



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 232

Remaking ASIC class orders on superannuation: [CO 04/1574] and [CO 06/636]

June 2015

About this paper

This consultation paper sets out ASIC's proposals to remake our class orders on superannuation into ASIC instruments. Under the *Legislative Instruments Act 2003*, these class orders will expire ('sunset') if not remade.

We are seeking feedback from the Australian superannuation industry on our proposals to remake, without significant changes, the following class orders:

- Class Order [CO 04/1574] *Application form and cooling-off relief for certain transfers of members between financial products and interests within a superannuation fund*, which is due to expire on 1 April 2016; and
- Class Order [CO 06/636] *Superannuation: Delivery of product disclosure for investment strategies*, which is due to expire on 1 October 2016.

Note: The draft ASIC instruments are available on our website at www.asic.gov.au/cp under CP 232.

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 2 June 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.

Contents

The consultation process	4
A Background	5
Purpose of ‘sunsetting’ legislative instruments	5
Our approach to remaking legislative instruments	5
B Remaking ASIC class orders	7
Your feedback	7
Class Order [CO 04/1574] <i>Application form and cooling-off relief for certain transfers of members between financial products and interests within a superannuation fund</i>	7
Class Order [CO 06/636] <i>Superannuation: Delivery of product disclosure for investment strategies</i>	9
Key terms	14

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 August 2015 to:

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What will happen next?

Stage 1	2 June 2015	ASIC consultation paper released
Stage 2	7 August 2015	Comments due on the consultation paper
Stage 3	December 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 the first 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). A 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 04/1574] *Application form and cooling-off relief for certain transfers of members between financial products and interests within a superannuation fund*, which sunsets on 1 April 2016; and
- Class Order [CO 06/636] *Superannuation: Delivery of product disclosures for investment strategies*, which sunsets on 1 October 2016.

We have formed the preliminary view that the 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 instruments. 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 232.

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 04/1574] *Application form and cooling-off relief for certain transfers of members between financial products and interests within a superannuation fund*

Background

- 7 When financial products are issued or sold, the *Corporations Act 2001* (Corporations Act) requires that an application form (s1016A) and a cooling-off period (s1019B) are provided to the acquirer of the products.
- 8 The purpose of [CO 04/1574] was to give a superannuation trustee relief from these requirements for an 'intra-fund transfer' (i.e. a change to the composition of a person's membership within a fund, such as a transfer of member benefits within the same fund) that occurs without the consent of the members of the fund. Under reg 7.9.02(4) of the Corporations Regulations 2001 (Corporations Regulations), an 'intra-fund transfer' is

deemed to be a new issue, which triggers the requirements for an application form and cooling-off period, as well as a Product Disclosure Statement (PDS) under s1012B.

- 9 Our view was that it would be inappropriate for the application form and cooling-off requirements to apply to an intra-fund transfer without member consent. The member would be adequately protected because there would be no reduction in the member's benefits. Compliance with the requirements would impose costs on the trustee that would not necessarily provide additional information value or suitable safeguards to fund members.
- 10 Further, relief from the requirements for an intra-fund transfer without member consent would be consistent with the position for an inter-fund transfer that is a successor fund transfer. The requirements do not apply for an inter-fund transfer that is a successor fund transfer: see reg 7.9.04(1)(c) of the Corporations Regulations.

Proposal

B1 To preserve its effect beyond the sunset date of 1 April 2016, we propose to continue the relief currently given by [CO 04/1574] in a new legislative instrument, without any significant changes: see draft ASIC Corporations (Application Form and Cooling-off Period Relief—Intra-fund Transfers) Instrument 2015/XX 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: [\[CO 04/1574\]](#).

The only changes proposed are to:

- (a) remove references to 'approved trustee' in line with the changes to the *Superannuation Industry (Supervision) Act 1993* (SIS 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
- (f) correct minor drafting errors.

Rationale

- 11 The policy principles that were the basis of [CO 04/1574] still apply with equal force to intra-fund transfers that occur without member consent. If the terms of the relief are not remade in a new legislative instrument, a superannuation trustee would incur higher compliance costs in having to provide an application form and cooling-off rights to members in circumstances where these requirements would not afford additional protection to members.

Removal of ‘approved trustee’

- 12 We have removed references to ‘approved trustee’ in the draft legislative instrument because the definition of ‘approved trustee’ in s10(1) of the SIS Act was repealed by the *Superannuation Safety Amendment Act 2004*. This repeal took effect on 1 July 2006.
- 13 The removal of the concept of an ‘approved trustee’ from the terms of the relief will have the effect that the new legislative instrument will operate in relation to superannuation trustees that hold a registrable superannuation entity (RSE) licence, and will no longer apply to a superannuation trustee that satisfied the former definition of an approved trustee.

Class Order [CO 06/636] Superannuation: Delivery of product disclosure for investment strategies**Background**

- 14 Section 1012IA of the Corporations Act requires the provider of a custodial service to give a person a PDS in certain circumstances. The operation of s1012IA includes a superannuation fund for which the trustee offers a choice of investment strategies to its members, where any of those strategies include accessible financial products¹ that will be acquired under the member’s choice of strategy. The trustee must give a member a PDS about any accessible financial product included in an investment strategy *before* acquiring the product as part of implementing the strategy.
- 15 The trustee must also comply with the general PDS requirements in Div 2 of Pt 7.9 of the Corporations Act to prepare and provide its own PDS about investment in the superannuation entity, including information about all of the investment strategies offered to members by the trustee.
- 16 The purpose of [CO 06/636] was to overcome the following difficulties resulting from the operation of s1012IA:
- (a) the duplication of disclosure obligations—when a superannuation fund offers a choice of investment strategies through which an accessible financial product will be acquired, the trustee must give at least two separate PDSs;
 - (b) the law does not allow the superannuation trustee to prepare the accessible financial product PDS—it must be prepared by the product issuer; and

¹ A financial product for which a member may give an instruction to acquire under the custodial arrangement is referred to as an ‘accessible financial product’.

- (c) the law requires the superannuation trustee to give a member a PDS each time an accessible financial product is acquired by the trustee on behalf of the member.

17 [CO 06/636] allows a superannuation trustee to rely on a modified form of the PDS requirements in Pt 7.9. When a superannuation fund gives a member a choice of investment strategy under which an accessible financial product may be acquired, [CO 06/636] allows the superannuation trustee to choose one of three options to provide product disclosure information to a member. These options are summarised in Table 1 and explained further in Regulatory Guide 184 *Superannuation: Delivery of product disclosure for investment strategies* (RG 184).

Table 1: Disclosure options under [CO 06/636]

<p>Option 1</p> <p>The member is given an accessible financial product PDS that is prepared by the trustee</p>	<p>This option allows the trustee to include less information about accessible financial products in the superannuation entity PDS, on the basis that information will be provided in a separate accessible financial product PDS. The trustee will prepare the superannuation entity PDS and, if a member requests a PDS for the accessible financial product, the trustee must give the accessible financial product PDS to the member. This option enables the trustee to:</p> <ul style="list-style-type: none"> • limit the information that is included in the superannuation entity PDS, on the basis that the trustee will be giving members more information about an accessible financial product in the accessible financial product PDS; and • prepare the accessible financial product PDS, even though the trustee is not the product issuer, and to tailor the information in the PDS to better suit the information needs of its members.
<p>Option 2</p> <p>The member is given an integrated PDS prepared by the trustee that contains information about any accessible financial products and the superannuation entity</p>	<p>This option allows the trustee to integrate information about the superannuation entity and the accessible financial products in one disclosure document. This option allows the trustee to tailor the content of the integrated PDS to better suit the information needs of its members.</p>
<p>Option 3</p> <p>The member is given an accessible financial product PDS prepared by the product issuer</p>	<p>Like Option 1, Option 3 allows the trustee to include less information about accessible financial products in the superannuation entity PDS, on the basis that information will be provided in a separate accessible financial product PDS. The trustee is responsible for giving a member the superannuation entity PDS and, if a member requests an accessible financial product PDS, the trustee is also responsible for giving that PDS to the member.</p>

18 [CO 06/636] also:

- (a) provides a conditional exemption to a trustee from the requirement under s1012IA to provide a PDS to a member before each time that an accessible financial product is acquired by the trustee on the member's behalf;

- (b) sets out requirements for a trustee to give updated disclosure to a member where the member has given the trustee instructions to follow an investment strategy that involves the acquisition of an accessible financial product; and
- (c) makes numerous technical drafting changes to Pt 7.9 of the Corporations Act and to the Corporations Regulations.

Proposal

B2 To preserve its effect beyond the sunset date of 1 October 2016, we propose to continue the relief currently given by [CO 06/636] in a new legislative instrument, without any significant changes: see draft ASIC Superannuation (Product Disclosure for Investment Strategies) 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 link: [CO 06/636].

The only changes proposed are to:

- (a) clarify that the relief does not affect the obligation of a trustee to prepare a PDS for the superannuation product—in particular, where Option 1 in the draft instrument is chosen, the PDS requirements that apply to the superannuation fund will continue to apply in full;
- (b) make technical changes to accommodate the shorter PDS regime;
- (c) remove historical notes;
- (d) update the name of the legislative instrument;
- (e) reflect current drafting practice and update the format of the current document;
- (f) simplify the drafting to give greater clarity;
- (g) update legislative references; and
- (h) correct minor drafting errors.

Rationale

- 19 The policy principles that founded our relief in [CO 06/636] still apply. If [CO 06/636] were allowed to sunset, superannuation trustees would be subject to duplication of PDS requirements at the time a person becomes a member of a superannuation fund through which the member could arrange for the trustee to acquire financial products on the member's behalf. Further, the absence of relief would mean that a trustee would be required to give a member a PDS on each occasion an additional investment were made in an accessible financial product, which would be at significant cost and for no real information value for the member.

Clarifying that the relief does not affect the obligation to prepare a PDS

- 20 The intention of [CO 06/636] was to provide a superannuation trustee with flexibility when providing an accessible financial product PDS for which a regulated acquisition may be made through a superannuation entity. As it was not intended that relief under [CO 06/636] would affect the information about the superannuation product provided in a separate or integrated PDS, our preliminary view is that the terms of the relief in the draft instrument be refined to better reflect this position.
- 21 The draft instrument clarifies that, where a trustee chooses to rely on Option 1, the PDS requirements that apply to the superannuation fund will continue to apply in full. A corollary is that the disclosure requirements that apply to the accessible financial product under s1013FB(3)(b) (as notionally inserted by the draft instrument that will remake [CO 06/636]) are in addition to the normal PDS requirements that must be observed for the superannuation fund.
- 22 The proposed changes clarifying the scope of the relief are minor and machinery in nature, and we anticipate they will be compliance cost neutral.

Technical changes to accommodate the shorter PDS regime

- 23 Depending on the type of financial product, an issuer may be required to provide a PDS under the shorter PDS provisions of the Corporations Regulations. A shorter PDS must set out prescribed content and, excluding information that is allowed to be incorporated by reference from an external source (such as a page from the issuer's website), it must not exceed a maximum number of pages (usually eight A4 pages). A shorter PDS must be provided for most accumulation style superannuation funds, First Home Saver Accounts, margin loans and simple managed investment schemes.
- 24 The terms of the relief in the draft instrument accommodate the shorter PDS provisions, which may be applicable for an accessible financial product that is a margin loan, a superannuation product or a simple managed investment scheme.
- 25 The effect of these provisions is that, for each type of accessible financial product, a trustee who chooses to rely on Option 1 of the draft instrument does not also have to include in the superannuation entity PDS the shorter PDS information for the accessible financial product that would otherwise be required to be given. The shorter PDS provisions will operate only to the extent that a PDS is given for the accessible financial product, which will be prepared by the trustee or the issuer of the accessible financial product.
- 26 For Option 2, the draft instrument clarifies that, when a trustee chooses to prepare an integrated PDS, the PDS requirements under Pt 7.9 will operate for the superannuation product and any accessible financial products. For an

accessible financial product, the Pt 7.9 requirements include the shorter PDS provisions that would apply if an accessible financial product is a margin loan, a superannuation product to which Subdiv 4.2B of Pt 7.9 of the Corporations Regulations applies, or a simple managed investment scheme to which Subdiv 4.2C of Pt 7.9 of the Corporations Regulations applies.

- 27 In addition to the operation of the PDS requirements under Pt 7.9, the draft instrument preserves the previous position under [CO 06/636] that the integrated PDS must contain the information that a person would reasonably require as a retail client to understand the investment strategy under which the accessible financial product may be acquired.
- 28 We anticipate that the proposed remaking of the relief in [CO 06/636] may be relevant to a superannuation trustee that offers investors a platform of financial products. Currently, Class Order [CO 12/749] *Relief from the Shorter PDS regime* exempts superannuation platforms from the shorter PDS provisions until 30 June 2016. We understand that the Australian Government is reviewing whether superannuation platforms should continue to be excluded from the shorter PDS regime. Please consider in your feedback whether your view would be different if superannuation platforms were not excluded from the shorter PDS regime.
- 29 These changes to the terms of our relief are minor and machinery in nature and are not expected to have a compliance cost impact on superannuation trustees or issuers of accessible financial products.

Other technical changes

- 30 Our draft instrument modifies s1017CA(5)(a) (which was notionally inserted by [CO 06/636])—which deals with the updated disclosure events that apply when a material adverse change or event occurs that is relevant to an accessible financial product—to clarify that it is directed to ‘closed’ financial products.
- 31 Other technical changes include:
- (a) for modified s1012IA(2A)(b) (which was notionally inserted by [CO 06/636]), stipulating a commencement date of 1 July 2007, rather than the commencement date of the remade legislative instrument; and
 - (b) inserting a definition of ‘Corporations Regulations 2001’ in modified s1011BA (which was notionally inserted by [CO 06/636]), which is required for the cross-references to the Corporations Regulations in the modified s1013F.

Removal of historical notes

- 32 We have removed the historical notes in [CO 06/636] from the draft instrument because they no longer have practical significance.

Key terms

Term	Meaning in this document
accessible financial product	A financial product for which a member may give an instruction to acquire under a custodial arrangement that is regulated by s1012IA of the Corporations Act
ASIC	Australian Securities and Investments Commission
[CO 04/1574] (for example)	An ASIC class order (in this example numbered 04/1574) 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
inter-fund transfer	A transfer of benefits from a superannuation fund to a different superannuation fund
Legislative Instruments Act	<i>Legislative Instruments Act 2003</i>
PDS	Product Disclosure Statement
Product Disclosure Statement	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
RSE licence	Registrable superannuation entity licence
s1016A(2) (for example)	A section of the Corporations Act (in this example numbered 1016A(2)), unless otherwise specified
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect