Definitions

In this instrument:

Act means the *Corporations Act 2001*.

debt instrument means a chose in action that includes an undertaking by a person to repay as a debt money deposited with or lent to the person.

securitisation business means a business that consists of managing by way of a securitisation transaction some or all of the economic risk associated with assets, liabilities or investments (whether the body assumes the risk from another person or creates the risk itself).

securitisation entity means a body corporate that satisfies all of the following requirements:

- (a) it carries on a securitisation business;
- (b) it reasonably believes that it is an insolvency-remote special purpose entity according to criteria of an internationally recognised rating agency that are applicable to the entity's circumstances (regardless of whether the agency has determined that the body meets those criteria);
- (c) it raises all or substantially all of its funds by issuing securitisation products on terms that the funds raised would be applied in the securitisation business.

Note: Paragraphs (a) and (b) of this definition are based on paragraphs 820–39(3)(a) and (c) and subsection 820–39(4) of the *Income Tax Assessment Act 1997*. An explanation of the operation of those provisions is set out at paragraphs 1.8 to

1.12 of the Explanatory Memorandum to the Taxation Laws Amendment Bill
(No 5) 2003.

securitisation product means:

- (a) a debt instrument; or
- (b) an interest in a managed investment scheme.

Part 2—Exemption

5 Exemption from the requirement to hold an Australian financial services licence

Services covered by exemption

- (1) A securitisation entity does not have to comply with subsection 911A(1) of the Act to the extent it requires the securitisation entity to hold an Australian financial services licence for the provision of a financial service in the course of a securitisation business where any of the following apply:
 - (a) the service consists of issuing a securitisation product where all of the following apply:
 - (i) both of the following apply:
 - (A) the securitisation product relates to a securitisation transaction for managing some or all of the economic risk associated with assets held by the securitisation entity;
 - (B) each other securitisation product issued by the securitisation entity relates to that securitisation transaction or another securitisation transaction for managing some or all of the economic risk associated with assets held by the securitisation entity;
 - (ii) the issue is to a person who either:
 - (A) holds an Australian financial services licence; or
 - (B) is exempt from holding an Australian financial services licence under this instrument or ASIC Class Orders [CO 03/1099], [CO 03/1100], [CO 03/1101], [CO 03/1102], [CO 03/1103], [CO 04/829] or [CO 04/1313] or any exemption under paragraph 911A(2)(h) or (l) or subsection 926A(2) of the Act that includes reference to the exempted person complying with or reasonably believing that they comply with the regulatory requirements of a foreign jurisdiction;
 - (iii) at the time of issuing the product the securitisation entity has taken all reasonable steps to ensure that:
 - (A) the securitisation product; and
 - (B) any other securitisation product that has been issued by the securitisation entity since 11 January 2005,

are not subsequently acquired by a retail client;

- (b) the service consists only of dealing in derivatives or foreign exchange contracts (or both) and all of the following apply:
 - (i) the service does not involve the making of a market for derivatives or foreign exchange contracts;
 - (ii) the dealing is entered into for the purpose of managing a financial risk that arises in the ordinary course of a securitisation business;
 - (iii) the counterparty for the dealing is a wholesale client;
- (c) the service is providing a custodial or depository service in relation to financial products held by the securitisation entity as trustee for the holders of the securitisation products and both the following are satisfied:
 - (i) the securitisation entity has not issued any of the securitisation products to a retail client;
 - (ii) has from the later of 1 July 2005 and when the entity first issues a securitisation product, taken all reasonable steps to ensure that the securitisation products are not acquired by a retail client;
- (d) the service:
 - (i) is dealing on behalf of the holders of the securitisation products in financial products held by the securitisation entity as trustee for those holders of the securitisation products; and
 - (ii) is not dealing by issuing or acquiring derivatives or foreign exchange contracts; and
 - (iii) the securitisation entity has not issued any of the securitisation products to a retail client and has from the later of 1 July 2005 and when the entity first issues a securitisation product, taken all reasonable steps to ensure that the securitisation products are not acquired by a retail client.

Further requirements for relying on the licensing exemption

- (2) The exemption does not apply to the financial services referred to in paragraphs 5(1)(a), (b) and (d) unless the securitisation entity:
 - (a) provides the relevant financial service in accordance with financial product advice provided by a financial services licensee authorised to provide such advice in relation to the financial product to which the financial service relates; and

- (b) has entered into a written agreement with the financial services licensee, under which:
 - (i) the securitisation entity receives the financial product advice described in paragraph (a); and
 - (ii) the financial services licensee has not by contract or otherwise excluded or limited (or purported to exclude or limit) its liability for any loss or damage resulting from any negligence by that licensee in providing the financial product advice to the securitisation entity.

ASIC notification that a person may not rely on this exemption

- (3) This exemption does not apply to a person from a date if ASIC notifies the person in writing that after that date the person may no longer rely on this exemption and that notice has not been withdrawn by ASIC in writing.