



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 255

Remaking ASIC class orders on financial services disclosure requirements

March 2016

About this paper

This consultation paper sets out ASIC's proposals to remake our class orders relating to specific financial services disclosure requirements. Under the *Legislation Act 2003*, these class orders will expire ('sunset') if not remade.

We are seeking feedback from the financial services industry on our proposals to remake, without significant changes, the following class orders, which are due to expire on 1 April 2017:

- Class Order [CO 02/1072] *Product Disclosure Statements: Top-up relief for managed investment schemes*;
- Class Order [CO 07/10] *Technical disclosure relief for reconstructions and capital reductions* (paragraph 9);
- Class Order [CO 03/237] *Updated information in Product Disclosure Statements*; and
- Class Order [CO 03/1092] *Further relief for joint Product Disclosure Statements*.

Note: The draft ASIC instruments are available on our website at www.asic.gov.au/cp under CP 255.

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 23 March 2016 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.

Contents

The consultation process	4
A Background	6
Purpose of ‘sunsetting’ legislative instruments.....	6
Our approach to remaking legislative instruments	6
B Remaking ASIC class orders	8
Your feedback.....	8
Class Order [CO 02/1072] <i>Product Disclosure Statements: Top-up relief for managed investment schemes</i>	8
Class Order [CO 07/10] <i>Technical disclosure relief for reconstructions and capital reductions (paragraph 9)</i>	10
Class Order [CO 03/237] <i>Updated information in Product Disclosure Statements</i>	11
Class Order [CO 03/1092] <i>Further relief for joint Product Disclosure Statements</i>	13
C Regulatory and financial impact	15
Key terms	16

The consultation process

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.

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 Product Disclosure Statements. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section C, 'Regulatory and financial impact'.

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 26 April 2016 to:

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What will happen next?

Stage 1	23 March 2016	ASIC consultation paper released
Stage 2	26 April 2016	Comments due on the consultation paper
Stage 3	July–August 2016	Commencement of remade instruments

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 *Legislation Act 2003* (Legislation Act), 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 Legislation (FRL). 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 the following class orders, which sunset on 1 April 2017:

- Class Order [CO 02/1072] *Product Disclosure Statements: Top-up relief for managed investment schemes*;
- Class Order [CO 07/10] *Technical disclosure relief for reconstructions and capital reductions* (paragraph 9);
- Class Order [CO 03/237] *Updated information in Product Disclosure Statements*; and
- Class Order [CO 03/1092] *Further relief for joint Product Disclosure Statements*.

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 255.

Your feedback

- 6 In this section, we have invited specific feedback on proposed minor policy changes. However, you are invited to comment on our proposals to remake the ASIC class orders in this section, including whether the class orders are currently operating effectively and efficiently. The proposals are only an indication of the approach we may take and are not our final policy.

Class Order [CO 02/1072] Product Disclosure Statements: Top-up relief for managed investment schemes

Background

- 7 [CO 02/1072] allows members in a managed investment scheme to make additional investments in the same scheme without being given a Product Disclosure Statement (PDS) provided that:
- (a) interests in the same class as the member's current holding are being acquired; and

- (b) the member has previously paid a total of at least \$500,000 for the purchase of interests in the same class (top-up relief).

- 8 This relief is consistent with the exemption given in s708(8)(b) of the *Corporations Act 2001* (Corporations Act) in relation to the provision of a prospectus to a sophisticated investor. A sophisticated investor is deemed to have sufficient investing experience and knowledge to weigh the risks and merits of an investment opportunity, and a prospectus may not be necessary.
- 9 Regulation 7.1.27 of the Corporations Regulations 2001 (Corporations Regulations) has the effect of deeming the member to be a wholesale client in respect of the interests acquired for as long as those interests are held by the member. This means that obligations in the Corporations Act that are limited to retail clients will not apply (e.g. s1017B, which requires the ongoing disclosure of material changes and significant events, but applies only when the product was acquired as a retail client) even if, for example, the value of the interests held becomes less than \$500,000.
- 10 However, reg 7.1.27 does not extend to any additional interests that may be acquired because the additional interests are a separate financial product. [CO 02/1072] addresses this limitation by giving top-up relief.

Proposal

- B1** To preserve its effect beyond the sunset date of 1 April 2017, we propose to continue the relief currently given by [CO 02/1072] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Top-up Product Disclosure Statements Relief) Instrument 2016/XX at Attachment 1 to this consultation paper. You can access the current instrument at www.legislation.gov.au by clicking on the following direct link: [\[CO 02/1072\]](#).

The proposed changes 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;
- (d) update legislative references and definitions; and
- (e) correct any minor drafting errors.

Rationale

- 11 We have formed the preliminary view that [CO 02/1072] is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.

Class Order [CO 07/10] *Technical disclosure relief for reconstructions and capital reductions (paragraph 9)*

Background

- 12 For reconstructions (e.g. foreign schemes and trust schemes) and capital reductions, paragraph 9 of [CO 07/10] gives relief from:
- (a) s1013B(1) of the Corporations Act, which requires the title ‘Product Disclosure Statement’ to be used on the cover of, or at the front of, a PDS (labelling requirement); and
 - (b) s1015C of the Corporations Act, which prescribes that a PDS must be given to a person, or the person’s agent, personally or at an address nominated by the person or agent (PDS delivery requirement).
- 13 Paragraph 9 of [CO 07/10] gives relief from these requirements to prevent confusion and technical breaches of the Corporations Act where an entity issues a PDS for an offer of interests to effect a reconstruction or capital reduction.
- 14 We consider that:
- (a) where entities conducting a reconstruction or capital reduction seek to issue a document that includes the PDS as well as other information (e.g. a notice of meeting or a prospectus), requiring the composite document to be called a ‘Product Disclosure Statement’ could be confusing to investors; and
 - (b) given a PDS in relation to a reconstruction or capital reduction will generally only be sent to a person who already owns interests in the managed investment scheme, sending the PDS to the member’s address as listed in the register is a suitable alternative to contacting each member for their nominated address.

Proposal

B2 To preserve its effect beyond the sunset date of 1 April 2017, we propose to continue the relief currently given in paragraph 9 of [CO 07/10] by amending ASIC Corporations (Compromises or Arrangements) Instrument 2015/358 by making ASIC Corporations (Amendment) Instrument 2016/XX: see Attachment 2 to this consultation paper. You can access the current instruments at www.legislation.gov.au by clicking on the following direct links: [\[CO 07/10\]](#) and [ASIC Corporations \(Compromises or Arrangements\) Instrument 2015/358](#).

The changes in the amending instrument proposed are to:

- (a) expand the relief to cover proposals for the transfer or sale of a financial product under a compromise or arrangement;

- (b) reflect current drafting practice and update the format of the current document;
- (c) simplify the drafting to give greater clarity;
- (d) update legislative references and definitions; and
- (e) correct any minor drafting errors.

Rationale

- 15 We have formed the preliminary view that paragraph 9 of [CO 07/10] is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of paragraph 9 of this class order.
- 16 We have previously given case-by-case relief similar to the relief in paragraph 9 of [CO 07/10] for a financial product that is being transferred or sold under a compromise or arrangement or is the subject of a capital reduction offer.
- 17 In view of this, we are proposing to expand the relief to include proposals for the transfer or sale of a financial product under a compromise or arrangement or which is the subject of a capital reduction offer.

Note: The relief in paragraphs 4 and 8 of [CO 07/10] will be dealt with in a separate consultation process and legislative instrument.

Class Order [CO 03/237] *Updated information in Product Disclosure Statements*

Background

- 18 [CO 03/237] grants relief from the requirement in s1012J of the Corporations Act for information in a PDS to be up to date at the time it is given to investors, in circumstances where:
- (a) there is a change to non-material information in the PDS, from the point of view of an investor;
 - (b) the investor can obtain the up-to-date information through a facility of a kind contemplated by [Regulatory Guide 155 *Debenture prospectuses*](#) (RG 155); and
 - (c) that facility is identified in the PDS.
- 19 [CO 03/237] enables a product issuer to avoid the expense and inconvenience of preparing successive supplementary PDSs, required by s1012J, by putting in place a mechanism by which investors may

conveniently obtain up-to-date information about matters that change frequently but that is not material information.

20 [CO 03/237] was intended to:

- (a) alleviate concerns about possible compliance failure where a PDS does not contain the most current information available at the time it is given to investors, even though it was up to date when it was prepared;
- (b) remove a perceived barrier to the appropriate disclosure of relevant performance information in a PDS; and
- (c) respond to industry concerns about the additional costs of preparing, printing and distributing supplementary PDSs to update information that changes frequently.

Proposal

B3 To preserve its effect beyond the sunset date of 1 April 2017, we propose to continue the relief currently given by [CO 03/237] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Updated Product Disclosure Statements) Instrument 2016/XX at Attachment 3 to this consultation paper. You can access the current instrument at www.legislation.gov.au by clicking on the following direct link: [\[CO 03/237\]](#).

The only changes proposed are to:

- (a) ensure consistency with ASIC's recently updated digital disclosure policy in [Regulatory Guide 221](#) *Facilitating digital financial services disclosures* (RG 221) and related ASIC instruments;
- (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;
- (e) update legislative references and definitions; and
- (f) correct any minor drafting errors.

Your feedback

B3Q1 Should the relief currently given by [CO 03/237] be amended to exclude shorter PDSs? Please provide reasons for your response.

B3Q2 Should the relief currently given by [CO 03/237] continue to apply to shorter PDSs, but be limited to particular kinds of non-material information in a shorter PDS? Please provide reasons for your response.

Rationale

- 21 We have formed the preliminary view that [CO 03/237] is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.
- 22 We consider [CO 03/237] applies to all PDSs, including shorter PDSs, and we are not proposing to change this, but we are seeking your views on the application of [CO 03/237] to shorter PDSs.

Class Order [CO 03/1092] *Further relief for joint Product Disclosure Statements*

Background

- 23 [CO 03/1092] grants relief from the requirements in s1013A of the Corporations Act to allow financial product issuers to jointly prepare a single PDS where the PDS clearly states:
- (a) that the PDS covers two or more separate financial products;
 - (b) the identity of the issuer of each financial product it covers;
 - (c) that each issuer takes full responsibility for the whole PDS;
 - (d) which external dispute resolution schemes are able to deal with complaints relating to the products covered by the PDS; and
 - (e) how clients may exercise their cooling-off rights.
- 24 Under s1013A, a PDS must be prepared by ‘the issuer of the financial product’ (i.e. a single issuer). We consider that Pt 7.9 of the Corporations Act does not contemplate multiple issuers issuing a single PDS in the absence of appropriate relief.
- 25 [CO 03/1092] enables product issuers that together offer two or more complementary products to issue a joint PDS so that retail clients can consider those products together as part of one overall purchasing decision.
- 26 [CO 03/237] was intended to provide certainty and flexibility for issuers of financial products working together by permitting them to prepare joint PDSs, while maintaining consumer safeguards already in place under the Corporations Act.
- 27 We consider that [CO 03/1092] is not capable of application to shorter PDSs.

Proposal

B4 To preserve its effect beyond the sunset date of 1 April 2017, we propose to continue the relief currently given by [CO 03/1092] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Joint Product Disclosure Statements) Instrument 2016/XX at Attachment 4 to this consultation paper. You can access the current instrument at www.legislation.gov.au by clicking on the following direct link: [\[CO 03/1092\]](#).

The only changes proposed are to:

- (a) remove legislative duplication of the requirements;
- (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;
- (e) update legislative references and definitions; and
- (f) correct any minor drafting errors.

Rationale

- 28 We have formed the preliminary view that [CO 03/1092] is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.
- 29 We are proposing to remove parts of [CO 03/1092] that are duplicated in the Corporations Act—that is:
- (a) paragraph 3(b)—the identity of the issuer of each product (which is already set out in s1013D(1)(a)(i) of the Corporations Act);
 - (b) paragraph 3(d)—which external dispute resolution schemes are able to handle complaints (which is in s1013D(1)(g)); and
 - (c) paragraph 3(e)—how cooling-off rights may be exercised (which is in s1013D(1)(i)).

C Regulatory and financial impact

30 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 regulatory burden on licensees in relation to product disclosure; and
- (b) providing adequate regulatory safeguards to ensure consumers receive appropriate financial product disclosure.

31 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 which 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 minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

32 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.

33 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
ASIC	Australian Securities and Investments Commission
[CO 14/26] (for example)	An ASIC class order (in this example numbered 14/26) 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
Legislation Act	<i>Legislation Act 2003</i>
Product Disclosure Statement (PDS)	A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act Note: See s761A for the exact definition.
RIS	Regulation Impact Statement
s25 (for example)	A section of the Corporations Act (in this example numbered 25), unless otherwise specified
shorter PDS	The requirements set out in Div 3A of Pt 7.9 of the Corporations Act as modified by Subdivs 4.2 to 4.2C and Schs 10B, 10C, 10D and 10E of the Corporations Regulations, which prescribe the content and length of the PDS for first home saver accounts, margin loans, superannuation products and simple managed investment schemes
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect