



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 230

Remaking ASIC class orders on banking and insurance

May 2015

About this paper

This consultation paper sets out ASIC's proposals to remake three class orders on banking and insurance into ASIC instruments. Under the *Legislative Instruments Act 2003*, these class orders will expire if not remade.

We are seeking feedback from the banking and insurance sectors on our proposals to remake, without significant changes, the following class orders:

- Class Order [CO 04/909] *Agency banking*, which is due to expire on 1 October 2017;
- Class Order [CO 05/681] *Transitional relief for deposit product providers—PDSs and periodic statements*, which is due to expire on 1 October 2015; and
- Class Order [CO 05/1070] *General insurance distributors*, which is 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 230.

We are also seeking feedback on our proposal to repeal the following class order that we consider is no longer required:

- Class Order [CO 06/623] *Relief for certain general insurers from s981B account requirements*, 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 26 May 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 7 July 2015 to:

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What will happen next?

Stage 1	26 May 2015	ASIC consultation paper released
Stage 2	7 July 2015	Comments due on the consultation paper
Stage 3	September 2015	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 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 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 04/909] *Agency banking*, which sunsets on 1 October 2017;
- Class Order [CO 05/681] *Transitional relief for deposit product providers—PDSs and periodic statements*, which sunsets on 1 October 2015; and
- Class Order [CO 05/1070] *General insurance distributors*, 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. 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 230.

Your feedback

- 6 You are invited to comment on any of our proposals to remake the ASIC class orders described 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.

Distribution of basic deposit and general insurance products: [CO 04/909] and [CO 05/1070]

Background to [CO 04/909]

- 7 As a general rule, Australian financial services (AFS) licensees must appoint persons who provide financial services on their behalf as their 'authorised representatives'.
- 8 The authorised representative regime applies generally to all financial services and a wide range of financial products. However, we consider that a streamlined regime is more appropriate for simple products (e.g. bank accounts) where the conduct of the distributor is limited to a very narrow range of financial services and is not inherently complex. We reached this view because:

- (a) the limited nature of the services provided means that there would be no benefit to the consumer in being able to check whether the distributor has been appointed as an authorised representative; and
- (b) the distributor can only provide services in relation to simple products that are well understood by consumers.

- 9 We also acknowledge that a streamlined regime may assist to promote access to important financial products in regional or remote areas where many AFS licensees may not have a significant corporate presence.
- 10 For these reasons, we made [CO 04/909], which modifies Pt 7.6 of the *Corporations Act 2001* (Corporations Act) to remove technical requirements in relation to the appointment of representatives, while providing consumers with the same protections they would have received if they had dealt directly with the product issuer or that issuer's authorised representative. [CO 04/909] allows distributors to arrange for the issue of basic deposit products without being the authorised representative of the product issuer.
- 11 Shortly afterwards we made [CO 05/1070], which provides similar relief from the obligation to appoint authorised representatives in relation to general insurance products: see paragraphs 12–13.

Background to [CO 05/1070]

- 12 In May 2005, the Government released a proposals paper outlining potential refinements to the financial services regulatory regime.¹ Refinement Proposal 12.2 was that ASIC provide further guidance on and relief from the requirement to appoint authorised representatives, similar to that already provided by [CO 04/909], to promote wide access to general insurance products issued by an Australian general insurer.
- 13 Following this paper, ASIC made [CO 05/1070]. This instrument also modifies Pt 7.6 of the Corporations Act to allow distributors to arrange for the issue of general insurance products without being the authorised representative of the AFS licensee on whose behalf they act. As with [CO 04/909], the arrangements put in place by [CO 05/1070] ensure the licensee takes responsibility for the conduct of the distributor.

Proposal

- B1** To preserve their effect beyond the respective sunset dates of 1 October 2017 and 1 April 2016, we propose to continue the relief currently given by [CO 04/909] and [CO 05/1070] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Distribution of Basic Deposit

¹ Treasury, *Refinements to financial services regulation*, proposals paper, 2 May 2005, <http://archive.treasury.gov.au/contentitem.asp?ContentID=973&NavID=>.

and General Insurance Products) Instrument 2015/XX at Attachment 1 to this consultation paper. You can access the current instruments on www.comlaw.gov.au or by clicking on the following direct links: [\[CO 04/909\]](#) and [\[CO 05/1070\]](#).

The minor changes proposed are to:

- (a) combine [CO 04/909] and [CO 05/1070] into one instrument;
- (b) increase the ways in which representatives can be appointed to reflect subsequent changes to the Corporations Act;
- (c) remove a condition requiring licensees to advise ASIC that they intend to rely on the instrument (to avoid the duplication of administrative requirements that have already been imposed);
- (d) remove a redundant modification of s917A of the Corporations Act;
- (e) use consistent language when referring to:
 - (i) the licensees that can rely on the relief currently provided by [CO 04/909] and [CO 05/1070];
 - (ii) the persons that those licensees may appoint as distributors; and
 - (iii) the financial services that distributors may provide; and
- (f) modernise the language and drafting of the instrument.

Rationale

14 We have reached the preliminary view that [CO 04/909] and [CO 05/1070] are operating effectively and efficiently. We are not aware of significant issues with the current operation of these class orders. In reaching our preliminary view, we spoke to industry participants about the current arrangements. Our preliminary view is that [CO 04/909] and [CO 05/1070]:

- (a) continue to be a useful part of the legislative framework. There have been limited changes to the authorised representative regime since these class orders were made, and in the absence of the relief the relevant AFS licensees would need to appoint their distributors as authorised representatives. A number of authorised deposit-taking institutions (ADIs) and insurers are currently relying on [CO 04/909] and [CO 05/1070] in relation to their respective distribution networks;
- (b) address the burden of notifying ASIC of the appointment of, and changes to the details of, authorised representatives who arrange for an AFS licensee to issue a simple, well-understood product to retail consumers; and
- (c) avoid unnecessary compliance costs while preserving the consumer protections that would apply if the distributors were appointed as authorised representatives.

Consolidation

- 15 [CO 04/909] and [CO 05/1070] currently modify the authorised representative requirements in the same way in relation to two different classes of products. As a result, we consider that the current arrangements can be consolidated into a single instrument.

Other minor changes

- 16 We are proposing to remove a condition that currently applies to [CO 04/909] requiring AFS licensees to advise ASIC that they intend to rely on the instrument. Removing this condition will avoid a duplication of an administrative requirement that has already been imposed.
- 17 We are also proposing to expand the ways in which AFS licensees can appoint distributors. [CO 04/909] and [CO 05/1070] currently allow licensees relying on the relief to appoint distributors in writing. [CO 05/1070] also allows licensees to consent to body corporate representatives authorising individuals on their behalf.
- 18 However, reg 7.6.08 of the Corporations Regulations 2001 (Corporations Regulations), which was made after [CO 04/909] and [CO 05/1070], allows for authorised representatives that are neither bodies corporate nor individuals to sub-authorise individuals on behalf of the AFS licensee. We intend to reflect these subsequent developments in the new instrument. Licensees relying on [CO 04/909] and [CO 05/1070] will not be required to change the structure of their current distribution networks.
- 19 We do not consider that the changes outlined at proposals B1(a)–B1(f) will change industry behaviour.

**Miscellaneous disclosure obligations for deposit products:
[CO 05/681]****Background: Disclosure of interest rates**

- 20 Generally, issuers of financial products (such as deposit products) must prepare a Product Disclosure Statement (PDS) that contains the information described in s1013D.
- 21 Section 1013D requires product providers to include information about significant benefits to which the person acquiring the product may or will become entitled. Information contained in the PDS must be up to date: see s1012J.

- 22 These obligations would normally require a PDS for a deposit product² to include the interest rate payable on deposits. Changes to applicable interest rates would then need to be reflected in updated information, either by replacing the PDS or issuing a supplementary PDS. This requirement is likely to:
- (a) be burdensome, because the cost for product providers to update interest rate information in PDSs would be substantial; and
 - (b) act as a disincentive to product changes, such as interest rate increases, that would benefit consumers.
- 23 We made [CO 05/681] to address this issue by removing the requirement, as long as:
- (a) the PDS states how a person may find out the applicable interest rate; and
 - (b) the person responsible for the PDS takes reasonable steps to allow a person to find out the interest rate in a simple, free and convenient way.

Background: Disclosure of termination values

- 24 Section 1017D requires issuers of deposit products to give their retail clients periodic statements that contain specified information. Periodic statements must include the termination value of the investment (in dollars) at the end of the statement period. A termination value is the amount that would be paid to the consumer if they closed their account at that time. The statement must also include the closing balance of the deposit account.
- 25 There has been uncertainty about whether a periodic statement for a deposit product must include both a closing balance and a termination value. In the context of this uncertainty, the requirement to include a termination value in periodic statements for deposit products would be unduly burdensome because:
- (a) there is often no difference between the closing balance and the termination value and the additional disclosure may be confusing; and
 - (b) the PDS would include information about whether there are any restrictions on termination and if any early termination costs may apply.
- 26 We made [CO 05/681] to address this issue by removing the need to include a termination value in a periodic statement for a deposit product.
- 27 When it was initially made, [CO 05/681] provided transitional relief until 30 June 2006. Subsequently, we made this relief ongoing. At this time some

² Some deposit products, known as ‘basic deposit products’, may be exempt from the PDS obligations: see reg 7.9.07FA. The PDS relief in [CO 05/681] has effect in situations where the exemption in reg 7.9.07FA does not apply (e.g. for deposit products that are not basic deposit products).

additional conditions on the relief from s1017D were removed because they had proved burdensome without providing additional benefits for consumers.

Proposal

B2 To preserve its effect beyond the sunset date of 1 October 2015, we propose to continue the relief currently given by [CO 05/681] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Miscellaneous Disclosure Obligations for Deposit Products) 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: [\[CO 05/681\]](#).

The only changes proposed are to modernise the language of the instrument.

Rationale

- 28 We have reached the preliminary view that [CO 05/681] is operating effectively and efficiently. We are not aware of significant issues with the current operation of [CO 05/681]. In reaching our preliminary view, we spoke to industry participants about the current arrangements. Our preliminary view is that [CO 05/681]:
- (a) continues to be a useful part of the legislative framework. There have been limited changes to the relevant disclosure obligations since [CO 05/681] was made, and in the absence of the relief the relevant product issuers would still need to include interest rates in PDSs and termination values in periodic statements;
 - (b) addresses:
 - (i) the burden of preparing new or updated PDSs when an interest rate changes; and
 - (ii) the uncertainty around the application of the requirement to provide termination values in periodic statements; and
 - (c) contains conditions that ensure consumers will continue to receive appropriate, clear disclosure about the deposit products they acquire.
- 29 Class Order [CO 14/1262] *Relief for 31 day notice term deposits* has recently altered the definition of ‘basic deposit product’ to include additional products. Product issuers may now be able to rely on reg 7.9.07FA instead of preparing a PDS for some term deposit products. However, there continues to be a group of deposit products that are not basic deposit products; we consider [CO 05/681] remains relevant for these products. [CO 05/681] also continues to provide relief in relation to the disclosure of termination values that applies to all deposit products.

C Repeal of redundant ASIC class order

Key points

We are proposing to repeal Class Order [CO 06/623] *Relief for certain general insurers from s981B account requirements*, which sunsets on 1 October 2016.

We have formed the preliminary view that [CO 06/623] is no longer required and is no longer a useful part of the regulatory framework.

Insurance money and trust accounts: [CO 06/623]

Background

- 30 We made [CO 06/623] for the avoidance of doubt. At the time there was a concern that the client money requirements under Subdiv A of Div 2 of Pt 7.8 and s1017E of the Corporations Act may apply inappropriately where one insurer received premium payments as the agent of another insurer.
- 31 [CO 06/623] dealt with this issue by exempting the insurer that receives the payments from the client money handling provisions in Pt 7.8 if that insurer complies with the money handling obligations under s1017E.
- 32 It also provides the insurer that does not collect the money with greater certainty that, regardless of which trust account the receiving insurer uses, it will not have breached its own obligations under s1017E.

Proposal

- c1 We propose to repeal [CO 06/623], which would otherwise sunset on 1 October 2016. You can access the current instrument by clicking on the following direct link: [\[CO 06/623\]](#).

Rationale

- 33 We consider that the client money handling requirements in the Corporations Act apply in the same way regardless of whether premium payments are collected by the insurer that issues the contract or by another insurer acting as the issuer's agent.
- 34 Our view is that the exemption from Subdiv A of Div 2 of Pt 7.8 contained in s981A(2)(c) extends to money collected by insurers that act as agents of the issuing insurer. This exemption will apply to the money if it is treated in accordance with s1017E.

- 35 We do not consider that [CO 06/623] is a useful part of the regulatory framework. The relief provided by [CO 06/623] is otherwise available under the ordinary operation of the Corporations Act. Additionally, we are not aware of any insurers relying on [CO 06/623]. The uncertainty that existed at the time that [CO 06/623] was made has diminished.

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.
ASIC	Australian Securities and Investments Commission
authorised representative	A person authorised in accordance with s916A or 916B of the Corporations Act to provide a financial service or financial services on behalf of an AFS licensee Note: This is a definition contained in s761A.
basic deposit product	A deposit product that satisfies conditions listed in the definition of basic deposit product in s761A of the Corporations Act
Ch 7 (for example)	A chapter of the Corporations Act (in this example numbered 7), unless otherwise specified
[CO 04/909] (for example)	An ASIC class order (in this example numbered 04/909) 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
Div 2	A division of the Corporations Act (in this example numbered 2), unless otherwise specified
Legislative Instruments Act	<i>Legislative Instruments 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.
Pt 7.6 (for example)	A part of the Corporations Act (in this example numbered 7.6), unless otherwise specified
reg 7.6.08 (for example)	A regulation of the Corporations Regulations (in this example numbered 7.6.08), unless otherwise specified
RIS	Regulation Impact Statement

Term	Meaning in this document
s981B (for example)	A section of the Corporations Act (in this example numbered 981B), unless otherwise specified
s981B account	An account of the kind described in s981B of the Corporations Act into which money to which Subdiv A of Div 2 of Pt 7.6 applies must be paid
s1017E account	An account of the kind described in s1017E of the Corporations Act into which money received for a financial product before that product is issued must be paid
Subdiv A	A subdivision of the Corporations Act (in this example labelled A), unless otherwise specified
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect