



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 249

Remaking ASIC class order on generic financial calculators: [CO 05/1122]

December 2015

About this paper

This consultation paper sets out ASIC's proposals to remake our class order on generic financial calculators. Under the *Legislative Instruments Act 2003*, this class order will expire ('sunset') if not remade.

We are seeking feedback from providers of generic financial calculators, consumers and other interested parties on our proposals to remake, without significant changes, Class Order [CO 05/1122] *Relief for providers of generic calculators*, 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 249.

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.

Contents

The consultation process	4
A Background	6
Purpose of 'sunsetting' legislative instruments	6
Our approach to remaking legislative instruments	6
B Remaking ASIC class order	8
Class Order [CO 05/1122] <i>Relief for providers of generic calculators</i>	8
C Regulatory and financial impact	17
Key terms	18

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 generic financial calculators. 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 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 12 February 2016 to:

Tony Christie
Senior Lawyer, Strategic Policy
Australian Securities and Investments Commission
GPO Box 9827
Melbourne Vic 3001
facsimile: 03 9280 3306
email: policy.submissions@asic.gov.au

What will happen next?

Stage 1	22 December 2015	ASIC consultation paper released
Stage 2	12 February 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 05/1122] *Relief for providers of generic calculators*, 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.

The class order has been redrafted using ASIC's current style and format, while generally preserving the current effect of the instrument. We are proposing to make minor amendments to the conditions of relief.

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 249.

Class Order [CO 05/1122] *Relief for providers of generic calculators*

Background

- 6 A generic financial calculator is a facility, device, table or other thing that:
- (a) is used to make a general numerical calculation or find out the result of a numerical calculation about a financial product; and
 - (b) does *not* advertise or promote one or more specific financial products.
- 7 Typically, generic financial calculators help the user calculate:
- (a) the estimated value of total superannuation, savings or investments at a future point in time; and/or
 - (b) the estimated level of superannuation contributions, savings, investments or life insurance cover required to achieve a particular financial goal.
- 8 Examples of generic financial calculators include the following (but only where they are not about specific financial products):
- (a) superannuation calculators;
 - (b) savings calculators;
 - (c) managed investment calculators; and
 - (d) life insurance calculators.

Impact of superannuation reforms

- 9 There are a number of superannuation reforms and initiatives that may need to be considered in determining how superannuation calculators could most appropriately present and calculate estimates in the future, including:
- (a) the commencement of s29QC of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) on 1 February 2017. Section 29QC requires that if a registrable superannuation entity (RSE) licensee provides certain information to the Australian Prudential Regulation Authority (APRA) and the RSE licensee gives the same or equivalent information to another person, including on a website, then the RSE licensee must ensure that this information is calculated in the same way as the information given to APRA;
 - (b) the government's response to the Financial System Inquiry recommendations about including retirement income projections on member statements and facilitating access to consolidated superannuation information from the Australian Taxation Office to use with retirement income projections;
 - (c) the release by ASIC of the consumer testing of the Choice product dashboard undertaken last year by researchers, Latitude Insights (see Report 455 *Consumer testing of the Choice product dashboard* (REP 455)); and
 - (d) the release of exposure draft legislation to refine the Corporations Act provisions on Choice product dashboards, including the use of a 'super estimator' (i.e. a link at the end of the Choice product dashboard to ASIC's MoneySmart website and a basic version of a calculator that uses some of the data from the dashboard).
- 10 We will monitor the impact of these developments to assess the ongoing appropriateness of our relief under [CO 05/1122] to superannuation calculators.

The need for relief

- 11 A generic financial calculator involves financial product advice if it produces recommendations or statements of opinion that are (or could reasonably be regarded as being) intended to influence the user in making a decision about a financial product or class of financial product: see s766B.
- 12 Personal advice is financial product advice that is given or directed to a person (including by electronic means) in circumstances where:
- (a) the provider of the advice has considered one or more of the client's objectives, financial situation and needs; or
 - (b) a reasonable person might expect the provider of the advice to have considered one or more of those matters (see s766B(3)).

- 13 Whether a particular calculator involves financial product advice and whether the financial product advice is likely to be personal advice will depend on the facts of the particular case.

Note: For more guidance on the difference between giving factual information, general advice and personal advice, see Regulatory Guide 244 *Giving information, general advice and scaled advice* (RG 244) and Regulatory Guide 36 *Licensing: Financial product advice and dealing* (RG 36).

- 14 Without the relief in [CO 05/1122] the provider of a generic financial calculator that provides financial product advice:
- (a) will be subject to the Australian financial services (AFS) licensing, conduct and disclosure obligations in Ch 7 of the *Corporations Act 2001* (Corporations Act); and
 - (b) must comply with the personal advice regime in Div 3 of Pt 7.7 of the Corporations Act if the generic financial calculator provides personal advice to retail clients.

Note: The best interests duty and related obligations under Div 2 of Pt 7.7A do not have effect in relation to a person to whom [CO 05/1122] applies: see reg 9.12.04 of the Corporations Regulations 2001 (first appearing). This is subject to compliance with the conditions set out in the exemption. This regulation will also apply to any legislative instrument that replaces [CO 05/1122].

- 15 We understand that the imposition of these regulatory requirements and/or the uncertainty about their application may inhibit the provision of generic financial calculators. The cost of complying with the AFS licensing, conduct and disclosure obligations may be passed on to consumers subject, in the case of trustees of regulated superannuation funds, to s99F of the SIS Act. In some cases, calculators may be withdrawn due to the operating costs. This may restrict access to useful information provided by calculators, which would disadvantage consumers.

Note: Generally, access to superannuation calculators is not going to be limited to members of the regulated superannuation fund and a superannuation calculator must not advertise or promote a particular financial product, such as a beneficial interest in a regulated superannuation fund. [CO 05/1122] does not give relief from the obligations under s99F of the SIS Act and therefore a trustee or trustees of a regulated superannuation fund must not directly or indirectly pass on to members the cost of establishing and operating the superannuation calculator if it involves the provision of personal advice to non-members or relates to a financial product that is not a beneficial interest in the fund.

- 16 The relief in [CO 05/1122] was granted for the removal of doubt and to provide legal certainty.

Proposal

- B1** To preserve its effect beyond the sunset date of 1 April 2016, we propose to continue the relief currently given by [CO 05/1122] in a new legislative instrument, without any significant changes: see draft ASIC

Corporations (Generic Calculators) Instrument 2016/XX attached to this consultation paper. You can access the current instrument on www.comlaw.gov.au by clicking on the following direct link: [\[CO 05/1122\]](#).

The only changes proposed are to:

- (a) include a new requirement that the assumptions must be clearly and prominently displayed but allow the provider greater flexibility about how they present information about why the assumptions are reasonable for working out the estimate—in particular, the information may be layered (i.e. detailed disclosure may be accessed through a link);
- (b) include a new requirement that if an estimate is of an amount payable or receivable at a future time of two or more years, the results must be adjusted for inflation;
- (c) include a new requirement that if a person relying on the relief becomes aware of a breach, or a likely breach, of any of the conditions in the relief, the person must lodge a written report on the matter with ASIC;
- (d) clarify that although the assumptions used by a calculator may in fact reflect a particular financial product, the calculator should not refer to any particular product;
- (e) update the name of the legislative instrument;
- (f) reflect current drafting practice and update the format of the current document;
- (g) simplify the drafting to give greater clarity;
- (h) update legislative references; and
- (i) correct any minor drafting errors.

Your feedback

B1Q1 Do you agree with these proposals? If not, why not?

B1Q2 Instead of remaking [CO 05/1122], should ASIC allow [CO 05/1122] to sunset on the basis that providers of generic financial calculators can refer users to the calculators provided on ASIC's consumer website, MoneySmart, for additional financial information and education?

B1Q3 Do these proposals help achieve our objective of facilitating the provision of useful and accurate information about financial products and services through generic financial calculators?

B1Q4 Do you think the current requirement that a generic financial calculator must display to the user in the ordinary course of its use clear and prominent statements and explanations is achieving its objective of promoting user engagement with this information?

- B1Q5 If we include a requirement that future projected amounts must be adjusted for inflation, should we prescribe an appropriate measure of inflation or should the provider be left to make assumptions about the rate of inflation? Would the Consumer Price Index averaged over a period of time, or the inflation assumptions used by ASIC's MoneySmart calculators, be an appropriate measure of inflation? Please give reasons for your view.
- B1Q6 Should we require that generic financial calculators include a field relating to fees and costs? Alternatively, should we allow the provider the flexibility to determine disclosure about fees and costs subject to the requirement that if the calculator does not include a provision for fees and costs this has to be clearly and prominently explained, including the impact of this limitation?
- B1Q7 If ASIC required generic financial calculators to include a field relating to fees and costs, should we prescribe standardised fees and costs? On what basis should the fees and costs be calculated and what requirements should ASIC set?
- B1Q8 How has the requirement in [CO 05/1122] that the provider of a generic financial calculator must take reasonable steps to ensure that the calculator does not advertise or promote a specific financial product worked in practice?
- B1Q9 Do you think that we should introduce a new express requirement that statutory assumptions, such as the taxation rates or the rates of compulsory superannuation contributions, must remain up to date?
- B1Q10 If the proposals about the 'super estimator' referred to in paragraph 9(d) are implemented, should ASIC make any changes to the relief in relation to superannuation funds retirement benefit projections where the super estimator applies?
- B1Q11 Please give details of any additional costs associated with the implementation of our proposals. If possible, please quantify these costs.
- B1Q12 What benefits do you consider will result from these proposals? If possible, please quantify these benefits.

Rationale

- 17 Generic financial calculators can be a useful and cost-effective educational tool through which consumers can better understand their financial circumstances and goals. Calculators can help consumers engage with their superannuation, insurance and investment strategies.
- 18 We are aware, however, that the AFS licensing, conduct and disclosure obligations in Ch 7 of the Corporations Act impose additional compliance costs on the provider that may lead to consumers having reduced access to

generic financial calculators, particularly because these calculators are often provided free of charge.

- 19 The relief in [CO 05/1122] facilitates the cost-effective provision of useful and accurate information about financial products and services to consumers through generic financial calculators.
- 20 Given the significant benefits that flow from providing consumers with generic financial calculators, we consider that [CO 05/1122] continues to be a useful part of the legislative framework.

Conditions of relief

- 21 Generic financial calculators have the potential to mislead consumers if they are not designed responsibly. The conditions of our relief seek to ensure that these calculators are designed responsibly and that the information provided is useful and accurate.

Ensuring statements and explanations encourage user engagement

- 22 It is important that users of generic financial calculators can easily understand that these calculators are educational tools and are not intended to provide personal advice. It is also important that users understand the assumptions and limitations of the calculator. For this reason, under our relief in [CO 05/1122] we require that a generic financial calculator must display ‘clear and prominent’ statements and explanations about prescribed matters.
- 23 We recently reviewed a number of online generic financial calculators and found that providers have interpreted the requirement about prominence of disclosure very differently. For example, some providers have interpreted ‘clear and prominent’ to mean that the statements and explanations must be provided on a detailed welcome page before the user can access the calculator. This may affect the consumer’s experience and the consumer may ignore the detail in the statements and explanations.
- 24 Under [CO 05/1122] a generic financial calculator must display to the user in the ordinary course of its use clear and prominent explanations of why the calculator’s assumptions are reasonable for the purpose of working out the estimate. It may be that having details about the basis for assumptions displayed with equal prominence to the assumptions themselves will dilute the prominence of the assumptions because prominence is inherently relative.
- 25 We are concerned that the current requirements do not permit innovative disclosure, such as ‘layering’ of information (i.e. providing short-form disclosure covering the most important points and more detailed disclosure on request through a link to the information).

- 26 The behavioural economics research suggests that people comprehend information differently depending on the context in which it is provided. Context can be based (among other things) on the environment, individual, nature of the products/services, timing factors, and/or the way the information is presented. We think this research supports giving providers greater flexibility on where and how to make relevant disclosures clear and prominent (including the layering of information about the basis for assumptions), rather than mandating any one approach to disclosure.
- 27 We are proposing to allow the provider greater flexibility about how they present information about why the assumptions are reasonable for working out the estimate. The headline assumptions must be clearly and prominently displayed, but our proposal will permit the layering of information in relation to the explanation about the reasonableness of assumptions.
- 28 We will provide additional guidance on our expectation that the provider will present statements and explanations in a way that aids comprehension and usability by an ordinary and reasonable consumer of the generic financial calculator. We consider that the approach adopted by the provider should reflect an understanding of how consumers access and engage with the particular calculator and make decisions (e.g. providers may consider user testing).
- 29 We consider that our proposal will promote user engagement with the information by giving providers more flexibility to improve the presentation of key statements and explanations.
- Disclosure of future values in today's dollars: Adjusting for inflation*
- 30 Under our relief, a generic financial calculator may provide results in future dollars only (i.e. the actual amount at a future point in time, rather than the amount with equivalent buying power in today's dollars).
- 31 To provide useful information to consumers, the information on future returns or amounts payable must be presented in such a way that it can be properly understood. We consider that consumers' comprehension of future returns is assisted by giving an indication of what the investment may be at current dollar values at the end of the specified term.
- 32 Therefore, we consider that the outcome of all generic financial calculators should account for inflation and convert the future projected amount into current dollar values. If a provider wishes to provide a result in future dollars as well as current dollars, both should be clearly labelled so as to avoid consumer confusion.
- 33 The provider of the generic financial calculator must make assumptions about the rate of inflation and those assumptions must be reasonable. We consider that the discount rate should be appropriately sourced and

referenced. Some sources that may be reasonable include the Consumer Price Index as supplied by the Australian Bureau of Statistics averaged over a period of time, or the inflation assumptions used by ASIC's MoneySmart calculators. For example, the MoneySmart Superannuation Calculator assumes a rate of inflation of 2.5% per annum.

Breach reporting

- 34 Under [CO 05/1122] a failure to comply with a condition precludes a person from taking advantage of the relief, but only if the person is given a notice in writing by ASIC.
- 35 Breach notifications play a very important role in ASIC's oversight of the financial services industry. Apart from alerting us to significant breaches of the law, they also give us valuable information to help us identify emerging trends of non-compliance.
- 36 The reporting of matters that constitute or may constitute contraventions of the conditions under [CO 05/1122] is an important element of the effective regulation of generic financial calculators and the protection of persons who rely on these calculators.
- 37 If the provider of a generic financial calculator does not hold an AFS licence, it is not subject to the obligation under s912D of the Corporations Act to report to ASIC certain breaches, or likely breaches, of the Corporations Act, including the conditions specified in the exemption under [CO 05/1122].
- 38 We are proposing to introduce a new requirement that if a person relying on the relief breaches, or is likely to breach, any of the conditions in the relief, the person must, as soon as practicable, and in any case within 10 business days of becoming aware of the breach or likely breach, lodge a written report on the matter with ASIC.

Fees and costs

- 39 [CO 05/1122] does not explicitly require generic financial calculators to include a field relating to fees or costs. For example, some calculators may present a default rate for investment earnings that is net of fees or costs, while others may present fees or costs as a separate factor in the calculation, or may not include a provision for fees or costs.
- 40 [CO 05/1122] requires that the assumptions about fees and costs must be reasonable and the generic financial calculator must include clear and prominent explanations of why the assumptions are reasonable and the limitations of the calculator.

41 Mandating standardised fee disclosure is difficult because generic financial calculators apply to a range of different financial products. We consider that the settings under [CO 05/1122] adequately inform consumers about the impact of fees and costs on long-term outcomes. For example, if the generic financial calculator does not take into account the effect of fees and costs, this has to be clearly and prominently explained to the user in the ordinary course of its use, including a clear and prominent explanation of the impact of this limitation. Further, a generic financial calculator is subject to the prohibition against misleading or deceptive conduct in the Corporations Act and the *Australian Securities and Investments Commission Act 2001*.

Statutory assumptions

42 Statutory assumptions, such as the taxation rates or the rates of compulsory superannuation contribution, can be an important component of a generic financial calculator. Under [CO 05/1122]:

- (a) the statutory assumptions, unless changed by the user, must be reasonable for working out the estimate; and
- (b) the generic financial calculator must include clear and prominent statements about:
 - (i) the limitations of the calculator and the impact of any significant limitation; and
 - (ii) why the provider considers the statutory assumptions are reasonable for the purposes of working out the estimate.

43 We consider there is potential for consumer confusion if the generic financial calculator includes out-of-date statutory assumptions. The behavioural economics research suggests that default settings are powerful and consumers are reluctant to change default settings.

44 We consider that the current conditions in [CO 05/1122] require statutory assumptions to be up to date because if they are not up to date they are not 'reasonable'.

C Regulatory and financial impact

- 45 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) helping consumers to engage with their superannuation, insurance and investment strategies by facilitating the provision of useful and accurate information about financial products and services through generic financial calculators; and
 - (b) not imposing unreasonable compliance costs on the provider of a generic financial calculator.
- 46 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).
- 47 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.
- 48 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. 6.

Key terms

Term	Meaning in this document
APRA	Australian Prudential Regulation Authority
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
financial product advice	A recommendation or a statement of opinion, or a report of either of these things, that: <ul style="list-style-type: none"> • is intended to influence a person or persons in making a decision about a particular financial product or class of financial product, or an interest in a particular financial product or class of financial product; or • could reasonably be regarded as being intended to have such an influence. <p>This does not include anything in an exempt document</p> <p>Note: This is a definition contained in s766B of the Corporations Act</p>
general advice	Financial product advice that is not personal advice Note: This is a definition contained in s766B(4) of the Corporations Act
generic financial calculator	A facility, device, table or other thing that: <ul style="list-style-type: none"> • is used to make a numerical calculation or find out the result of a numerical calculation about a financial product; and • does <i>not</i> advertise or promote one or more specific financial products.
Legislative Instruments Act	<i>Legislative Instruments Act 2003</i>
personal advice	Financial product advice given or directed to a person (including by electronic means) in circumstances where: <ul style="list-style-type: none"> • the person giving the advice has considered one or more of the client's objectives, financial situation and needs; or • a reasonable person might expect the person giving the advice to have considered one or more of these matters <p>Note: This is a definition contained in s766B(3) of the Corporations Act</p>

Term	Meaning in this document
RIS	Regulation Impact Statement
s25 (for example)	A section of the Corporations Act (in this example numbered 25), 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