



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 256

Remaking and repealing ASIC class orders on trustee company common funds

March 2016

About this paper

This consultation paper sets out ASIC's proposals to address two class orders relating to trustee companies. Under the *Legislation Act 2003*, these class orders will expire ('sunset') if not remade.

We are seeking feedback from trustee companies and other Australian financial services (AFS) licensees on our proposal to remake, without significant changes, Class Order [CO 04/1063] *Section 981B money in cash common funds*, which is due to expire on 1 April 2017.

Note: The draft ASIC instrument is available on our website at www.asic.gov.au/cp under CP 256.

We are also seeking feedback on our proposal to repeal Class Order [CO 00/199] *Trustee companies' common funds*, which is due to expire on 1 October 2016.

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 March 2016 and is based on the Corporations Act 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 27 April 2016 to:

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What will happen next?

Stage 1	24 March 2016	ASIC consultation paper released
Stage 2	27 April 2016	Comments due on the consultation paper
Stage 3	June–July 2016	Commencement of remade instrument

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 order

Key points

We are proposing to remake Class Order [CO 04/1063] *Section 981B money in cash common funds*, which sunsets on 1 April 2017.

We have formed the preliminary view that this class order is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework.

The class order has been redrafted with minor and technical modifications, using ASIC's current style and format, while preserving the current effect of the instrument. The draft ASIC instrument, which reflects the minor amendments proposed in this paper, is available on our website at www.asic.gov.au/cp under CP 256.

Your feedback

- 6 You are invited to comment on any of our proposals to remake the ASIC class order in this section, including whether the class order is 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 04/1063] *Section 981B money in cash common funds*

Background

- 7 Subdivision A of Div 2 of Pt 7.8 of the *Corporations Act 2001* (Corporations Act) specifies how Australian financial services (AFS) licensees may deal with money received from or on behalf of a client (client money). The underlying purpose of these rules is to protect client money paid to a licensee in connection with a financial service or the acquisition of a financial product.
- 8 Broadly, the Subdivision requires AFS licensees to ensure that client money is paid into an account (referred to as a s981B account) that meets specified requirements. The kinds of account specified are:
- (a) an account with an Australian authorised deposit-taking institution;
 - (b) an account with an approved foreign bank; and
 - (c) a cash management trust.

Cash management trusts and cash common funds

- 9 A ‘cash management trust interest’ is defined in the Corporations Act to mean an interest in a registered managed investment scheme (registered scheme) that relates to an undertaking of the kind commonly known as a cash management trust.
- 10 The term ‘cash management trust’ is used to describe a managed investment where the funds of individual unit holders are pooled, the primary investment is in cash securities and the value of each unit does not change. Cash management trusts are relatively low-risk investment products.
- 11 Another similar arrangement is a ‘common fund’. A common fund is a fund created and operated by a licensed trustee company. Common funds allow for the co-mingling of trust assets that would otherwise have to be held discretely under trust law. A trustee company must hold an AFS licence to operate a common fund.
- 12 Cash common funds are substantively similar to cash management trusts—both pooled arrangements are used to make comparable investments. The similarities are greatest when the cash common fund is a registered scheme (like cash management trusts).
- 13 Common funds operated by licensed trustee companies are now regulated under the Corporations Act following the transfer of the regulation of traditional trustee company services to the Commonwealth in May 2010.
- 14 It is unclear whether s981B of the Corporations Act and reg 7.8.01 of the Corporations Regulations 2001 allow client money to be paid into a cash common fund. This is because there is doubt about whether an interest in a registered cash common fund is a ‘cash management trust interest’.
- 15 We made [CO 04/1063] to permit client money held by an AFS licensee to be paid into a cash common fund, provided the fund is also a registered scheme under Ch 5C of the Corporations Act.

Proposal

B1 To preserve its effect beyond the sunset date of 1 April 2017, we propose to continue the relief given by [CO 04/1063] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Client Money—Cash Common Funds) Instrument 2016/XX attached to this consultation paper. You can access the current instrument on www.comlaw.gov.au by clicking on the following direct link: [\[CO 04/1063\]](#).

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

Rationale

- 16 We have reached the preliminary view that [CO 04/1063] is operating effectively and efficiently. We are not aware of significant issues with the current operation of [CO 04/1063]. In reaching our preliminary view, we spoke to industry participants about the current arrangements.
- 17 Our preliminary view is that [CO 04/1063]:
- (a) continues to be a useful part of the legislative framework because it addresses the uncertainty about whether client money can be paid into cash common funds; and
 - (b) maintains the consumer protection safeguards associated with holding client money imposed by Pt 7.8 (i.e. only allowing client money to be placed into accounts or registered cash schemes operated by licensed entities).

C Repealing ASIC class order

Key points

We are proposing to repeal Class Order [CO 00/199] *Trustee companies' common funds*, which sunsets on 1 October 2016.

We have formed the preliminary view that [CO 00/199] is no longer required and is no longer a useful part of the regulatory framework.

Your feedback

- 18 You are invited to comment on our proposal to repeal the ASIC class order in this section, including whether the class order is currently 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 00/199] *Trustee companies' common funds*

Background

- 19 [CO 00/199] modifies provisions of Ch 5C of the Corporations Act in relation to common funds that are also registered schemes. These types of funds are operated by licensed trustee companies.
- 20 [CO 00/199] provides relief from:
- (a) the provisions that relate to the retirement of the responsible entity of the registered scheme and the removal of the responsible entity by members (s601FL, 601FM and 601FQ);
 - (b) the limitations in s601GC on changes to the scheme constitution;
 - (c) aspects of the related party transaction provisions in Pt 5C.7; and
 - (d) the rules in Pt 5C.9 that relate to the winding up of registered schemes.

Proposal

- c1 We propose to repeal [CO 00/199], which would otherwise sunset on 1 October 2016. You can access the current instrument on www.comlaw.gov.au by clicking on the following direct link: [\[CO 00/199\]](#).

Rationale

- 21 We do not consider that [CO 00/199] is a useful part of the regulatory framework. We have consulted informally with the licensed trustee companies that operate common funds that are also registered schemes. All entities that could rely on [CO 00/199] have advised ASIC that they do not use this relief; the relevant common funds meet the requirements in Ch 5C.
- 22 Given the current practice of the industry, we expect that common funds that are registered schemes will comply with Ch 5C. It is open to licensed trustee companies to apply for relief from specific provisions on an individual basis.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	An AFS licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services
ASIC	Australian Securities and Investments Commission
cash management trust interest	Has the meaning given in s9 of the Corporations Act
Ch 5C (for example)	A chapter of the Corporations Act (in this example numbered 5C)
client money	Money that is paid to an AFS licensee under s981A
[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.
common fund	Has the meaning given in s601SCA of the Corporations Act
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Div 5A (for example)	A division of the Corporations Act (in this example numbered 5A)
Legislation Act	<i>Legislation Act 2003</i>
licensed trustee company	Has the meaning given in s601RAA of the Corporations Act
Pt 7.9 (for example)	A part of the Corporations Act (in this example numbered 7.9)
reg 7.8.01 (for example)	A regulation of the Corporations Regulations 2001 (in this example numbered 7.8.01)
registered scheme	A registered managed investment scheme, which has the meaning given in s9 of the Corporations Act
RIS	Regulation Impact Statement
s25 (for example)	A section of the Corporations Act (in this example numbered 25)

Term	Meaning in this document
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect
traditional trustee company services	<p data-bbox="772 421 1391 481">Has the meaning given in s601RAC(1) of the Corporations Act—that is:</p> <ul data-bbox="772 488 1391 840" style="list-style-type: none"> <li data-bbox="772 488 1391 548">• performing estate management functions (as defined in s601RAC(2)); <li data-bbox="772 555 1391 616">• preparing a will, a trust instrument, a power of attorney or an agency arrangement; <li data-bbox="772 622 1391 728">• applying for probate of a will, applying for grant of letters of administration, or electing to administer a deceased estate; <li data-bbox="772 734 1391 772">• establishing and operating common funds; and <li data-bbox="772 779 1391 840">• any other services prescribed by the regulations for the purpose of s601RAC(1)
trustee company	Has the meaning given in s601RAB of the Corporations Act