



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 286

Remaking ASIC class orders on mortgage offset accounts and factoring arrangements

June 2017

About this paper

This consultation paper sets out ASIC's proposals to remake our class orders on mortgage offset accounts and debt factoring. Under the *Legislation Act 2003*, these class orders will expire ('sunset') if not remade.

We are seeking feedback from mortgage brokers, and providers and users of debt factoring arrangements, on our proposals to remake, without significant changes, the following class orders:

- Class Order [CO 03/1048] *Mortgage offset accounts*, which is due to expire on 1 October 2017; and
- Class Order [CO 04/239] *Factoring arrangements: Licensing, hawking and disclosure relief*, which is due to expire on 1 October 2017.

Note: The draft ASIC instruments are available on our website at www.asic.gov.au/cp under CP 286.

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 7 June 2017 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 6 July 2017 to:

Gerard Andrews
 Lawyer
 Deposit Takers, Credit and Insurers
 Australian Securities and Investments Commission
 Level 1, 11 Mounts Bay Road
 Perth WA 6000
 email: gerard.andrews@asic.gov.au

What will happen next?

Stage 1	7 June 2017	ASIC consultation paper released
Stage 2	6 July 2017	Comments due on the consultation paper
Stage 3	By 1 October 2017	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*, 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.

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 consumer trust and confidence and ensuring fair and efficient markets.
- 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 any proposed changes to the class order that are not minor and machinery. 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 03/1048] *Mortgage offset accounts*, which sunsets on 1 October 2017; and
- Class Order [CO 04/239] *Factoring arrangements: Licensing, hawking and disclosure relief*, which sunsets on 1 October 2017.

We have formed the preliminary view that these class orders are operating effectively and efficiently, and continue to form a 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 286.

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 03/1048] *Mortgage offset accounts*

Background

- 7 A mortgage offset account is a facility that lenders offer to borrowers with home loans. In general, the borrower deposits money into the offset account which is notionally offset against the balance of the loan so that the borrower pays interest only on the notionally reduced balance. Usually, the credit balance of the mortgage offset account is available to the borrower at call.
- 8 Mortgage offset accounts are financial products, as either a financial investment under s763B of the *Corporations Act 2001* (Corporations Act) or a deposit-taking facility under s764A(1)(i) of the Corporations Act.
- 9 Many persons involved in obtaining credit, such as mortgage brokers, provide advice on mortgage offset accounts, or deal in those accounts, but do not provide any other financial services. Under the normal operation of the

Corporations Act, these persons would need to obtain an Australian financial services (AFS) licence.

- 10 We made [CO 03/1048] to permit the provision of financial product advice on a mortgage offset account and for arranging for another person to apply for, acquire, vary or dispose of a mortgage offset account without an AFS licence as long as the person is a member of an ASIC-approved external dispute resolution (EDR) scheme. Persons who advise or deal in relation to mortgage offset accounts do not need to obtain an AFS licence solely for these purposes.

Proposal

- B1** To preserve its effect beyond the sunset date of 1 October 2017, we propose to continue the relief currently given by [CO 03/1048] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Mortgage Offset Accounts) Instrument 2017/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: [\[CO 03/1048\]](#).

The only changes proposed are to:

- (a) remove the requirement for EDR membership because it is now redundant due to the commencement of the *National Consumer Credit Protection Act 2009* (National Credit Act);
- (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

- 11 We have reached the preliminary view that [CO 03/1048] is operating effectively and efficiently, and continues to form a useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.
- 12 When we remake [CO 03/1048], we are proposing to remove the requirement that a person relying on the exemption obtain EDR membership. This requirement is now redundant because the National Credit Act requires credit licensees and credit representatives to be members of an ASIC-approved EDR scheme. Many of the persons relying on [CO 03/1048], such as mortgage brokers, may be credit licensees or credit representatives.

Class Order [CO 04/239] *Factoring arrangements: Licensing, hawking and disclosure relief*

Background

- 13 Factoring involves the sale of the accounts receivable of a business to a factor company. By selling debts (represented by invoices for future payment) to a factor company, the business generates immediate cash flow rather than waiting for payments to be received on the ordinary trading terms of the business. The factor company takes title to the debts and collects them when they are due. The debts are purchased at a discount to compensate the factor company for the risk and effort involved in providing the service.
- 14 Some factoring arrangements may technically be derivatives under s761D of the Corporations Act. This is because factor companies may have an obligation to pay their clients amounts at some future date, under the factoring arrangement, where the amount of the payment is determined by reference to the value of the relevant debts. The number and amount of the debts is not known at the time the factoring arrangement is entered into.
- 15 Generally, persons providing financial services in relation to derivatives must:
- (a) hold an AFS licence and comply with general licensee obligations under Pt 7.6 of the Corporations Act;
 - (b) comply with disclosure requirements in Pt 7.7 of the Corporations Act, including the requirements to give a Financial Services Guide and Statement of Advice to retail clients;
 - (c) comply with conduct requirements in Pt 7.8 of the Corporations Act, specifically s992A relating to the hawking of financial products; and
 - (d) comply with the disclosure requirements in Pt 7.9 of the Corporations Act, including the requirements to prepare and issue a Product Disclosure Statement, to confirm transactions (s1017F) and to provide ongoing disclosure of material or significant changes (s1017B).
- 16 We considered that these requirements were not intended to apply to factoring arrangements. As a result, we made [CO 04/239], which exempts persons providing, or advising on, debt factoring arrangements that are derivatives from the requirement to hold an AFS licence, and from the product disclosure and hawking provisions of Ch 7 of the Corporations Act.
- 17 The exemption is conditional on persons maintaining internal dispute resolution processes, which minimise the risk of consumer detriment by ensuring that consumers have a mechanism to resolve any disputes arising from the financial services they receive in relation to factoring arrangements.

Proposal

B2 To preserve its effect beyond the sunset date of 1 October 2017, we propose to continue the relief currently given by [CO 04/239] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Factoring Arrangements) Instrument 2017/XX at Attachment 2 to this consultation paper. You can access the current instrument at www.legislation.gov.au by clicking on the following direct link: [\[CO 04/239\]](#).

The only changes proposed are to:

- (a) clarify that the relief applies to the extent that a factoring arrangement constitutes a derivative;
- (b) update a reference to the Australian Standard on complaints handling to the relevant current standard;
- (c) update the name of the legislative instrument;
- (d) reflect current drafting practice and update the format of the current document;
- (e) simplify the drafting to give greater clarity;
- (f) update legislative references and definitions; and
- (g) correct any minor drafting errors.

Rationale

- 18 We have reached the preliminary view that [CO 04/239] is operating effectively and efficiently, and continues to form a useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.
- 19 Our preliminary view is that [CO 04/239] has been a low-cost, efficient means of addressing the original problem. Businesses have been able to sell their accounts receivable and factoring companies have been able to acquire these debts without the need to obtain authorisation under an AFS licence. The compliance costs associated with the conditions on [CO 04/239] are significantly lower than the cost of obtaining an AFS licence and complying with other obligations under the Corporations Act.
- 20 Since [CO 04/239] was made, the Australian Standard on complaints handling has been updated. We intend to reference the new standard when we remake the exemption.

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.
ASIC	Australian Securities and Investments Commission
[CO 03/1048] (for example)	An ASIC class order (in this example numbered 03/1048) Note: Legislative instruments made from 2015 are referred to as ASIC instruments.
Ch 7 (for example)	A chapter of the Corporations Act (in this example numbered 7), unless otherwise specified
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
credit licensee	A person who holds an Australian credit licence under s35 of the National Credit Act
credit representative	A person authorised to engage in specified credit activities on behalf of a credit licensee under s64(2) or 65(2) of the National Credit Act
derivative	Has the meaning given by s761D of the Corporations Act
EDR scheme	An external dispute resolution scheme approved by ASIC under the Corporations Act (see s912A(2)(b) and 1017G(2)(b)) and/or the National Credit Act (see s11(1)(a)) in accordance with our requirements in Regulatory Guide 139 <i>Approval and oversight of external complaints resolution schemes</i> (RG 139)
financial product advice	A recommendation or a statement of opinion, or a report of either of these things, that: <ul style="list-style-type: none"> • is intended to influence a person or persons in making a decision about a particular financial product or class of financial product, or an interest in a particular financial product or class of financial product; or • could reasonably be regarded as being intended to have such an influence. <p>This does not include anything in an exempt document</p> <p>Note: This is the definition contained in s766B of the Corporations Act.</p>

Term	Meaning in this document
National Credit Act	<i>National Consumer Credit Protection Act 2009</i> , including regulations made for the purposes of that Act
s25 (for example)	A section of the Corporations Act (in this example numbered 25), unless otherwise specified
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect