



**ASIC**

Australian Securities & Investments Commission

## CONSULTATION PAPER 241

# Remaking ASIC class orders on foreign licensees and ADIs: [CO 06/68] and [CO 03/823]

October 2015

### About this paper

This consultation paper sets out ASIC's proposals to remake as a single new ASIC instrument our class orders relating to foreign entities that hold an Australian financial services (AFS) licence (foreign licensees). Under the *Legislative Instruments Act 2003*, these class orders will expire ('sunset') if not remade.

We are seeking feedback from foreign licensees and ADIs on our proposals to remake, without significant changes, the following class orders:

- Class Order [CO 03/823] *Relief from licensing, accounting and audit requirements for foreign authorised deposit-taking institutions*, which is due to expire on 1 April 2017; and
- Class Order [CO 06/68] *Conditional relief for foreign licensees from financial reporting and record keeping obligations*, which is due to expire on 1 April 2016.

Note: The draft ASIC instrument is available on our website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 241.

### 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 1 October 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](http://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 30 October 2015 to:

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 Senior Executive Leader  
 Financial Reporting and Audit  
 Australian Securities and Investments Commission  
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 Sydney NSW 2000  
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### What will happen next?

<b>Stage 1</b>	1 October 2015	ASIC consultation paper released
<b>Stage 2</b>	30 October 2015	Comments due on the consultation paper
<b>Stage 3</b>	January 2016	Commencement of merged instrument

## A Background

### Key points

Legislative instruments, such as class orders, are repealed automatically, or 'sunset', after 10 years, unless action is taken to exempt or preserve them. We will consult on all sunseting legislative instruments that have more than a minor or machinery regulatory impact.

### Purpose of 'sunseting' legislative instruments

- 1 Under the *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 class order without substantive changes.

## B Remaking ASIC class orders

### Key points

We are proposing to remake as a single new instrument:

- Class Order [CO 03/823] *Relief from licensing, accounting and audit requirements for foreign authorised deposit-taking institutions*, which sunsets on 1 April 2017; and
- Class Order [CO 06/68] *Conditional relief for foreign licensees from financial reporting and record keeping obligations*, 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.

The class orders have been redrafted into a single new instrument using ASIC's current style and format, while preserving the current effect of the instruments. The draft ASIC instrument, which reflects the minor amendments proposed in this consultation paper, is available on our website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 241.

### Financial reporting, record-keeping and licensing obligations for foreign entities: [CO 03/823] and [CO 06/68]

#### Background

- 6 Division 6 of Pt 7.8 of the *Corporations Act 2001* (Corporations Act) requires Australian financial services (AFS) licensees to:
- (a) prepare and lodge audited financial statements; and
  - (b) keep financial records in relation to their financial services businesses.
- 7 These obligations apply to all AFS licensees regardless of where they are incorporated or where they carry on their business operations.
- 8 These obligations can be disproportionately burdensome for some foreign entities that hold AFS licences (foreign licensees)—in particular, because:
- (a) the obligations apply to the whole of a foreign company, and not just their operations in Australia (which are often a relatively small part of their business); and
  - (b) ASIC already has access to financial information about registered foreign companies operating in Australia. Under s601CK(1) of the Corporations Act, foreign companies must lodge financial statements with ASIC in the form required by the laws of the foreign licensee's home jurisdiction.

9 The financial services regulatory regime, as a general rule, does not require persons transacting on their own behalf to hold an AFS licence. However, persons who carry out certain dealings in derivatives or foreign exchange contracts cannot rely on this exemption. Therefore, specific authorisations will be required under an AFS licence for this activity. For some entities, this may be the sole reason they need an AFS licence. We consider the requirement to hold a licence in such circumstances may be excessive.

10 [CO 03/823] and [CO 06/68] were designed to address these issues.

**[CO 03/823]**

11 [CO 03/823] exempts foreign licensees that are authorised deposit-taking institutions (foreign ADIs) from certain financial record-keeping and financial reporting obligations in Div 6 of Pt 7.8, and from the AFS licensing requirements in relation to particular dealings in derivatives and foreign exchange contracts.

12 A foreign ADI seeking to rely on the relief in [CO 03/823] from the financial statement and record-keeping requirements must lodge with ASIC at least once a year a copy of its profit and loss statement, balance sheet and cash flow statement—as required to be prepared by the laws of the foreign licensee’s home jurisdiction—together with a statement verifying that the copies are true copies of the documents required.

13 Complying with this condition will also satisfy the requirements of s601CK(1). As a result, foreign ADIs that are registered as a foreign company under Div 2 of Pt 5B.2 need only lodge a single set of financial statements.

14 The foreign ADI must also ensure that the financial statements are audited in accordance with the requirements of the entity’s home jurisdiction and must lodge a copy of a document setting out the auditor’s views about the financial statements.

15 [CO 03/823] also relieves foreign ADIs from the requirement to hold an AFS licence for the provision of financial services involving dealing in derivatives and/or foreign exchange contracts, where:

- (a) the service does not involve the making of a market for derivatives or foreign exchange contracts;
- (b) the dealing is entered into for the purpose of managing a financial risk that arises in the ordinary course of the ADI’s banking business;
- (c) the dealing is entered into on the foreign ADI’s own behalf;
- (d) the counterparty for the dealing is a wholesale client; and
- (e) the foreign ADI does not hold an AFS licence covering the provision of the service.

This exemption is drafted in similar terms to the exemption in reg 7.6.01(1)(m).



**[CO 06/68]**

- 16 [CO 06/68] exempts foreign licensees that are not ADIs from certain financial record-keeping and financial reporting obligations in Div 6 of Pt 7.8, similar to those covered by [CO 03/823].
- 17 There are some minor differences in terms of the specific provisions that are covered by the exemptions in [CO 03/823] and [CO 06/68]. There do not appear to be compelling reasons for the minor differences to continue.

**Proposal**

**B1** To preserve their effect beyond the respective sunset dates of 1 April 2017 and 1 April 2016, we propose to continue the relief currently given by [CO 03/823] and [CO 06/68] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Foreign Licensees and ADIs) Instrument 2015/XX attached to this consultation paper. You can access the current instruments on [www.comlaw.gov.au](http://www.comlaw.gov.au) by clicking on the following direct links: [\[CO 03/823\]](#) and [\[CO 06/68\]](#).

The only changes proposed are to:

- (a) combine [CO 03/823] and [CO 06/68] into a single instrument, aligning the scope and conditions of the relief in each of the current class orders so that they apply equally to foreign licensees that are ADIs and foreign licensees that are not ADIs;
- (b) include the derivatives and foreign exchange contracts exemption for foreign ADIs in this same combined instrument; and
- (c) make other minor changes to:
  - (i) update the name of the legislative instrument;
  - (ii) reflect current drafting practice and update the format of the current document;
  - (iii) simplify the drafting to give greater clarity;
  - (iv) update legislative references and definitions; and
  - (v) correct any minor drafting errors.

*Feedback*

B1Q1 Do you agree that the relief currently set out in [CO 03/823] and [CO 06/68] should continue in one form or another?

B1Q2 Have you relied on the relief in either [CO 03/823] or [CO 06/68]? If yes, to what extent?

B1Q3 Do the scope and conditions set out in [CO 03/823] and in [CO 06/68] remain appropriate? Do you agree that the scope and conditions should be aligned?

B1Q4 Do you agree with proposal B1(a) that the two class orders should be combined into a single instrument? Please provide reasons for your answer.

B1Q5 Do you agree with proposal B1(b) that the derivatives and foreign exchange contracts exemption for foreign ADIs can be included in the combined instrument, or should it be in a stand-alone instrument? Please provide reasons for your answer.

## Rationale

- 18 We have formed the preliminary view that [CO 03/823] and [CO 06/68] are operating effectively and efficiently, and continue to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of these class orders.
- 19 [CO 03/823] and [CO 06/68] are intended to remove unnecessary regulatory duplication and burden. The two class orders contain similar, but not identical, relief.
- 20 We consider that, without making any significant changes to the existing relief, efficiency could be increased by aligning the scope and conditions of the exemptions currently set out in each of the class orders, and by combining these so that the substance of both exemptions will be contained in a single new instrument.
- 21 The new draft instrument combines the original instruments into a single document. For the exemptions from financial reporting and record keeping to apply under the existing class orders, a balance sheet, cash flow statement and profit and loss statement, together with a document setting out the view of the auditor, must be lodged by the licensee with ASIC. There were differences in the wording of that condition between the class orders and these differences have been eliminated.
- 22 At the time of issuing [CO 06/68], we stated that we had chosen not to disturb the existing relief given to foreign ADIs. There do not appear to be other reasons for the existence of two separate instruments for two classes of foreign licensees.
- 23 While the AFS licensing exemption in [CO 03/823] relating to particular dealings in derivatives and foreign exchange contracts applies only to foreign ADIs (and not to foreign licensees generally), we see no reason why that exemption could not form part of the new combined instrument.

## Key terms

Term	Meaning in this document
ADI	Authorised deposit-taking institution
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
[CO 14/26] (for example)	An ASIC class order (in this example numbered 14/26) Note: Legislative instruments made from 2015 are referred to as ASIC instruments.
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
Div 5 (for example)	A Division of the Corporations Act (in this example numbered 5) unless otherwise specified
foreign ADI	A foreign licensee that is an authorised deposit-taking institution
foreign licensee	A foreign entity that holds an AFS licence
Legislative Instruments Act	<i>Legislative Instruments Act 2003</i>
Pt 3 (for example)	A Part of the Corporations Act (in this example numbered 3) unless otherwise specified
reg 7.6.04 (for example)	A regulation of the Corporations Regulations (in this case numbered 7.6.04) unless otherwise specified
RIS	Regulation Impact Statement
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

## List of proposals and questions

Proposal	Your feedback
<p>B1 To preserve their effect beyond the respective sunset dates of 1 April 2017 and 1 April 2016, we propose to continue the relief currently given by [CO 03/823] and [CO 06/68] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Foreign Licensees and ADIs) Instrument 2015/XX attached to this consultation paper. You can access the current instruments on <a href="http://www.comlaw.gov.au">www.comlaw.gov.au</a> by clicking on the following direct links: [CO 03/823] and [CO 06/68].</p> <p>The only changes proposed are to:</p> <ul style="list-style-type: none"> <li>(a) combine [CO 03/823] and [CO 06/68] into a single instrument, aligning the scope and conditions of the relief in each of the current class orders so that they apply equally to foreign licensees that are ADIs and foreign licensees that are not ADIs;</li> <li>(b) include the derivatives and foreign exchange contracts exemption for foreign ADIs in this same combined instrument; and</li> <li>(c) make other minor changes to: <ul style="list-style-type: none"> <li>(i) update the name of the legislative instrument;</li> <li>(ii) reflect current drafting practice and update the format of the current document;</li> <li>(iii) simplify the drafting to give greater clarity;</li> <li>(iv) update legislative references and definitions; and</li> <li>(v) correct any minor drafting errors.</li> </ul> </li> </ul>	<p>B1Q1 Do you agree that the relief currently set out in [CO 03/823] and [CO 06/68] should continue in one form or another?</p> <p>B1Q2 Have you relied on the relief in either [CO 03/823] or [CO 06/68]? If yes, to what extent?</p> <p>B1Q3 Do the scope and conditions set out in [CO 03/823] and in [CO 06/68] remain appropriate? Do you agree that the scope and conditions should be aligned?</p> <p>B1Q4 Do you agree with proposal B1(a) that the two class orders should be combined into a single instrument? Please provide reasons for your answer.</p> <p>B1Q5 Do you agree with proposal B1(b) that the derivatives and foreign exchange contracts exemption for foreign ADIs can be included in the combined instrument, or should it be in a stand-alone instrument? Please provide reasons for your answer.</p>