



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 226

Remaking ASIC class orders on secondary services and general advice

December 2014

About this paper

This consultation paper sets out ASIC's proposals to remake into ASIC instruments our class orders on:

- Financial Services Guide (FSG) relief for experts and persons arranging for the issue of a financial product by a product provider under an intermediary authorisation (arrangers); and
- relief relating to general advice warnings.

Under the *Legislative Instruments Act 2003*, these class orders will expire ('sunset') if not remade.

We are seeking feedback—in particular, from product issuers, Australian financial services (AFS) licensees that are authorised to provide general advice and their representatives (e.g. authorised representatives and employees), and AFS licensees (or authorised representatives) who provide financial services to retail clients via an intermediary (secondary service providers)—on our proposals to remake, without significant changes, the following class orders:

- [CO 05/835], which is due to expire on 1 October 2015; and
- [CO 04/1572], [CO 04/1573] and [CO 05/1195], which are due to expire on 1 April 2016.

Note: The draft ASIC instruments are available on our website at www.asic.gov.au/cp under CP 226.

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 11 December 2014 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	5
Purpose of ‘sunsetting’ legislative instruments	5
Our approach to remaking legislative instruments	5
B Remaking of ASIC class orders	7
Your feedback	7
Class Order [CO 04/1572] <i>Secondary Services: Financial Services</i> <i>Guide relief for experts</i>	7
Class Order [CO 04/1573] <i>Secondary Services: Financial Services</i> <i>Guide relief for arrangers acting under an intermediary authorisation</i>	10
Class Order [CO 05/835] <i>General advice in advertising</i>	11
Class Order [CO 05/1195] <i>Simplified warning for oral general advice</i> ..	13
Key terms	16

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 9 February 2015 to:

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What will happen next?

Stage 1	11 December 2014	ASIC consultation paper released
Stage 2	9 February 2015	Comments due on the consultation paper Assess any feedback from the consultation
Stage 3	February–March 2015	Remake the instruments
Stage 4	April 2015	Remade instruments will commence

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 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 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 class order if we are able to do so without undermining ASIC's priorities of promoting investor and financial consumer trust and confidence and ensuring fair, orderly and transparent 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 our proposed changes to the class order. Where the class order is operating effectively and efficiently, we will remake the class order without substantive changes.

B Remaking of ASIC class orders

Key points

We are proposing to remake:

- Class Order [CO 04/1572] *Secondary Services: Financial Services Guide relief for experts*, which sunsets on 1 April 2016;
- Class Order [CO 04/1573] *Secondary Services: Financial Services Guide relief for arrangers acting under an intermediary authorisation*, which sunsets on 1 April 2016;
- Class Order [CO 05/835] *General advice in advertising*, which sunsets on 1 October 2015; and
- Class Order [CO 05/1195] *Simplified warning for oral general advice*, which sunsets on 1 April 2016.

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. [CO 04/1572] and [CO 04/1573] will be consolidated into the one 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 226.

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 04/1572] *Secondary Services: Financial Services Guide relief for experts*

Background

- 7 A financial service that is provided to a retail client via an intermediary is a 'secondary service'. The intermediary is the entity through which the financial service is made available to the retail client.

- 8 It is common for experts¹ to provide their reports containing general advice to clients who are proposing to issue a financial product or undertake some corporate action, knowing that the advice will be included in a disclosure document prepared by the client (e.g. a scheme document, takeover document, prospectus or Product Disclosure Statement (PDS)) that is then provided or made available to a third party—a retail client. Where this is the case, the expert will be providing a secondary service to the retail client.
- 9 As such, the expert may need to consider whether they are required to meet the conduct and disclosure obligations in Ch 7 and Pts 7.7 and 7.9 of the *Corporations Act 2001* (Corporations Act), such as:
- (a) having an appropriate retail Australian financial services (AFS) licence authorisation;
 - (b) having appropriate dispute resolution processes;
 - (c) providing a Financial Services Guide (FSG) about the services they are providing;
 - (d) following the guidance in Regulatory Guide 146 *Licensing: Training of financial product advisers* (RG 146); and
 - (e) satisfying the general advice warning requirements if general advice is provided.
- 10 In December 2004, ASIC released [CO 04/1572] to address concerns expressed to ASIC by experts about the difficulty in providing a FSG to a retail client where the expert does not have a direct relationship with the retail client.
- 11 [CO 04/1572] provides relief to allow the author of an ‘expert report’ to include its FSG as a separate and clearly identifiable part of the expert report that is prepared for inclusion in a third party’s disclosure document, subject to certain conditions specified in the class order.
- 12 The relief applies where the expert gives general advice in a report or statement (the expert report) and this is included in a document (the disclosure document) prepared by or on behalf of another person (the principal) and all of the following conditions are met:
- (a) the expert is not the person who prepared the disclosure document or an employee or director of the principal;
 - (b) the disclosure document clearly and prominently discloses the identity of the expert, the person for whom the expert report was prepared and the principal;

¹ Section 9 of the *Corporations Act 2001* (Corporations Act) defines an expert as ‘... a person whose profession or reputation gives authority to a statement made by him or her in relation to that matter’.

- (c) the disclosure document clearly and prominently discloses the nature of the relationship between the expert and the person for whom, or on whose behalf, the expert report was prepared and the principal;
- (d) the disclosure document clearly and prominently discloses the extent of the liability of the expert in relation to the disclosure document and the expert report;
- (e) the expert report forms a separate and clearly identifiable part of the disclosure document and bears an expression at or near the front of the report that makes it clear that it is both an expert report and an FSG; and
- (f) the expert FSG forms a separate and clearly identifiable part of the expert report.

Proposal

B1 To preserve its effect beyond the sunset date of 1 April 2016, we propose to continue the relief currently given by [CO 04/1572] in a new legislative instrument, without any significant changes: see draft ASIC Corporations (Financial Services Guides—Secondary Services) Instrument 2015 at Attachment 1 to this consultation paper. You can access the current instrument on www.asic.gov.au/co or by clicking on the following link to download a PDF version: [\[CO 04/1572\]](#).

The only changes proposed are to:

- (a) update the name of the legislative instrument;
- (b) reflect current drafting practices, update the format of the current document and consolidate it with [CO 04/1573];
- (c) simplify the drafting to give greater clarity;
- (d) update legislative references; and
- (e) correct minor drafting errors.

Rationale for remaking the class order

- 13 The relief in [CO 04/1572] is required because an expert who provides a report to an issuer or entity (that is proposing to issue a financial product or undertake a corporate action) for inclusion in a document (e.g. a prospectus, PDS, scheme document or takeover document) may expect that the report will then be provided to retail clients. This means that the expert may be influencing a wider class of persons with financial advice and therefore needs to give an FSG under s941A(1) and 941B(1) to retail clients with whom the expert has no relationship.
- 14 There are benefits in including the expert's FSG in the expert report, rather than requiring it to be provided separately before the expert report is provided:
- (a) It provides significant commercial benefit for both the expert and the AFS licensee issuing the disclosure document.

- (b) It assists the financial services sector to address some of the practical difficulties that exist in giving an FSG to a retail client where the expert does not have a direct relationship with that retail client.
- (c) Retail clients are able to receive the FSG with no reduction in consumer protection.

Class Order [CO 04/1573] *Secondary Services: Financial Services* Guide relief for arrangers acting under an intermediary authorisation

Background

- 15 An intermediary who arranges for the issue of a financial product by a product provider under an intermediary authorisation² to a retail client will be providing a secondary service to the retail client. As such, the intermediary may be required to meet the conduct and disclosure obligations in Ch 7 and Pts 7.7 and 7.9 of the Corporations Act, including providing an FSG about the services they are providing.
- 16 In December 2004, ASIC released [CO 04/1573] to address concerns expressed to ASIC by intermediaries about the difficulty in providing an FSG to a retail client as, following the arranging of the financial product, the intermediary may no longer deal directly with the client.
- 17 [CO 04/1573] provides relief to allow an FSG from a person arranging for the issue of a financial product by a product provider under an intermediary authorisation to be included as a separate and clearly identifiable part of the product provider's PDS (if certain conditions are met).
- 18 This exemption applies where the intermediary provides a financial service consisting of arranging for the issue of a financial product under an intermediary authorisation, and all of the following conditions are satisfied:
- (a) the intermediary FSG forms a separate and clearly identifiable part of the PDS for the financial product;
 - (b) the expression 'Financial Services Guide' appears at or near the front of the part of the PDS that is the intermediary FSG;
 - (c) the intermediary FSG clearly and prominently discloses the identity of the product provider, the intermediary—and, where the intermediary is an authorised representative, the AFS licensee on whose behalf the intermediary acts in relation to the intermediary authorisation; and
 - (d) the intermediary FSG clearly and prominently discloses the nature of the relationship between the product provider and the intermediary—

² Intermediary authorisation has the same meaning as in s911A(2)(b) of the Corporations Act.

and, where the intermediary is an authorised representative, the AFS licensee on whose behalf the intermediary acts in relation to the intermediary authorisation.

Proposal

B2 To preserve its effect beyond the sunset date of 1 April 2016, we propose to continue the relief currently given by [CO 04/1573] in a new legislative instrument, without any significant changes: see draft ASIC Corporations (Financial Services Guides—Secondary Services) Instrument 2015 at Attachment 1 to this consultation paper. You can access the current instrument on www.asic.gov.au/co or by clicking on the following link to download a PDF version: [\[CO 04/1573\]](#).

The only changes proposed are to:

- (a) update the name of the legislative instrument;
- (b) reflect current drafting practice, update the format of the current document and consolidate it with [CO 04/1572];
- (c) simplify the drafting to give greater clarity;
- (d) update legislative definitions; and
- (e) correct minor drafting errors.

Rationale for remaking the class order

- 19 The relief provided by [CO 04/1573] overcomes some practical difficulties associated with giving an FSG when providing a secondary service, without reducing the level of information that is provided to retail clients.
- 20 [CO 04/1573] assists intermediaries to comply with their FSG obligations, as well as giving greater certainty about how the Corporations Act applies to the provision of secondary services. Information contained in an FSG is important, and relevant information in the context of secondary services should be given to retail clients.
- 21 Allowing the FSG to be included in a PDS helps reduce costs and makes the relevant information about the product and associated services available in one document.

Class Order [CO 05/835] *General advice in advertising*

Background

- 22 Under s949A of the Corporations Act, AFS licensees and their representatives must give a general advice warning to a retail client when they give general advice to that client.

- 23 The objective of the general advice warning is to alert the client to the fact that the advice is general in nature and does not take into account their objectives, financial situation or needs. If the warning is not given, there is a risk that the client will consider that the advice is appropriate to their relevant circumstances.
- 24 The Australian Government's proposal paper, *Refinements to Financial Services Regulation* (FSR refinement proposals) noted that: '[t]he General Advice Warning requirements do not apply consistently to different types of advertisers'.³
- 25 On 12 May 2005, ASIC committed to:
 issue class order relief to deal with the current anomaly that, unlike licensed product issuers, unlicensed product issuers do not have the option of issuing a simpler General Advice Warning in their advertising.⁴
- 26 ASIC issued [CO 05/835] in August 2005 to address this anomaly. [CO 05/835] provides:
- (a) an exemption to issuers of financial products from the requirement to hold an AFS licence for providing financial advice, where they provide general financial product advice in advertisements in the media or on a billboard or poster; and
 - (b) an exemption to licensed issuers from the requirement to give an FSG in accordance with s941A(1) and the requirement to give a general advice warning under s949A(2), where they provide general advice on an offer or intended offer of their securities in advertisements in the media or on a billboard or poster.
- 27 [CO 05/835] grants this relief on condition that those issuers of financial products or securities include a statement in their advertisement that a person should consider whether the financial product or securities are appropriate for them.

Proposal

B3 To preserve its effect beyond the sunset date of 1 October 2015, we propose to continue the relief currently given by [CO 05/835] in a new legislative instrument, without any significant changes: see draft ASIC Corporations (Advertising by Product Issuers) Instrument 2015 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: [\[CO 05/835\]](#).

The only changes proposed are to:

- (a) update the name of the legislative instrument;

³ Treasury, *Refinements to Financial Services Regulation*, proposal paper, 2 May 2005, p. 14.

⁴ Information Release (IR 05-22) *ASIC provides details on financial services refinement projects*, 12 May 2005.

- (b) reflect current drafting practice and update the format of the current document;
- (c) simplify the drafting to give greater clarity;
- (d) remove the restrictions on the form of advertising to encompass contemporary forms of advertising; and
- (e) update legislative definitions.

Rationale for remaking the class order

- 28 [CO 05/835] creates parity between the requirements that apply to licensed and unlicensed issuers providing general financial product advice in advertisements.
- 29 [CO 05/835] is beneficial to both consumers and product issuers because:
- (a) it addresses the existing inconsistent advertising disclosure requirements for licensed issuers and unlicensed issuers under the Corporations Act; and
 - (b) it ensures that consumers receive important information in a simpler and more consistent manner.
- 30 The modification also reduces the regulatory burden on product issuers because it allows them to give general financial product advice in advertisements, without needing to provide an FSG or general advice warning. Under [CO 05/835], product issuers need only include a statement in their advertisement that a person should consider whether the financial product is appropriate for them.

Class Order [CO 05/1195] *Simplified warning for oral general advice*

Background

- 31 Under the FSR refinement proposals, proposal 5.1 stated that ASIC would:
- ... provide further guidance to develop simple General Advice Warnings conveying the substance of the legislative requirements, instead of relying on the precise wording of the Corporations Act. ASIC will also use its powers to provide relief where appropriate.
- 32 The FSR refinement proposals also noted that:
- The General Advice Warning (GAW) requirement in section 949A of the Corporations Act is designed to alert consumers that advice is general in nature and does not take into account their personal circumstances ... It is the substance of the GAW that is important. The form of the GAW should be modified to suit the circumstances. To encourage this, ASIC will assist licensees to refine GAWs to be more easily understood by consumers. ASIC will also use its powers to provide relief from the GAW requirements, where appropriate.

- 33 ASIC responded to proposal 5.1 by granting relief through [CO 05/1195] to simplify the general advice warning required where oral general advice is provided to a retail client. This class order exempts AFS licensees that are authorised to provide general advice (and their representatives) from the obligation under s949A(2) to give a general advice warning for oral general advice on the condition that a simplified oral warning is given by the advice provider, which conveys that:
- (a) the advice is general; and
 - (b) the advice may not be appropriate for the client.
- 34 [CO 05/1195] also:
- (a) varies [CO 05/835] to provide relief from the requirement to give a general advice warning under s949A(2) to licensed issuers providing general advice on an offer or intended offer of their securities in advertisements in the media or on a billboard or poster; and
 - (b) varies s949A(4) to amend the references to subsection (1) and replace with subsection (2).

Proposal

B4 To preserve its effect beyond the sunset date of 1 April 2016, we propose to continue the relief currently given by [CO 05/1195] in a new legislative instrument, without any significant changes: see draft ASIC Corporations (General Advice Warning) Instrument 2015 at Attachment 3 to this consultation paper. You can access the current instrument on www.comlaw.gov.au or by clicking on the following direct link: [\[CO 05/1195\]](#).

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 definitions;
- (e) remove obsolete paragraphs; and
- (f) correct minor drafting errors.

Rationale for remaking the class order

- 35 When an AFS licensee or its authorised representatives provide general advice to a retail client, they must give the client a general advice warning under s949A(2). If a client does not receive a general advice warning when general advice is provided, there is a risk that the client may make an inappropriate decision to acquire, dispose of or hold a financial product due to a misunderstanding that they received advice that was appropriate for them.

- 36 We provided relief under [CO 05/1195] because the full recital of the general advice warning may not be appropriate in all circumstances when giving general advice.
- 37 It has previously been suggested that retail clients do not understand or do not listen to the full general advice warning when it is given orally. There were also concerns that giving the full general advice warning orally increases the time required to deal with oral inquiries and so increases costs for general advice providers.⁵
- 38 [CO 05/1195] is beneficial to advice providers and retail clients because it allows general advice providers to give a shorter, simpler general advice warning when they provide oral general advice. The modification is intended to make the warning more easily understood by retail clients and to reduce the regulatory burden on general advice providers and their representatives. Advice providers may also use their own words to convey the simpler warning.

⁵ [CO 05/1195], RIS, November, 2005.

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	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A.
arranger	A person who arranges for the issue of a financial product by a product provider under an intermediary authorisation
ASIC	Australian Securities and Investments Commission
[CO 14/26] (for example)	An ASIC class order (in this example numbered 14/26)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
expert	A person whose profession or reputation gives authority to a statement made by him or her in relation to that matter Note: This is a definition contained in s9 of the Corporations Act.
FSG	Financial Services Guide
FSR refinement proposals	The Australian Government's proposal paper, <i>Refinements to Financial Services Regulation</i> , issued in May 2005
Legislative Instruments Act	<i>Legislative Instruments Act 2003</i>
PDS	Product Disclosure Statement
RIS	Regulation Impact Statement
s25 (for example)	A section of the Corporations Act (in this example numbered 25), unless otherwise specified
secondary service provider	An AFS licensee or authorised representative who provides financial services to retail clients via an intermediary
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect