



**ASIC**

Australian Securities & Investments Commission

## CONSULTATION PAPER 248

# Remaking ASIC class orders on reporting by foreign entities: [CO 98/98] and [CO 02/1432]

December 2015

### About this paper

This consultation paper sets out ASIC's proposals to remake our class orders relating to reporting by foreign entities. Under the *Legislative Instruments Act 2003*, these class orders will expire ('sunset') if not remade.

We are seeking feedback on our proposals to remake the following class orders:

- Class Order [CO 98/98] *Small proprietary companies which are controlled by a foreign company but which are not part of a large group in Australia*, which is due to expire on 1 April 2017; and
- Class Order [CO 02/1432] *Registered foreign companies: financial reporting requirements*, 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](http://www.asic.gov.au/cp) under CP 248.

### 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 22 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.

Your comments will help us develop our policy on financial reporting by foreign entities and foreign-controlled entities. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section C, 'Regulatory and financial impact'.

### 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 29 February 2016 to:

Douglas Niven  
Senior Executive Leader, Financial Reporting and Audit  
Australian Securities and Investments Commission  
Level 5, 100 Market Street  
Sydney NSW 2000  
facsimile: +61 2 9911 5231  
email: [policy.submissions@asic.gov.au](mailto:policy.submissions@asic.gov.au)

## What will happen next?

<b>Stage 1</b>	22 December 2015	ASIC consultation paper released
<b>Stage 2</b>	29 February 2016	Comments due on the consultation paper
<b>Stage 3</b>	May 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 98/98] *Small proprietary companies which are controlled by a foreign company but which are not part of a large group in Australia*, which sunsets on 1 April 2017; and
- Class Order [CO 02/1432] *Registered foreign companies: financial reporting requirements*, which sunsets on 1 April 2017.

We are proposing to continue the relief currently given by [CO 98/98] and [CO 02/1432] with one amendment—the relief would not be available to an individual entity if:

- the entity has been notified by ASIC that it may not rely on the relief; and
- ASIC’s notification has not been revoked or varied to allow the relief to be relied on for the relevant financial year.

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. The draft ASIC instrument, which reflects the amendments proposed in this paper, is available on our website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 248.

### Class orders on reporting by foreign entities: [CO 98/98] and [CO 02/1432]

#### Background to [CO 98/98]

- 6 Section 292(2)(b) of the *Corporations Act 2001* (Corporations Act) requires a small proprietary company that was controlled by a foreign company for all or part of a financial year to comply with the financial reporting obligations under Pt 2M.3 of the Corporations Act unless it was consolidated for that period in financial statements lodged with ASIC by a registered foreign company, a company, a disclosing entity or a registered scheme.
- 7 Section 292(2)(b) results in more onerous financial reporting requirements applying to small foreign-controlled proprietary companies than apply to their Australian counterparts that are not foreign controlled.
- 8 [CO 98/98] puts the reporting requirements of small foreign-controlled proprietary companies on a par with other Australian small proprietary companies. However, a condition of the relief is that the company seeking



relief cannot be part of a large group in Australia. This condition prevents disaggregation of foreign-controlled companies into smaller companies to avoid financial reporting obligations.

### **Background to [CO 02/1432]**

- 9 A registered foreign company must lodge with ASIC a copy of its balance sheet, cash flow statement and profit and loss statement ('financial statements') for its last financial year at least once in every calendar year. The requirements are set out in s601CK of the Corporations Act.
- 10 These financial statements are those required by the law in the company's place of origin. If financial statements are not required in the company's place of origin or if the disclosures contained therein are not sufficient, ASIC can require the company to prepare and lodge financial statements prepared as if the company were a public company formed under the Corporations Act.
- 11 For some registered foreign companies, particularly those that are not required by the law in their place of origin to prepare financial statements, these requirements are more onerous than those that apply to some proprietary companies incorporated under the Corporations Act.
- 12 [CO 02/1432] relieves a registered foreign company with characteristics similar to a small Australian proprietary company from the requirements of s601CK. As with [CO 98/98], the company cannot be part of a large group in Australia.

### **Proposal**

**B1** To preserve their effect beyond the sunset date of 1 April 2017, we propose to largely continue the relief currently given by [CO 98/98] and [CO 02/1432] in a new legislative instrument that reflects current drafting practice, but with the changes set out below: see draft ASIC Corporations (Foreign Entity Reports) Instrument 2016/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: [\[CO 98/98\]](#) and [\[CO 02/1432\]](#).

The only changes proposed are to:

- (a) combine the effects of [CO 98/98] and [CO 02/1432] into a single instrument;
- (b) modify [CO 98/98] and [CO 02/1432] so that the relief does not apply to an individual entity if:
  - (i) the entity has been notified by ASIC that it may not rely on the relief; and
  - (ii) ASIC's notification has not been revoked or varied to allow the relief to be relied on for the relevant financial year;

- (c) update the name of the legislative instrument;
- (d) reflect current drafting practice and update the format of the current documents;
- (e) simplify the drafting to give greater clarity;
- (f) update legislative references and definitions; and
- (g) correct any minor drafting errors.

*Feedback*

- B1Q1 Do you agree that the relief in [CO 98/98] and [CO 02/1432] should be continued in one form or another?
- B1Q2 Do you agree that ASIC should be able to notify an entity that the relief may not be relied on? If not, why not?
- B1Q3 If you agree with proposal B1(b), what, if any, restrictions should be placed on the ability of ASIC to notify an entity that it cannot rely on the relief?

**Rationale**

- 13 We have formed the preliminary view that [CO 98/98] and [CO 02/1432] 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.
- 14 The revised instrument provides ASIC with the ability to give notice to an individual entity that it may not rely on the relief. In making a decision as to whether to notify an entity that it cannot rely on the relief for a particular financial year, we will have regard to information provided by the Australian Taxation Office (ATO) or other regulators.
- 15 We will consider whether preparing and lodging a financial report is in the public interest and whether the benefits of reporting outweigh the additional costs to the entity. Circumstances in which we may notify an entity include, but are not limited to, instances where:
  - (a) the ATO has or is undertaking a review of a taxpayer and the lodgement is considered to support transparency leading to improved compliance (without limiting the circumstances, an example may be where the ATO is undertaking a profit shifting inquiry); and
  - (b) information received suggests that an entity is relying on the relief when it is not meeting the conditions for relief.

## C Regulatory and financial impact

- 16 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:
- (a) reducing compliance costs; and
  - (b) improving the transparency of financial reporting.
- 17 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:
- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
  - (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
  - (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).
- 18 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.
- 19 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:
- (a) the likely compliance costs;
  - (b) the likely effect on competition; and
  - (c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

## Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
[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
Legislative Instruments Act	<i>Legislative Instruments Act 2003</i>
Pt 7.9 (for example)	A part of the Corporations Act (in this example numbered 7.9)
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