



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 251

Remaking ASIC class order on financial product advice: Exempt documents— [CO 03/606]

February 2016

About this paper

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

We are seeking feedback on our proposal to remake, without significant changes, Class Order [CO 03/606] *Financial product advice: Exempt documents*, 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 251.

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 February 2016 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 18 March 2016 to:

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 Senior Lawyer, Investment Managers and Superannuation
 Australian Securities and Investments Commission
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What will happen next?

Stage 1	16 February 2016	ASIC consultation paper released
Stage 2	18 March 2016	Comments due on the consultation paper
Stage 3	April–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 order

Key points

We are proposing to remake Class Order [CO 03/606] *Financial product advice: Exempt documents*, which sunsets on 1 April 2017.

We have formed the preliminary view that the 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 preserving the current effect of the instrument. 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 251.

Your feedback

- 6 You are invited to comment on any of our proposals to remake the ASIC class order in this section, including whether the class order is currently operating effectively and efficiently. These proposals are only an indication of the approach we may take and are not our final policy.

Class Order [CO 03/606] *Financial product advice: Exempt documents*

Background

- 7 Part 7.6 of the *Corporations Act 2001* (Corporations Act) deals with licensing of providers of financial services. Under s911A(1), a person who carries on a financial services business in Australia must hold an Australian financial services (AFS) licence. If you give 'financial product advice' that is a financial service, you must hold an AFS licence, unless an exemption applies.
- 8 If a communication is a recommendation or a statement of opinion, or a report of either of these things, that is intended to, or could reasonably be regarded as being intended to, influence a client in making a decision about a particular financial product or class of financial product (or an interest in these), it is financial product advice: s766B.
- 9 Under s766B(1A), the giving of an 'exempt document or statement' does not constitute the provision of financial product advice.

- 10 Under s766B(9), an ‘exempt document or statement’ in s766B(1A) means:
- (a) a document prepared, or a statement given, in accordance with the requirements of Ch 7, other than:
 - (i) a Statement of Advice; or
 - (ii) a document or statement of a kind prescribed by regulations made for the purposes of s766B(9); or
 - (b) any other document or statement of a kind prescribed by regulations made for the purposes of s766B(9).
- 11 Regulation 7.1.08(3) of the Corporations Regulations 2001 (Corporations Regulations) requires that a document or statement of a kind prescribed by regulations for the purposes of s766B(9), and so included in the definition of ‘exempt document or statement’, means documents, information and statements that:
- (a) do not contain personal advice;
 - (b) are required by, and prepared as a result of, a requirement under an Australian law; and
 - (c) are included in a class of documents, information or statements specified by ASIC in a list published in the *Gazette* for the purposes of reg 7.1.08(3) of the Corporations Regulations.
- 12 [CO 03/606] specifies a list of documents, information or statements for the purposes of reg 7.1.08(3) as being exempt from the AFS licence requirement in relation to any general advice given in the document.
- 13 The documents specified in [CO 03/606] include:
- (a) documents prepared in accordance with the Corporations Act or other Act such as the *Superannuation Industry (Supervision) Act 1993* (SIS Act);
 - (b) those issued by entities not ordinarily in the business of providing financial product advice;
 - (c) explanatory statements for certain foreign schemes of arrangement; and
 - (d) documents provided in relation to a transaction involving the acquisition of control or potential control of, or the acquisition of a substantial interest in, an issuer of securities or a managed investment scheme that is regulated in the jurisdiction of an approved foreign market.
- 14 [CO 03/606] covers:
- (a) unintended situations of providing financial product advice that is general advice; and

- (b) general advice that is contained in an offer document, or a document responding to an offer document under a control transaction, that is regulated in the jurisdiction of an approved foreign market. Without relief a person who distributes such a document in Australia would need an AFS licence.

15 The jurisdiction of an approved foreign market is one which provides a takeover regime that offers a comparable level of disclosure and investor protection to that provided in Australia.

Proposal

B1 To preserve its effect beyond the sunset date of 1 April 2017, we propose to continue the relief currently given by [CO 03/606] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Financial Product Advice — Exempt Documents) 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: [\[CO 03/606\]](#).

The only changes proposed are to:

- (a) update the name of the legislative instrument;
- (b) reflect current drafting practice and update the format of the current document; and
- (c) simplify the drafting to give greater clarity, including replacing the list of specified documents prepared as a result of a requirement of the Corporations Act or SIS Act with a general description.

Rationale

16 We have formed the preliminary view that [CO 03/606] is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of the class order. We consulted on this relief in Consultation Paper 79 *Disclosure relief for foreign scrip takeovers* (CP 79) and do not consider any significant amendment is required since that time.

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.
approved foreign market	A financial market that has been approved by ASIC for the purposes of the relief set out in RG 72 <i>Foreign securities: Disclosure relief</i> (as listed in the individual instruments)
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
CP 79 (for example)	An ASIC consultation paper (in this example numbered 79)
financial product	A facility through which, or through the acquisition of which, a person does one or more of the following: <ul style="list-style-type: none"> • makes a financial investment (see s763B) • manages a financial risk (see s763C); or • makes non-cash payments (see s763D) Note: This is a definition contained in s763A of the Corporations Act: see also s763B–765A.
financial product advice	A recommendation or 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. This does not include anything in an exempt document Note: This is a definition contained in s766B of the Corporations Act.
general advice	Financial product advice that is not personal advice Note: This is a definition contained in s766B(4) of the Corporations Act

Term	Meaning in this document
Legislative Instruments Act	<i>Legislative Instruments Act 2003</i>
managed investment scheme	As defined in s9 of the Corporations Act
personal advice	<p>Financial product advice given or directed to a person (including by electronic means) in circumstances where:</p> <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>
reg 7.1.08	A regulation of the Corporations Regulations (in this example numbered 7.1.108), unless otherwise specified
RIS	Regulation Impact Statement
s25 (for example)	A section of the Corporations Act (in this example numbered 25), unless otherwise specified
Statement of Advice (SOA)	<p>A document that must be given to a client for the provision of personal advice under Subdivs C and D of Div 3 of Pt 7.7 of the Corporations Act</p> <p>Note: See s761A for the exact definition.</p>
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect