



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 236

Remaking ASIC class orders on dematerialised securities and CHESS units of foreign securities

August 2015

About this paper

This consultation paper sets out ASIC's proposals to remake two class orders into ASIC instruments. Under the *Legislative Instruments Act 2003*, these class orders will expire ('sunset') if not remade.

We are seeking feedback from stakeholders on our proposals to remake, without significant changes, the following class orders:

- Class Order [CO 02/281] *Dematerialised securities traded on Austraclear*, which is due to expire on 1 April 2017; and
- Class Order [CO 02/312] *Part 7.11, Division 4 financial products for ASTC*, which is due to expire on 1 April 2017.

We are also seeking feedback on our proposal to repeal:

- Class Order [CO 00/2449] *ASX Online—relief from paper form lodgement*, which is due to expire on 1 October 2016; and
- Class Order [CO 02/1296] *ASX managed investment warrants—FSR Act transition*, which is due to expire on 1 April 2017.

Note: The draft ASIC instruments are available on our website at www.asic.gov.au/cp under CP 236.

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 24 August 2015 and is based on the Corporations 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.

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The consultation process

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 September 2015 to:

Ms Ananda Stoevelaar
Lawyer
Market and Participant Supervision
Australian Securities and Investments Commission
Level 5, 100 Market Street
Sydney NSW 2000
email: market.participants@asic.gov.au

What will happen next?

Stage 1	24 August 2015	ASIC consultation paper released
Stage 2	21 September 2015	Comments due on the consultation paper
Stage 3	February 2016	Commencement of remade instrument(s)

A Background

Key points

Legislative instruments, such as class orders, are repealed automatically, or ‘sunset’, after 10 years, unless action is taken to exempt or preserve them. We will consult on all sunseting legislative instruments that have more than a minor or machinery regulatory impact.

Purpose of ‘sunseting’ legislative instruments

- 1 Under the *Legislative Instruments Act 2003*, legislative instruments cease automatically, or ‘sunset’, after 10 years, unless action is taken to exempt or preserve them. Section 50(1) repeals a legislative instrument on either 1 April or 1 October—whichever date occurs first on or after the 10th anniversary of its registration on the Federal Register of Legislative Instruments (FRLI). Repeal does not undo the past effect of the instrument.
- 2 To preserve its effect, a legislative instrument, such as a class order, must be remade before the sunset date. The purpose of sunseting is to ensure that instruments are kept up to date and only remain in force while they are fit for purpose, necessary and relevant.

Our approach to remaking legislative instruments

- 3 If it is necessary to remake a legislative instrument, our focus is on making it clear and user friendly. We will also, where possible, simplify and rationalise its content and conditions. For example, we will remove or reduce an obligation or burden in a legislative instrument if we are able to do so without undermining ASIC’s priorities of promoting investor and financial consumer trust and confidence and ensuring markets are fair, orderly and transparent.
- 4 We will consult affected stakeholders on all ASIC legislative instruments that have more than a minor or machinery regulatory impact, and are subject to sunseting, to ensure:
 - (a) we carefully consider the continuing regulatory and financial impact of the instrument; and
 - (b) the instrument retains its effectiveness in addressing an identified issue or problem.
- 5 Generally, a Regulation Impact Statement (RIS) is required for new and amended policy that has a significant regulatory impact: see the [Australian Government Guide to Regulation](#). We will review, including public

consultation, all class orders that have a significant regulatory impact before the scheduled sunset date. Where our review finds that a class order is not operating effectively and efficiently, we will prepare a RIS to assess our proposed changes to the class order. Where the class order is operating effectively and efficiently, we will remake the instrument without substantive changes.

B Remaking ASIC class orders

Key points

We are proposing to remake:

- Class Order [CO 02/281] *Dematerialised securities traded on Austraclear*, which sunsets on 1 April 2017; and
- Class Order [CO 02/312] *Part 7.11, Division 4 financial products for ASTC*, which sunsets on 1 April 2017.

We have formed the preliminary view that these class orders are operating effectively and efficiently, and continue to form a necessary and useful part of the legislative framework.

Each class order has been redrafted using ASIC's current style and format, while preserving the current effect of the instrument. The draft ASIC instruments, which reflect the minor amendments proposed in this paper, are available on our website at www.asic.gov.au/cp under CP 236.

Your feedback

- 6 You are invited to comment on any of our proposals to remake the ASIC class orders in this section, including whether the class orders are currently operating effectively and efficiently. These proposals are only an indication of the approach we may take and are not our final policy.

Class Order [CO 02/281] *Dematerialised securities traded on Austraclear*

Background

- 7 [CO 02/281] ensures the same legislative treatment of e-notes (including electronic certificates of deposit) and e-bills (both dematerialised securities) traded on Austraclear Limited (Austraclear) to that of their respective paper-based equivalents, promissory notes (including certificates of deposit) and bills of exchange.
- 8 We made [CO 02/281] to remove any doubt as to whether the electronic equivalents of promissory notes and bills of exchange were excluded from the definition of 'debenture'. At the time that [CO 02/281] was made, promissory notes and bills of exchange were expressly excluded from the definition of 'debenture' in the *Corporations Act 2001* (Corporations Act). Accordingly, certain requirements in the Corporations Act which applied to debentures did not apply to promissory notes and bills of exchange.

Consistent with the policy that electronic and paper transactions should generally be regulated in the same way, [CO 02/281] removed those legislative requirements for e-notes and e-bills.

- 9 In 2009, the *Corporations Legislation Amendment (Financial Services Modernisation Act) 2009* amended the definition of ‘debenture’ in the Corporations Act. Under this amendment, promissory notes with a value of more than \$50,000 were no longer excluded from the definition of ‘debenture’.

Proposal

B1 To preserve its effect beyond the sunset date of 1 April 2017, we propose to continue the relief currently given by [CO 02/281] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Dematerialised Securities of Austraclear Limited) Instrument 2015/XX at Attachment 1 to this consultation paper. You can access the current instrument on www.comlaw.gov.au or by clicking on the following direct link: [\[CO 02/281\]](#).

The only changes proposed are to:

- (a) reduce the application of the ASIC Corporations (Dematerialised Securities of Austraclear Limited) Instrument 2015/XX so that it no longer provides relief for e-notes, consistent with the legislative amendments made in 2009 in respect of promissory notes;
- (b) update the name of the legislative instrument;
- (c) reflect current drafting practice and update the format of the current document;
- (d) simplify the drafting to give greater clarity; and
- (e) update legislative references, definitions and entity names.

Rationale

- 10 We consider that, as a matter of policy, electronic commerce should be facilitated by regulating electronic transactions (including dematerialised securities) in a manner which, where appropriate, is consistent with the regulation of equivalent paper-based transactions.
- 11 Since [CO 02/281] was made, the definition of ‘debenture’ in the Corporations Act has not been amended to treat electronic instruments in a manner consistent with their paper-based equivalents. This may be because Parliament decided that a legislative amendment was not necessary. Our preliminary review is that the relief should nonetheless continue for the avoidance of doubt.
- 12 In the case of e-bills and electronic certificates of deposit issued by a bank, ASX indicated in preliminary consultation that these products continue to be an important part of the Austraclear system and that the relief provided by the [CO 02/281] should continue to apply to them.

- 13 [CO 02/281] currently also applies to e-notes issued by persons other than banks. As a result, the debenture provisions in Pts 2L.1–2L.6 of the Corporations Act do not currently apply to e-notes issued by persons other than banks. However, the debenture provisions in Pts 2L.1–2L.6 do apply to their paper-based equivalents. Therefore, the regulation of these e-notes and promissory notes is not consistent.
- 14 To address this inconsistency, we have proposed not to include e-notes issued by persons other than banks in the new instrument—this will ensure that they are subject to the same regime for the regulation of debentures as promissory notes.
- 15 The language of the new instrument will be amended to ensure that it is consistent with the terminology currently used in the Corporations Act and other instruments (e.g. ‘member’ rather than ‘participant’ and ‘Austraclear System Regulations’ rather than ‘Austraclear Regulations’).

Class Order [CO 02/312] Part 7.11, Division 4 financial products for ASTC

Background

- 16 [CO 02/312] extends the statutory warranties and indemnities provided for in the National Guarantee Fund provisions to additional financial products, including CHESS Depository Interests (CDI) over foreign securities and interests in foreign managed investment schemes.
- 17 The National Guarantee Fund is a compensation fund operated in accordance with the Corporations Act that is available to meet valid claims arising from dealings with market participants in the circumstances set out in the legislation.

Proposal

B2 To preserve its effect beyond the sunset date of 1 April 2017, we propose to continue the relief currently given by [CO 02/312] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Part 7.11, Division 4 of Financial Products for ASX Settlement Pty Ltd) Instrument 2015/XX at Attachment 2 to this consultation paper. You can access the current instrument on www.comlaw.gov.au or by clicking on the following direct link: [\[CO 02/312\]](#).

The only changes proposed are to:

- (a) update the name of the legislative instrument;
- (b) reflect current drafting practice and update the format of the current document;
- (c) simplify the drafting to give greater clarity; and
- (d) update legislative references, definitions and entity names.

Rationale

- 18 We consider it appropriate that the National Guarantee Fund should apply to additional financial products such as CDIs over foreign securities and interests in foreign managed investment schemes. This ensures that the protections for investors in such financial products are consistent with the protections for investors in analogous domestic products such as Australian managed investment schemes. There is no regulatory reason that the extension of the National Guarantee Fund provisions to the financial products covered by [CO 02/312] should cease.

C Repeal of ASIC class orders

Key points

We are proposing to repeal:

- Class Order [CO 00/2449] *ASX Online—relief from paper lodgement*, which sunsets on 1 October 2016; and
- Class Order [CO 02/1296] *ASX managed investment warrants—FSR Act transition*, which sunsets on 1 April 2017.

We have formed the preliminary view that these class orders are no longer required and do not form a necessary and useful part of the regulatory framework.

Your feedback

- 19 You are invited to comment on the proposals to repeal [CO 00/2449] and [CO 02/1296], including whether the class orders are currently being relied on and are operating effectively and efficiently. The proposal is only an indication of the approach we may take and is not our final policy.

Class Order [CO 00/2449] *ASX Online—relief from paper lodgement*

Background

- 20 [CO 00/2449] provides relief from the obligation of bodies listed on ASX to lodge or send documents to ASX in hardcopy form or fax. Under [CO 00/2449], bodies listed on ASX are permitted to lodge documents electronically using ‘ASX Online’, ASX’s electronic lodgement facility.
- 21 We remain of the view that there is no regulatory benefit in requiring information to be provided to ASX in paper form rather than through electronic means such as ASX Online.
- 22 However, since we made [CO 00/2449], we have formed the view that electronic lodgement with ASX through ASX Online is effective under the Corporations Act without the provision of relief.

Proposal

- c1 We propose to repeal [CO 00/2449] which would otherwise sunset on 1 October 2016. You can access the current instrument by clicking on www.comlaw.gov.au or by clicking on the following direct link: [\[CO 00/2449\]](#).

Rationale

- 23 [CO 00/2449] was intended to remove any doubt about the legal effectiveness of electronic lodgement through ASX Online of documents which are required to be provided under the Corporations Act. Since [CO 00/2449] was made, the prevalence of electronic communication has continued to increase. We no longer consider that there is any doubt that the electronic provision of a document is legally effective under the Corporations Act, in the absence of a clear intention to the contrary. This is consistent with our approach in Regulatory Guide 107 [Fundraising: Facilitating electronic offers of securities](#) (RG 107) at RG 107.21.
- 24 Consistent with our view in RG107.21, we consider the lodgement of a document through ASX Online to be legally effective. Where the Corporations Act requires a copy of a document to be provided to ASX, we would consider the provision of an electronic copy to be sufficient if:
- (a) it is identical in format and content to the original document—for example, where the electronic document is a scanned copy of the original document, saved or stored in portable document format (PDF); or
 - (b) it contains the same information in the same sequence, and with the same prominence, as the original document—with the exception of modifications that are immaterial and reflect necessary adjustments or increased functionality when using different electronic media.
- 25 We therefore consider that [CO 00/2449] is no longer required.

Class Order [CO 02/1296] ASX managed investment warrants—FSR Act transition

Background

- 26 [CO 02/1296] extends the definition of ‘warrant’ in reg 1.0.02(1) of the Corporations Regulations 2001 (Corporations Regulations) to include managed investment warrants.
- 27 [CO 02/1296] also relieves managed investment warrant issuers and purchasers from a number of disclosure requirements imposed by Pt 7.9 of the Corporations Act following the enactment of the *Financial Services Reform Act 2001* (FSR Act). This relief was intended to broadly mirror the transitional relief provided by s1438 of the Corporations Act. Section 1438 does not apply to managed investment warrants.

Proposal

- c2 We propose to repeal [CO 02/1296], which would otherwise sunset on 1 April 2017. You can access the current instrument by clicking

on www.comlaw.gov.au or by clicking on the following direct link: [\[CO 02/1296\]](#).

Rationale

28 [CO 02/1296] should be allowed to sunset because the relief has been rendered unnecessary by either:

- (a) legislative amendment; or
- (b) the expiry of the transitional relief period in [CO 02/1296].

Definition of warrant has been amended to include managed investment warrants

29 Regulation 1.0.02(1) of the Corporations Regulations was amended by the Corporations Amendment Regulations 2003 (No. 1) 2003 No. 31 to extend the definition of 'warrant' to include managed investment warrants. As a result of this amendment, this part of [CO 02/1296] is no longer necessary.

Transitional relief period has expired

30 The exemptions provided by s1438 of the Corporations Act only applied during the period beginning on commencement of the FSR Act and ending on the earlier of the expiry of a two year period after the commencement of the FSR Act or the date specified in a notice lodged with ASIC.

31 The two year period has since expired and the transitional relief provided by s1438 is no longer in effect. As a result, the extension of this relief to managed investment warrants by [CO 02/1296] is no longer required.

32 [CO 02/1296] grants relief in respect of managed investment warrants where the offer, recommendation, issue or on-sale of the warrants occurs before the end of the exemption periods provided by s1438. Because this period has since expired, we consider that [CO 02/1296] no longer has any substantive effect.

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
ASX	ASX Limited or the exchange market operated by ASX Limited
Austraclear	The electronic registry and settlement system for government, semi-government and private sector debt securities
CDI (CHES Depository Interest)	An instrument used by non-Australian companies to support electronic registration, transfer and settlement of their products listed on ASX
CHES	Clearing House Electronic Subregister System
[CO 02/281] (for example)	An ASIC class order (in this example numbered 02/281) Note: Legislative instruments made from 2015 are referred to as ASIC instruments.
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
FSR Act	<i>Financial Services Reform Act 2001</i>
Pt 2L.1 (for example)	A part of the Corporations Act (in this example numbered 2L.1), unless otherwise specified
reg 1.0.02(1) (for example)	A regulation of the Corporations Regulations (in this example numbered 1.0.02(1)), unless otherwise specified
RIS	Regulation Impact Statement
s1438 (for example)	A section of the Corporations Act (in this example numbered 1438), unless otherwise specified
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect