



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 244

Remaking ASIC class orders on dealing in underlying investments

December 2015

About this paper

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

We are seeking feedback from superannuation trustees and responsible entities of registered managed investment schemes on our proposals to remake, without significant changes, the following class orders:

- Class Order [CO 02/1161] *Licensing relief (dealing) for public offer superannuation entities*, which is due to expire on 1 April 2017;
- Class Order [CO 02/1073] *Financial Services Guide: Dealing in underlying investments by responsible entities*, which is due to expire on 1 April 2017; and
- Class Order [CO 02/1074] *Financial Services Guide: Dealing in underlying investments by superannuation trustees*, which is due to expire on 1 April 2017.

Note: The draft ASIC instrument is available on our website at www.asic.gov.au/cp under CP 244.

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 4 December 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 15 February 2016 to:

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What will happen next?

Stage 1	4 December 2015	ASIC consultation paper released
Stage 2	15 February 2016	Comments due on the consultation paper
Stage 3	March–April 2016	Commencement of remade 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 instrument without substantive changes.

B Remaking ASIC class orders

Key points

We are proposing to remake as a single new instrument:

- Class Order [CO 02/1161] *Licensing relief (dealing) for public offer superannuation entities*, which sunsets on 1 April 2017;
- Class Order [CO 02/1073] *Financial Services Guide: Dealing in underlying investments by responsible entities*, which sunsets on 1 April 2017; and
- Class Order [CO 02/1074] *Financial Services Guide: Dealing in underlying investments by superannuation trustees*, which sunsets on 1 April 2017.

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 effects of the instruments. The draft ASIC instrument, which reflects the minor amendments proposed in this paper, is available on our website at www.asic.gov.au/cp under CP 244.

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.

Dealing in underlying investments: [CO 02/1161], [CO 02/1073] and [CO 02/1074]

Background

- 7 Under the *Corporations Act 2001* (Corporations Act), an entity that carries on a financial services business must hold an Australian financial services (AFS) licence. Financial services include dealing in a financial product. A superannuation interest and an interest in a registered managed investment scheme are both defined as financial products: s764A(1).
- 8 Dealing is defined in s766C(1). However, there is an exemption under which a person who deals on their own behalf is not required to hold an AFS licence, and is deemed to not deal in a financial product: see s766C(3).

9 Under the old Corporations Law (former reg 7.3.13), there was an exemption from the requirement to hold a dealer's licence if a superannuation trustee dealt in securities only in relation to the management and administration of a superannuation scheme. However, this exemption cannot be relied on now by superannuation trustees because their dealings are not on their own behalf, but rather on behalf of their beneficiaries.

10 This was the central issue behind the introduction of [CO 02/1161], and relevantly applies to [CO 02/1073] and [CO 02/1074], which were introduced to:

- (a) clarify the intended application of some of the provisions of Ch 7 of the Corporations Act, as amended by the *Financial Services Reform Act 2001*; and
- (b) remove unnecessary regulatory duplication and burden.

[CO 02/1161]

11 [CO 02/1161] exempts trustees of public offer superannuation funds from the requirement to hold an AFS licence for dealing in financial products on behalf of members in the course of operating the superannuation fund.

12 This relief is necessary because a superannuation trustee is not able to rely on the self-dealing exemption of s766C(3) because a trustee dealing in its capacity as a trustee is not dealing on its own behalf, but on behalf of its beneficiaries.

13 Without the relief in [CO 02/1161], a superannuation trustee would be required to:

- (a) hold an AFS licence for its dealings in underlying investments;
- (b) hold appropriate authorisations in each of the financial products in which it deals, such as insurance, securities and derivatives;
- (c) meet organisational competence requirements; and
- (d) meet requirements relating to each responsible manager's experience and qualifications relevant to each authorisation applied for.

14 These obligations would come with a compliance cost of hiring additional resources with appropriate skills and qualifications depending on each AFS licensee's authorisations. We consider this to be an added burden on industry and possibly dual regulation because these trustees are already subject to regulation of their prudential management of fund assets by the Australian Prudential Regulation Authority (APRA).

[CO 02/1073] and [CO 02/1074]

15 [CO 02/1073] and [CO 02/1074] were issued for a similar reason to [CO 02/1161], and relate to the same central issue of dealing in underlying

investments. These class orders exempt responsible entities and superannuation trustees from providing a Financial Services Guide (FSG) when dealing in underlying investments on behalf of investors or members in the course of operating the scheme or fund.

- 16 AFS licensees must provide an FSG to retail clients: see s941A of the Corporations Act. However, s941C(2) and 941C(3) provide exemptions for dealing by a responsible entity in the interests of a registered management investment scheme, but do not cover dealing by a responsible entity in the underlying investments or assets of the scheme.
- 17 If an FSG is required for dealing in the underlying investments, the exemption in s941C(3) would have little practical effect and its intent would not be achieved.
- 18 This is the rationale for the relief provided by [CO 02/1073] (responsible entities) and [CO 02/1074] (superannuation trustees). An additional requirement to issue an FSG for dealing in underlying investments by superannuation trustees and responsible entities of registered managed investment schemes would amount to a significant cost to industry.
- 19 The respective entities do not have to provide an FSG merely because the entity deals in financial products that are the underlying investments of the relevant fund or scheme.

Proposal

B1 To preserve their effects beyond the sunset date of 1 April 2017, we propose to continue the relief currently given by [CO 02/1161], [CO 02/1073] and [CO 02/1074] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Superannuation and Schemes: Underlying Investments) Instrument 2015/XX attached to this consultation paper. You can access the current instruments on www.comlaw.gov.au by clicking on the following direct links: [\[CO 02/1161\]](#), [\[CO 02/1073\]](#) and [\[CO 02/1074\]](#).

The only changes proposed are to:

- (a) combine the effects of [CO 02/1161], [CO 02/1073] and [CO 02/1074] into a single instrument;
- (b) update the name of the legislative instrument;
- (c) reflect current drafting practice and update the format of the current document;
- (d) simplify the drafting to give greater clarity;
- (e) update legislative references and definitions; and
- (f) correct any minor drafting errors.

Rationale

- 20 We have reached the preliminary view that [CO 02/1161], [CO 02/1073] and [CO 02/1074] 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.

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
[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
Financial Services Guide	A document that must be given to a retail client in relation to the provision of a financial service in accordance with Div 2 of Pt 7.7 of the Corporations Act Note: See s761A of the Corporations Act for the exact definition.
Legislative Instruments Act	<i>Legislative Instruments Act 2003</i>
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