



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 246

Remaking ASIC class order on securitisation special purpose vehicles: [CO 04/1526]

December 2015

About this paper

This consultation paper sets out ASIC's proposal to remake our class order on securitisation special purpose vehicles. Under the *Legislative Instruments Act 2003*, this class order will expire ('sunset') if not remade.

We are seeking feedback from the securitisation industry on our proposal to remake Class Order [CO 04/1526] *Securitisation special purpose vehicles*, 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 under CP 246.

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 16 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

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

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 29 January 2016 to:

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What will happen next?

Stage 1	16 December 2015	ASIC consultation paper released
Stage 2	29 January 2016	Comments due on the consultation paper
Stage 3	1 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 order

Key points

We are proposing to remake Class Order [CO 04/1526] *Securitisation special purpose vehicles*, which sunsets on 1 April 2016.

We have formed the preliminary view that this class order is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework.

Our intention is to omit cl 3(a) of [CO 04/1526] on the basis that it does not appear to be relied on and so should be removed as part of our deregulatory initiatives. The effect of this omission would be that securitisation entities seeking to rely on this relief will need to comply with the alternative condition in cl 3(b).

The class order has been redrafted using ASIC's current style and format, while preserving the current effect of the instrument. The draft ASIC instrument, which reflects the amendments proposed in this paper, is available on our website at www.asic.gov.au/cp under CP 246.

Class Order [CO 04/1526] *Securitisation special purpose vehicles*

Background

- 6 A securitisation arrangement is an arrangement where a portfolio of relatively illiquid assets is packaged into marketable securities ('securitisation products'). These securitisation products are then sold into the capital markets, on either a public or private basis. The benefits payable to investors from a securitisation product will depend largely on the return from the underlying securitised assets.
- 7 The securitisation industry operates almost exclusively in the wholesale market, where the securitisation product is sold to wholesale investors, usually through the on-sale of the financial product by a licensed dealer.
- 8 A securitisation arrangement typically involves a special purpose vehicle (SPV), which is established only for the purpose of a specific securitisation transaction. This specialised securitisation entity has a number of roles, including appointing service providers, such as a manager and a servicer (of the securitised assets) to perform specific dedicated services in respect of the securitisation.
- 9 In addition, SPVs generally carry on a business of providing financial services in one of a number of ways. In particular, they provide a financial service by issuing financial products. This arrangement would ordinarily

require the SPV to hold an Australian financial services (AFS) licence in order to deal in a financial product, unless otherwise exempted.

Note: Parts 7.6–7.8 of the *Corporations Act 2001* (Corporations Act) set out the AFS licensing requirements for carrying on a business of providing financial services (unless an exemption applies under s911A(2)). We have the power to exempt a financial services provider under s911A(2)(l) from the requirement to hold an AFS licence.

10 In July 2005, we issued [CO 04/1526] to address concerns around the disproportionate burden placed on firms carrying out securitisation arrangements in the absence of AFS licensing relief. [CO 04/1526] provides relief from the requirement to hold an AFS licence for certain securitisation entities for dealing in and providing a custodial and depository service, where they have been established for the limited purpose of carrying out a securitisation transaction.

11 The market integrity objectives of the Corporations Act are achieved under the exemption in [CO 04/1526] where the securitisation entity only deals in financial products either on the advice of an AFS licensee or under the supervision of a licensee.

Note: See Regulatory Guide 167 *Licensing: Discretionary powers* (RG 167) at RG 167.49F, which sets out the underlying principles of the relief.

Clause 3: Requirements for relying on the exemption

12 [CO 04/1526] provides two alternative relief conditions to allow a securitisation entity to rely on relief that best suits its situation. They are:

- (a) the securitisation entity is subject to an irrevocable deed poll with an AFS licensee whereby the licensee agrees to be liable for the securitisation entity's acts or omissions (cl 3(a)); or
- (b) the securitisation entity acts only in accordance with the financial advice of an AFS licensee, and the licensee that provides that advice has not excluded or limited its liability in relation to that advice (cl 3(b)).

Note: RG 167.49C sets out these relief conditions.

13 Before first issuing [CO 04/1526], we consulted with the Australian Prudential Regulation Authority (APRA) to confirm that under APRA policy an authorised deposit-taking (ADI) subsidiary can comply with cl 3(b) in typical securitisation arrangements without failing to comply with its prudential obligations. That is, an ADI subsidiary can still maintain operational and financial independence from the securitisation entity where the securitisation entity elects to comply with cl 3(b). Any ADI subsidiary that does provide financial product advice under the contract required by cl 3(b) would, of course, need to comply with all prudential requirements applied by APRA to the functions it is contracted to undertake.

Note: RG 167.49L–167.49M set out the basis for the two alternative relief conditions, and provide details of the relevant prudential requirements an ADI subsidiary is not barred from complying with. The relevant APRA standard is *Prudential Standard APS 120—Funds management and securitisation*. APRA released a consultation paper proposing revisions to this standard on 26 November 2015. At this stage, we do not expect the proposed revisions to affect the operation of our relief conditions in cl 3 of [CO 04/1526].

Proposal

- B1** To preserve its effect beyond the sunset date of 1 April 2016, we propose to continue the relief currently given by [CO 04/1526] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Securitisation Special Purpose Vehicles) Instrument 2016/XX attached to this consultation paper. You can access the current instrument on our website at www.asic.gov.au by clicking on the following link to the PDF: [\[CO 04/1526\]](#).

The only changes proposed are to:

- (a) omit cl 3(a) on the grounds that it is not currently being relied on (this option for a securitisation entity requires an AFS licensee to give an irrevocable deed poll agreeing to be liable for the securitisation entity's acts or omissions);
- (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; and
- (e) update legislative references and definitions.

Your feedback

- B1Q1 We are proposing to omit cl 3(a) on the grounds that it is not being relied on. Is there any reason why ASIC should retain cl 3(a)?
- B1Q2 Do you think that cl 3(b) is operating effectively and efficiently, and as intended? Clause 3(b) requires the securitisation entity to act in accordance with financial advice from an AFS licensee. The securitisation entity may rely on this condition as an alternative to cl 3(a): see the explanation in paragraphs 21–23 below.
- B1Q3 What are the scope and terms of the financial advice that has been given by the AFS licensee to the securitisation entity under cl 3(b)?
- B1Q4 Are you aware of any entities currently relying on [CO 04/1526] that do not have to comply with the APRA's *Prudential Standard APS 120—Funds management and securitisation*?
- B1Q5 Do you have any concerns or comments about any of the other proposed changes?

Rationale

14 We have formed the preliminary view that [CO 04/1526] is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework.

15 We are proposing to continue the relief in [CO 04/1526] because it would be disproportionately burdensome to require a securitisation entity to hold an AFS licence, where that securitisation entity has been established for the limited purpose of carrying out a securitisation transaction.

Omitting cl 3(a): AFS licensee responsible for securitisation entity

16 Clause 3(a) of [CO 04/1526] currently provides that a securitisation entity may rely on the relief where the securitisation entity is subject to an irrevocable deed poll with an AFS licensee that agrees to be liable for its acts or omissions. It also requires, as far as possible, that the securitisation entity complies with the Corporations Act as if it were a representative of the licensee.

17 Clause 3(a)(ii) provides that the AFS licensee that is party to the deed must notify ASIC that the condition in cl 3(a)(i) applies in relation to the securitisation entity. ASIC has not received any notifications under [CO 04/1526], which is evidence that securitisation entities have not relied on cl 3(a).

18 If cl 3(a) is not currently being relied on, we are proposing to remove it as part of our deregulatory initiatives. We are committed to reducing red tape for business. Part of this process of deregulation includes removing existing regulation that does not serve clear policy goals (e.g. it is not being used).¹

19 However, before we decide to omit cl 3(a) from the new ASIC instrument, we are seeking feedback on whether the securitisation industry is in fact relying on cl 3(a) or may rely on it in the future, or if there are any other reasons why cl 3(a) should not be omitted.

20 The effect of omitting cl 3(a) would be that securitisation entities seeking to rely on this relief would need to comply with the alternative condition in cl 3(b).

Operation of cl 3(b): AFS licensee advising securitisation entity

21 Clause 3(b) of [CO 04/1526] currently provides that a securitisation entity may rely on the relief where the securitisation entity acts only in accordance with the financial advice of an AFS licensee, and the licensee that provides that advice has not excluded or limited its liability for any loss or damage

¹ See, for example, Report 391 *ASIC's deregulatory initiatives* (REP 391), paragraph 5.

resulting from any negligence by that licensee in providing the financial product advice to the securitisation entity.

- 22 We have provided guidance about the intended operation of cl 3(b) in RG 167: see RG 167.49O–RG 167.49Q. Our guidance states that when the securitisation entity relies on the relief in cl 3(b):
- (a) the AFS licensee providing advice to the securitisation entity will need to take account of any obligations of the securitisation entity under a trust deed, its contracts and general law;
 - (b) we expect that the advice will be framed so as to ensure the AFS licensee’s conduct in providing advice to the securitisation entity does not adversely affect the efficient, honest and fair provision of financial services by the securitisation entity;
 - (c) the advice must be provided under a contract between the securitisation entity and the AFS licensee giving advice; and
 - (d) under the contract between the securitisation entity and the AFS licensee authorised to provide advice, the licensee may not exclude liability for its negligence.
- 23 We would appreciate feedback on whether cl 3(b) is operating efficiently and effectively in practice, and whether it is operating as intended and explained in our guidance in RG 167.49O–RG 167.49Q.

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.
ADI	Authorised deposit-taking institution
ASIC	Australian Securities and Investments Commission
APRA	Australian Prudential Regulation Authority
cl 3(a) (for example)	A clause in [CO 14/1526] (in this example numbered 3(a)), unless otherwise specified
[CO 14/1526] (for example)	An ASIC class order (in this example numbered 14/1526) 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
Legislative Instruments Act	<i>Legislative Instruments Act 2003</i>
RIS	Regulation Impact Statement
s911A(2) (for example)	A section of the Corporations Act (in this example numbered 911A(2)), unless otherwise specified
securitisation entity	A body corporate that: <ul style="list-style-type: none"> • carries on a securitisation business; • is an insolvency-remote special purpose entity according to the criteria of an internationally recognised credit rating agency (see s820–839(3)(c) of the <i>Income Tax Assessment Act 1997</i>); and • funds itself by issuing securitisation products
securitisation product	A debt instrument or an interest in a managed investment scheme
SPV	Special purpose vehicle
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect