CONSULTATION PAPER 355

Product intervention orders: Short term credit and continuing credit contracts

December 2021

About this paper

This consultation paper sets out ASIC's proposal to make, under Pt 7.9A of the *Corporations Act 2001* (Corporations Act):

- a product intervention order in substantially the same terms as *ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2019/917* (short term credit product intervention order); and
- a product intervention order as set out in Consultation Paper 330 *Using the product intervention power: Continuing credit contracts* (CP 330) and the Addendum to CP 330 (continuing credit contracts product intervention order).

We are seeking the views of interested stakeholders, including industry and consumers, on our proposal.

> Note: The draft ASIC instruments attached to this paper are available on our website at www.asic.gov.au/cp under CP 355.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This paper was issued on 9 December 2021 and is based on the Corporations Act and the National Credit Act as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

Contents

The consultation process

ASIC invites stakeholder feedback on two proposals:

- Proposal D1—Make the short term credit product intervention order; and
- Proposal D2—Make the continuing credit product intervention order.

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy. When providing feedback, please specify which proposal you are providing feedback on.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information. We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on exercising the product intervention power. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account.

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at www.asic.gov.au/privacy for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by **21 January 2022** to:

Senior Manager, Credit & Banking
Financial Services and Wealth Group
Australian Securities and Investments Commission
Level 7, 120 Collins Street
Melbourne VIC 3000
email: product.regulation@asic.gov.au

What will happen next?

Stage 1	9 December 2021	ASIC consultation paper released
Stage 2	21 January 2022	Comments due on the consultation paper
Stage 3	Between January 2022 and March 2022	*Proposed short term credit product intervention order* Review and consider all relevant submissions Decide whether to seek the Minister's approval and whether to exercise our power to make the order *Proposed continuing credit contracts product intervention order* Review and consider all relevant submissions, including previous submissions in response to CP 330 and the Addendum to CP 330 Decide whether to exercise our power to make this order

A Background to our proposals

Key points

This consultation paper seeks feedback on ASIC's proposals to make a short term credit product intervention order and a continuing credit contracts product intervention order under Pt 7.9A of the Corporations Act.

Short term credit product intervention order

CP 316

1 In July 2019, ASIC publicly consulted on a proposal to make a product intervention order in relation to short term credit facilities: see Consultation Paper 316 *Using the product intervention power: Short term credit* (CP 316).

2 Interested and affected stakeholders including retail clients, industry bodies and participants, a complaints authority, consumer organisations and legal centres provided submissions to ASIC about the proposal.

The 2019 order

3 On 12 September 2019, a product intervention order was made by legislative instrument under Pt 7.9A of the Corporations Act: see *ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2019/917*. This order was made after ASIC was satisfied that a class of financial products—namely, short term credit facilities, when provided in conjunction with collateral contracts—was resulting in, or would or was likely to result in, significant detriment to retail clients.

Note: In this paper, we refer to this product intervention order as the '2019 order'.

4 In making the 2019 order, ASIC considered that the combination of financially stressed retail clients obtaining short term credit with no adequate affordability assessment, high fees charged through a collateral contract (including upfront, ongoing and default fees) plus a high default rate, resulted in small debts spiralling into larger debts, exacerbating clients' overall financially stressed position and reducing their ability to meet ongoing basic living expenses.

5 ASIC had identified the following examples of impacts of the significant detriment on retail clients from the sale of short term credit. Retail clients:

(a) were left with no money to pay for food;

(b) had to seek emergency food relief;

(c) were unable to pay rent and housing expenses and had become at risk of homelessness;

(d) had to file for bankruptcy;

(e) suffered from stress and anxiety and other mental health impacts arising from, or exacerbated by, the financial stress, including one client who was reported to have committed suicide; and

(f) suffered additional stress and anxiety when their debts were referred to external debt collectors who threatened them with legal action.

Note: For more information about the 2019 order, see pp. 2–10 of its accompanying product intervention order notice (PDF 285 KB).

6 The 2019 order came into force on 14 September 2019 and expired after a period of 18 months, on 13 March 2021.

Note: In paragraphs 32–34 we describe how the 2019 order operated.

Judicial review proceedings

7 A judicial review application was filed on 20 September 2019 in the Federal Court of Australia by Cigno Pty Ltd (Cigno) which sought to quash the 2019 order in relation to short term credit. In April 2020, the Federal Court dismissed that application with costs awarded to ASIC.

8 In May 2020 an appeal was filed by Cigno in the Federal Court of Australia. A hearing was held on 19 November 2020 before the Full Federal Court. The Full Federal Court dismissed Cigno's appeal on 29 June 2021, with costs awarded to ASIC.

Note: See Media Release (21-151MR) *Full Federal Court upholds first ASIC product intervention order* (29 June 2021).

Expiry of the 2019 order

9 When the 2019 order expired in March 2021, ASIC did not propose to extend the order because of an ambiguity in the product intervention provisions in the Corporations Act and the *National Consumer Credit Protection Act 2009* (National Credit Act) in relation to ASIC's ability to intervene in relation to the cost of financial and credit products.

10 On 24 June 2021, the Treasury Laws Amendment (2021 Measures No. 4) Bill 2021 was passed which removed the ambiguity and ensured ASIC's ability to intervene in relation to the costs of financial and credit products. The *Treasury Laws Amendment (2021 Measures No. 4) Act 2021* (Amendment Act) received royal assent on 30 June 2021.

Current consultation

11 ASIC has been monitoring the impact of the 2019 order and changes in the market: see paragraphs 41–42 for our findings. ASIC is seeking any further quantitative or qualitative data in relation to the issue of these short term credit facilities and any associated impact on retail clients.

12 Subject to consultation and the Minister's written approval, ASIC is proposing to make a new short term credit product intervention order, in substantially the same terms as the 2019 order in relation to short term credit.

Continuing credit contracts product intervention order

CP 330

13 In July 2020, ASIC publicly consulted on a proposal to make an industry-wide product intervention order by way of legislative instrument in relation to continuing credit contracts: see Consultation Paper 330 *Using the product intervention power: Continuing credit contracts* (CP 330).

Note: The draft product intervention order was labelled 'Attachment to CP 330'.

14 In CP 330, ASIC noted that these continuing credit contracts appear to have been introduced into the market after ASIC made the 2019 order on 12 September 2019.

15 As discussed in detail in CP 330, these continuing credit contracts are being issued in circumstances where:

(a) the credit provider does not hold an Australian credit licence, so retail clients do not have the consumer protections under the National Credit Act, including the ability to have complaints resolved through an external dispute resolution scheme;

(b) the credit provider is not appropriately considering the expenses of each retail client to test whether they can afford the repayments;

(c) high fees charged by an associate of the credit provider under a collateral contract become payable on default, creating a financial incentive to offer credit to retail clients who are unable to meet repayments; and

(d) the provision of credit can exacerbate a retail client's existing financial hardship due to the high costs charged relative to the amount of credit.

Note: See Section C of CP 330.

16 In response to CP 330, ASIC received over 900 submissions from interested and affected stakeholders including retail clients, industry bodies and participants, a comparison site, a complaints authority, consumer organisations and legal centres.

Addendum to CP 330

17 Several of the CP 330 submissions ASIC received stated that the proposed continuing credit contracts product intervention order would capture certain sub-classes of continuing credit contracts that were not being issued to retail clients in the way described in CP 330.

18 To address any potential unintended consequences, ASIC made changes to the draft product intervention order to provide certain exclusions for:

(a) buy now pay later arrangements; and

(b) collateral non-cash payment facilities.

19 ASIC sought feedback on these proposed changes by publishing an addendum to CP 330 in November 2020: see Addendum to CP 330.

Note: The revised draft product intervention order was *Updated draft ASIC Corporations (Product Intervention – Continuing Credit Contracts) Instrument 2020/XX* (PDF 96 KB).

20 Following this further consultation, ASIC did not make the proposed continuing credit contracts product intervention order as we were awaiting:

(a) the Full Federal Court decision on the judicial review of the 2019 order (see paragraphs 7–8); and

(b) amendments to the product intervention power made by the Amendment Act, which clarified and confirmed ASIC's ability to make product intervention orders in certain circumstances (see paragraphs 9–10).

Current consultation

21 ASIC is seeking updated quantitative or qualitative data in relation to the issue of these continuing credit contracts and any associated impact on retail clients. We will consider any submissions received in response to this consultation and previous consultations in deciding whether to make the proposed continuing credit contracts product intervention order.

B The short term credit product intervention order

Key points

This section describes the proposed short term credit product intervention order and ASIC's rationale for making the order. It also describes how the 2019 order operated and the impact it had.

A class of financial products: Short term credit facilities

22 Short term credit facilities are financial products within the meaning of Div 2 of Pt 2 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and s6(1) of the National Credit Code, and are financial products for the purposes of Pt 7.9A of the Corporations Act.

Note: The National Credit Code is Sch 1 to the National Credit Act.

23 ASIC is aware of a class of financial products—namely, short term credit facilities—that were being provided to retail clients in the following manner:

(a) a short term credit facility is provided by the short term credit provider, who charges fees consistent with limits prescribed in the exemption in s6(1) of the National Credit Code (short term credit exemption); and

(b) an associate of the provider provides collateral services (e.g. application, distribution, management and collection services) in relation to the facility and charges significant fees or other charges under a separate collateral contract.

Note: In CP 316, we described this structure as the 'short term lending model'. For further details see paragraphs 1–2 of CP 316.

24 ASIC is aware that short term credit facilities have been issued to retail clients in the manner described in paragraph 23 by:

(a) Finance & Loans Direct Pty Ltd, Gold-Silver Standard Finance Pty Ltd (GSSF) and BHF Solutions Pty Ltd (BHFS) as the short term credit provider; and

(b) Teleloans Pty Ltd, Cigno and MyFi Australia Pty Ltd (now known as Fi-Fit Services Pty Ltd) as the associate.

Significant detriment resulting from short term credit facilities

25 In determining whether the issue of short term credit facilities had resulted in, or would or was likely to result in, significant detriment to retail clients, ASIC reviewed reports of misconduct, gathered data and evidence, and undertook a public consultation process: see CP 316.

26 After considering all the relevant material, ASIC was satisfied that the short term credit facilities issued in the manner described in paragraph 23 had resulted in, or would or were likely to result in, significant detriment to retail clients.

27 In becoming satisfied that there was significant detriment, ASIC considered the following factors:

(a) the target market included vulnerable retail clients who were in financial difficulty and required short-term loans generally to cover basic living expenses, many of whom had been declined for regulated credit;

(b) the short-term nature of the short term credit facilities provided retail clients with limited time to raise funds to make the required repayments;

(c) the overall fees and charges charged for the short term credit facilities were significantly higher than was permitted under the short term credit exemption;

(d) the product had an overall high default rate, which resulted in large amounts of default-related fees being charged to retail clients; and

(e) many retail clients could not afford to repay the short term credit facilities or to repay them without suffering substantial hardship.

28 ASIC also identified the following financial losses resulting from the short term credit facilities issued in the manner described in paragraph 23:

(a) retail clients were being charged significant upfront, ongoing and default fees in total for the short term credit facilities, in excess of what is permitted under the short term credit exemption;

(b) additional fees from third parties were often incurred, including bank charges in relation to dishonoured direct debits and overdrawn fees;

(c) due to the significant fees and charges and subsequent increase in debt, retail clients were often unable to meet other financial commitments; and

(d) because the short term credit facilities were not regulated, retail clients did not have the following statutory protections under the National Credit Act and National Credit Code, that would otherwise apply to regulated ‘small amount credit contracts’:

(i) a cap on fees, being an establishment fee of up to 20% of the credit amount, and a monthly fee of up to 4% of the credit amount;

(ii) a prohibition on charging an establishment fee to refinance the loan; and

(iii) a cap on default fees and charges, limited to double the amount borrowed.

Note: See paragraph 5 of CP 316 for case studies which show the significant detriment suffered by retail clients resulting from the issue of the short term credit facilities. See also paragraphs 52–57 of CP 316 for the fees charged by Cigno in relation to the short term credit facilities.

29 From a review of fees and additional confidential data received for the period May 2016 to April 2019, ASIC understands the following in relation to the short term credit facilities issued in the manner described in paragraph 23 by GSSF and Cigno:

(a) the lender fee, equalling 5% of the loan amount, was the only fee charged by the short term credit provider under the short term credit facility, which amounted to approximately 2% of the overall fees charged for the facility;

(b) the fees charged by the associate under a collateral contract, comprising 98% of the overall fees charged in relation to the credit facilities, exceeded the fees that could be charged under the short term credit exemption;

(c) the short term credit facilities had a high default rate, which was almost double the default rate of similar regulated credit products, such as small amount credit contracts; and

(d) ASIC estimates that before 14 September 2019 at least 270,000 retail clients had obtained credit from GSSF and through Cigno.

Note: For the default rate for payday loans, see the report by Digital Finance Analytics and Monash University Centre for Commercial Law and Regulatory Studies, *The stressed finance landscape: Data analysis*, October 2015.

30 For more information on ASIC's rationale for making the 2019 order, see the product intervention order notice (PDF 285 KB) published with the order on 12 September 2019.

31 Subject to the consultation process, in ASIC's view, it is likely that if entities resume or start issuing the short term credit facilities, it will or is likely to result in significant detriment to retail clients.

How the 2019 order operated

32 The 2019 order related to short term credit facilities provided by short term credit providers who purported to rely on the short term credit exemption in s6(1) of the National Credit Code.

33 The order prohibited:

(a) the provision of short term credit facilities and the charging of collateral fees and charges by short term credit providers and/or their associates, in circumstances where the credit fees and charges under the credit contract and the collateral fees and charges under a collateral contract, together, exceed the limits in the short term credit exemption; and

(b) directors of short term credit providers and/or their associates from causing or authorising that prohibited conduct.

34 The order did not prohibit persons from providing short term credit facilities in reliance on the short term credit exemption. Short term credit providers and their associates could continue to issue and provide services in relation to short term credit facilities in reliance on this exemption, provided that they complied with the condition in the order.

ASIC's power to remake product intervention orders

35 Under s1023M of the Corporations Act, if a product intervention order ceases to be in force or is revoked, ASIC must not remake the order or make an order in substantially the same terms, unless:

(a) we are satisfied the circumstances have materially changed since the order was made; or

(b) the Minister approves, in writing, the remaking or making of the order.

36 If either of the requirements set out in s1023M is satisfied, we may exercise our powers under s1023D to remake a product intervention order, or make an order in substantially the same terms.

37 We must also be satisfied that the financial product, or class of financial products, which is the subject of the order has resulted in, or will or is likely to result in, significant detriment to retail clients: see s1023D(3)(b) of the Corporations Act.

38 The legislation sets out the criteria ASIC is required to take into account in considering whether a financial product, or a class of financial products, has resulted in, or will or is likely to result in, significant detriment to retail clients.

39 These criteria are:

(a) the nature and extent of the detriment;

(b) without limiting sub-paragraph (a), the actual or potential financial loss to retail clients resulting from the product;

(c) the impact that the detriment has had, or will or is likely to have, on retail clients; and

(d) any other matter prescribed by the regulations (see s1023E(1) of the Corporations Act).

40 We may also consider other factors: see s1023E(2) of the Corporations Act.

Impact of the 2019 order

41 Since the 2019 order came into force on 14 September 2019, ASIC has observed the following from information and data collected:

(a) short term credit facilities issued in the manner described in paragraph 23 ceased to be issued to retail clients after 14 September 2019; but

(b) ASIC continued to receive reports of misconduct regarding short term credit facilities issued before 14 September 2019; and

(c) BHFS and Cigno, entities that previously issued short term credit facilities to retail clients in the manner described in paragraph 23, commenced issuing a new class of financial products to retail clients on 16 September 2019—namely, continuing credit contracts. These products appear to be issued to retail clients in a similar manner to the short term credit facilities described in paragraph 23 but rely on a different exemption from the National Credit Code.

42 As the 2019 order ceased to be in force on 13 March 2021, ASIC is concerned that entities may resume or start issuing short term credit facilities in the manner described in paragraph 23 in the future.

43 ASIC understands that two companies registered in March 2021—namely, BSF Solutions Pty Ltd (BSF Solutions) and its associate, Cigno Australia Pty Ltd (Cigno Australia)—may currently be issuing short term credit facilities in the manner described in paragraph 23.

Drafting changes in the proposed order

44 We have made drafting changes in the proposed short term credit product intervention order. The differences from the 2019 order include:

(a) defining *credit fees and charges* and *interest charges* to make it clear which fees are captured by the conditions;

(b) specifying that the *credit fees and charges*, *interest charges* and other fees and charges that are captured by the conditions in the order are only those that are paid or payable by a retail client; and

(c) noting that the order is subject to the limitations in s1023C of the Corporations Act (e.g. the order does not apply to a financial product held by a person if the person acquired, or entered into a contract to acquire, the product before the order comes into force).

45 These changes ensure that the proposed order addresses the significant detriment by capturing the relevant fees that ASIC is concerned about and that it does not have unintended impacts or consequences.

C The continuing credit contracts product intervention order

Key points

This section describes the proposed continuing credit contracts product intervention order and includes ASIC's rationale for making the order.

ASIC's proposed continuing credit contracts product intervention order

46 Our consultation on the proposed continuing credit contracts product intervention order builds on our previous consultations that occurred in July and November 2020: see CP 330 and the Addendum to CP 330.

47 As outlined in CP 330, ASIC is aware of a class of financial products—namely, continuing credit contracts—that are, or are likely to be made, available for acquisition by issue to persons who are retail clients.

Note: For further details, see paragraphs 6–12 of CP 330.

48 ASIC is aware that continuing credit contracts have been issued to retail clients in the following circumstances:

(a) a continuing credit contract is provided by the credit contract provider, who charges fees consistent with limits prescribed in the exemption in s6(5) of the National Credit Code (continuing credit contracts exemption); and

(b) an associate of the credit provider provides collateral services (e.g. application, distribution, management and collection services) in relation to the continuing credit contract and charges significant fees or other charges under a separate collateral contract.

49 This manner of issuing continuing credit contracts is almost identical to the way in which short term credit facilities were issued to retail clients, as described in paragraph 23.

50 ASIC is aware that Cigno and BHFS have provided continuing credit contracts in this manner. ASIC considers it is likely that other entities may also make continuing credit contracts available in this way in the future.

51 Subject to consultation, ASIC considers that, when issued to retail clients in certain circumstances, these continuing credit contracts have resulted in, or will or are likely to result in, significant detriment to these clients. This detriment is set out in paragraph 15 and in Section C of CP 330.

52 Subject to this consultation, we propose to use our product intervention power under Pt 7.9A of the Corporations Act to address the significant detriment that has resulted from, or will or is likely to result from, these continuing credit contracts.

53 Under this proposal, ASIC would make an industry-wide product intervention order by legislative instrument under s1023D(3) of the Corporations Act to prohibit credit providers and their associates (including directors of such entities) from issuing continuing credit contracts, in circumstances where total fees exceed the maximum permitted under the continuing credit contracts exemption in s6(5) of the National Credit Code and reg 51 of the *National Consumer Credit Protection Regulations 2010*.

54 The proposed order will have:

(a) specific exclusions for buy now pay later arrangements and non-cash payment facilities as outlined in the Addendum to CP 330; and

(b) some changes as outlined in paragraph 55.

Drafting changes in the proposed order

55 We have made further drafting changes in the proposed continuing credit contracts product intervention order. The differences from the previous draft order (see paragraph 19) include:

(a) changing the definition of *buy now pay later arrangement* including by:

(i) changing the description and use of an 'identifier'; and

(ii) expanding the exemption for the principal business of a merchant to include brokerage, collection, recovery or other services relating to the provision of credit under continuing credit contracts;

(b) changing the definition of *collateral contract* to specify that it is a contract or arrangement (without limitation) for the continuing credit provider or an associate to provide services to the retail client in relation to the continuing credit contract;

(c) specifying that the fees and charges that are captured by the condition in the order are only the fees and charges that are paid or payable by a retail client; and

(d) noting that the order is subject to the limitations in s1023C of the Corporations Act (e.g. the order does not apply to a financial product held by a person if the person acquired, or entered into a contract to acquire, the product before the order comes into force).

56 The purpose of these changes is to ensure that the proposed order addresses the significant detriment that ASIC is concerned about and that it does not have unintended impacts or consequences.

57 The proposed order does not prohibit persons from providing continuing credit contracts in reliance on the continuing credit contracts exemption in s6(5) of the National Credit Code. Providers of continuing credit contracts and their associates can continue to issue and provide services in relation to continuing credit contracts in reliance on this exemption, provided that they comply with the conditions in the order.

Note: For details of the impact of this proposed product intervention order, see paragraphs 33–38 of CP 330.

58 We will monitor the impacts of the product intervention order, in particular the operation of the order in relation to buy now pay later arrangements and whether it is operating as intended.

59 Given the history of this issue, it is possible that businesses may seek to develop new models to circumvent the operation of the order. For example, businesses may seek to characterise themselves as buy now pay later arrangements but adopt models that have resulted in, or will or are likely to result in, significant detriment to retail clients. If this occurs, ASIC will consider further action as necessary, including amending the order.

D Our proposals

Key points

This section outlines our proposals to make the short term credit product intervention order and make the continuing credit contracts product intervention order.

Addressing significant detriment in the short term credit and continuing credit contracts markets

60 As outlined in this paper and subject to consultation, ASIC proposes to make the short term credit product intervention order (subject to the Minister's written approval) and to make the continuing credit contracts product intervention order.

61 ASIC considers that both product intervention orders are necessary to stop the likely impact of significant detriment occurring in both the short term credit and continuing credit markets to retail clients. ASIC notes that providers of both products—namely, Cigno and BHFS—have previously switched from issuing and providing services in relation to short term credit facilities, to issuing and providing services in relation to continuing credit contracts.

Proposal to make the short term credit product intervention order

Proposal

D1 Subject to consultation and the Minister's written approval, we propose to make the industry-wide short term credit product intervention order by legislative instrument under s1023D(3) of the Corporations Act: see the draft product intervention order in Attachment 1 to this paper.

Your feedback

D1Q1 Do you consider that short term credit facilities, when issued to retail clients in the way described in paragraph 23, have resulted in, or will or are likely to result in, significant detriment to retail clients? Please provide any relevant case studies and evidence (including qualitative and quantitative data) which support your response.

D1Q2 Do you consider that ASIC should make the order, which is in substantially the same terms as the 2019 order (i.e. *ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2019/917*)? Please give reasons to support your response, including whether you consider that there have been any significant changes in matters relevant to ASIC's decision (such as the financial circumstances of retail clients) since 14 September 2019.

D1Q3 Are you aware of entities, including BSF Solutions and Cigno Australia, that are currently issuing, or likely to issue, short term credit facilities in the way described in paragraph 23? If so, please provide any relevant evidence to support your response.

D1Q4 What alternative approaches could ASIC take that would achieve our objectives of preventing the significant detriment identified in this paper?

Proposal to make the continuing credit contracts product intervention order

Proposal

D2 We propose to make the industry-wide continuing credit contracts product intervention order by legislative instrument under s1023D(3) of the Corporations Act: see the draft product intervention order in Attachment 2 to this paper.

Your feedback

D2Q1 Do you consider that continuing credit contracts, when issued to retail clients in the way described in paragraph 48, have resulted in, or will or are likely to result in, significant detriment to retail clients? Please provide any relevant case studies and evidence (including qualitative and quantitative data) which support your response.

D2Q2 Are you aware of entities, including Cigno and BHFS, that are issuing, or likely to issue, continuing credit contracts in the way described in paragraph 48? If so, please provide any relevant evidence to support your response.

D2Q3 Are you aware of any changes in the continuing credit contracts market—including changes to the continuing credit contracts that were issued in the way described in paragraph 48—since the publication of CP 330 (July 2020) and the Addendum to CP 330 (November 2020), which may be relevant to ASIC's proposal to make a continuing credit contracts production intervention order? If so, please provide any relevant evidence to support your response.

D2Q4 Do you agree with our proposal to make a continuing credit contracts product intervention order by legislative instrument as set out in the draft product intervention order in Attachment 2 to this paper?

D2Q5 What alternative approaches could ASIC take that would achieve our objectives of preventing the significant detriment identified in this paper?

E Regulatory and financial impact

62 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:

(a) reducing the likelihood of the significant detriment resulting from short term credit facilities and continuing credit contracts to retail clients; and

(b) the financial and other impacts of the proposed orders on the issuers or prospective issuers of short term credit facilities and continuining credit contracts.

63 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:

(a) considering all feasible options, including examining the likely impacts of the range of alternative options that could meet our policy objectives;

(b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and

(c) if our proposed option has more than a minor or machinery impact on business or on the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

64 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

65 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:

(a) the likely compliance costs;

(b) the likely effect on competition; and

(c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

Key terms

Term	Meaning in this document
2019 order	The product intervention order made on 12 September 2019 by *ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2019/917*
Amendment Act	*Treasury Laws Amendment (2021 Measures No. 4) Act 2021*
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
BHFS	BHF Solutions Pty Ltd
buy now pay later arrangement	Means an arrangement or series of arrangements comprising: • an arrangement between a person (merchant) and another person (retail client) in relation to the supply of goods or services by the merchant to the retail client; and • either: – an arrangement between the merchant and a person (BNPL provider) in relation to which the BNPL provider pays the merchant for the supply of those goods or services to the retail client (less any merchant fees); or – an arrangement between the retail client and a person (BNPL provider) in relation to which, when the retail client is required to pay the merchant for the supply of those goods or services, the retail client pays the merchant by using an identifier provided or made available to the retail client for such a purpose; and • an arrangement between the BNPL provider and the retail client which includes a short term credit facility or a continuing credit contract in relation to which the retail client pays the BNPL provider over time in relation to the supply of those goods or services; but only where the principal business of the merchant is not the supply of administration, brokerage, management, collection, recovery or other services in relation to the provision of credit under continuing credit contracts
Cigno	Cigno Pty Ltd
Cigno Australia	Cigno Australia Pty Ltd, registered in March 2021
collateral contract	A collateral contract, in relation to a short term credit facility or a continuing credit contract, means a separate contract between a retail client and a credit provider or an associate in relation to the facility or continuing credit contract, including (without limitation) a contract or arrangement for the credit provider or an associate to provide services to the retail client in relation to the facility or continuing credit contract.

Term	Meaning in this document
collateral fees and charges	Fees, charges or other consideration paid or payable by a retail client imposed or provided for under a collateral contract
collateral services	A service provided to a retail client in relation to the provision of credit by a credit provider under a short term credit facility or a continuing credit contract
consumer	Means both a retail client for a financial product and a consumer for a credit product, unless otherwise specified
continuing credit contract	The relevant class of financial products to which the proposed continuing credit contracts product intervention order relates Note: For the definition of 'continuing credit contract', see s204 of the National Credit Code.
continuing credit exemption	Means the exemption in s6(5) of the National Credit Code
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
CP 316 (for example)	An ASIC consultation paper (in this example numbered 316)
credit fees and charges	Has the same meaning as in subsection 6(1) of the National Credit Code (as affected by subsections 6(2) and (3) of the National Credit Code).
credit product	Means a credit contract, mortgage, guarantee or consumer lease Note: See s301D(a) of the National Credit Act.
credit provider	Has the meaning given in s5 of the National Credit Act
financial product	A facility through which, or through the acquisition of which, a person does one or more of the following: • makes a financial investment (see s763B); • manages financial risk (see s763C); • makes non-cash payments (see s763D) Note: This is a definition contained in s763A of the Corporations Act. See also s763B–765A.
GSSF	Gold-Silver Standard Finance Pty Ltd
interest charges	Include, for the avoidance of doubt, default interest charges
National Credit Act	*National Consumer Credit Protection Act 2009*
National Credit Code	National Credit Code at Sch 1 to the National Credit Act
Pt 7.9A (for example)	A part of the Corporations Act (in this example numbered 7.9A), unless otherwise specified
retail client	A client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of the *Corporations Regulations 2001*
short term credit	Has the meaning given in s6(1) of the National Credit Code

Term	Meaning in this document
short term credit exemption	The exemption in s6(1) of the National Credit Code
short term credit facility	A financial product covered by both: • s12BAA(7)(k) of the ASIC Act; and • s6(1) of the National Credit Code
short term credit provider	A provider of short term credit
small amount credit contract	Has the meaning given in s5 of the National Credit Act
s204 (for example)	A section of the National Credit Code (in this example numbered 204), unless otherwise specified

List of proposals and questions

Proposal	Your feedback
D1 Subject to consultation and the Minister's written approval, we propose to make the industry-wide short term credit product intervention order by legislative instrument under s1023D(3) of the Corporations Act: see the draft product intervention order in Attachment 1 to this paper.	D1Q1 Do you consider that short term credit facilities, when issued to retail clients in the way described in paragraph 23, have resulted in, or will or are likely to result in, significant detriment to retail clients? Please provide any relevant case studies and evidence (including qualitative and quantitative data) which support your response. D1Q2 Do you consider that ASIC should make the order, which is in substantially the same terms as the 2019 order (i.e. ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2019/917)? Please give reasons to support your response, including whether you consider that there have been any significant changes in matters relevant to ASIC's decision (such as the financial circumstances of retail clients) since 14 September 2019. D1Q3 Are you aware of entities, including BSF Solutions and Cigno Australia, that are currently issuing, or likely to issue, short term credit facilities in the way described in paragraph 23? If so, please provide any relevant evidence to support your response. D1Q4 What alternative approaches could ASIC take that would achieve our objectives of preventing the significant detriment identified in this paper?

Proposal	Your feedback
D2 We propose to make the industry-wide continuing credit contracts product intervention order by legislative instrument under s1023D(3) of the Corporations Act: see the draft product intervention order in Attachment 2 to this paper.	D2Q1 Do you consider that continuing credit contracts, when issued to retail clients in the way described in paragraph 48, have resulted in, or will or are likely to result in, significant detriment to retail clients? Please provide any relevant case studies and evidence (including qualitative and quantitative data) which support your response. D2Q2 Are you aware of entities, including Cigno and BHFS, that are issuing, or likely to issue, continuing credit contracts in the way described in paragraph 48? If so, please provide any relevant evidence to support your response. D2Q3 Are you aware of any changes in the continuing credit contracts market—including changes to the continuing credit contracts that were issued in the way described in paragraph 48—since the publication of CP 330 (July 2020) and the Addendum to CP 330 (November 2020), which may be relevant to ASIC's proposal to make a continuing credit contracts production intervention order? If so, please provide any relevant evidence to support your response. D2Q4 Do you agree with our proposal to make a continuing credit contracts product intervention order by legislative instrument as set out in the draft product intervention order in Attachment 2 to this paper? D2Q5 What alternative approaches could ASIC take that would achieve our objectives of preventing the significant detriment identified in this paper?