



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 252

Remaking ASIC class order on share and interest sale facilities: [CO 08/10]

February 2016

About this paper

This consultation paper sets out ASIC's proposals to remake our class order on share and interest sale facilities. 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 08/10] *Share and interest sale facilities*, which is due to expire on 1 April 2018.

Note: The draft ASIC instrument is available on our website at www.asic.gov.au/cp under CP 252.

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.

Contents

The consultation process	4
A Background	5
Purpose of ‘sunsetting’ legislative instruments	5
Our approach to remaking legislative instruments	5
B Remaking ASIC class order	7
Your feedback	7
Class Order [CO 08/10] <i>Share and interest sale facilities</i>	7
Key terms	11

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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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 08/10] *Share and interest sale facilities*, which sunsets on 1 April 2018.

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 252.

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 08/10] *Share and interest sale facilities*

Background

- 7 Sale facilities can be a convenient and cost effective way, especially for smaller holders of shares and interests in managed investment schemes, to:
- (a) sell their shares or interests at or near their current market value; or
 - (b) purchase more shares or interests of the same class.
- 8 Sale facilities are offered in a variety of situations. Some are stand-alone facilities and others form part of a restructure or some other larger transaction.
- 9 While the context may differ, many sale facilities share the same basic features, including:
- (a) the issuer invites holders to sell their shares or interests through the sale facility;
 - (b) the shares or interests of holders who elect to participate in the facility are sold on a licensed market or approved foreign market by an

Australian financial services (AFS) licensee in batches over a specified period of time;

- (c) the proceeds of the sale through the facility are pooled; and
- (d) participating holders are paid a volume weighted average price on all shares or interests sold through the facility less reasonable expenses of operating the facility (unless those expenses are borne by the issuer).

- 10 Sale facilities are also a way for issuers to reduce the high administrative costs involved in maintaining a register with many small holdings. Where changes are being made to the capital structure of a company or managed investment scheme, a sale facility may also be used to facilitate the conversion of existing shares or interests to new financial products, or enable holders of existing shares or interests to cash-out those products, instead of receiving the new financial products.
- 11 As an alternative to the sale facility, some issuers may also offer a ‘purchase facility’ or ‘top-up facility’ (related purchase facility) to encourage small holders to acquire more shares or interests of the same class. Related purchase facilities typically work in a similar way to the sale facilities, in that shares or interests are acquired on-market by a broker, and participating holders receive the benefit of the broker batching purchase orders and averaging the price paid to acquire shares or interests through the purchase facility.
- 12 Some sale facilities and related purchase facilities may satisfy the definition of a ‘managed investment scheme’ for the purposes of Ch 5C of the *Corporations Act 2001* (Corporations Act). This is because participating holders contribute shares, interests or money, which are then pooled and used to produce benefits for the holders (including the ability to sell or purchase shares or interests more easily and lower brokerage and transaction costs). The participating holders have no involvement in, or control over, the carrying out of the scheme.
- 13 The requirements to register a managed investment scheme, hold an AFS licence and give a Product Disclosure Statement (PDS) might apply to the product issuer who operates the facility. These requirements might also apply to other persons who act as agent of the product issuer and who are involved in operating these facilities (i.e. the operator of the issuer’s registry and the intermediary appointed by the issuer to sell or purchase products on a financial market).
- 14 The operation of certain sale facilities may also be prohibited under s1019F of the Corporations Act, which prevents a person from inviting another person to make an offer to sell a financial product in circumstances where, if the invitation were instead an offer to purchase the financial product, that offer would be covered by Div 5A of Pt 7.9 of the Corporations Act.

- 15 Sale facilities involve an entity that issues shares or interests inviting the holders of those products to offer to sell those products to third parties. Sale facilities contravene s1019F because:
- (a) the invitation is unsolicited; and
 - (b) although the offers to sell shares or interests that are made through the sale facility are made on a licensed or approved foreign market, the invitation to participate in the sale facility is not made on a licensed or approved foreign market.
- 16 [CO 08/10] exempts issuers of shares and interests who operate a sale facility or related purchase facility from:
- (a) the obligation to register a managed investment scheme under s601ED of the Corporations Act in relation to the facility;
 - (b) the product disclosure provisions under Divs 2–5 of Pt 7.9 of the Corporations Act in relation to an interest in the facility;
 - (c) the requirement to hold an AFS licence covering dealing in, and general advice in relation to, an interest in the facility; and
 - (d) Div 5A of Pt 7.9, where issuers invite a holder of those products to make an offer to sell those products through a sale facility.
- 17 The relief in [CO 08/10] facilitates the operation of sale facilities and related purchase facilities because ASIC is satisfied that:
- (a) the prohibition in s1019F, and the managed investment, AFS licensing and product disclosure provisions, were not intended to apply to these types of facilities;
 - (b) without relief, issuers would be unable to offer these facilities to their members without incurring excessive costs or regulatory obstacles, which would disadvantage both issuers and members; and
 - (c) the relief maintains sufficient disclosure to members.
- 18 Regulatory Guide 161 *Share and interest sale facilities* (RG 161) outlines the relief we have given for sale facilities and related purchase facilities under [CO 08/10] and our approach for facilities not covered by the relief. We do not plan to make any substantive change to our policy in RG 161, but we intend to update the guide when we remake [CO 08/10] so that it refers to the correct instrument and sets out the amended requirements.

Proposal

- B1** To preserve its effect beyond the sunset date of 1 April 2018, we propose to continue the relief currently given by [CO 08/10] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Share and Interest Sale Facilities) 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: [\[CO 08/10\]](#).

The only changes proposed are to:

- (a) update the list of approved foreign markets with the current names of those markets;
- (b) extend relief to a related body corporate of the product issuer;
- (c) remove the requirement to notify ASIC of a failure to comply with a condition of the legislative instrument;
- (d) update the name of the legislative instrument;
- (e) reflect current drafting practice and update the format of the current document; and
- (f) simplify the drafting to give greater clarity;

Rationale

- 19 We have reached the preliminary view that [CO 08/10] is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework.
- 20 We have proposed to extend the relief in [CO 08/10] to a related body corporate of the product issuer that offers the facility. We consider this accommodates what may often occur in practice.
- 21 We are not aware of significant issues with the current operation of the class order. We consulted on this relief in Consultation Paper 85 *Share and unit sale facilities* (CP 85) and do not consider any significant amendment is required since that time.

Key terms

Term	Meaning in this document
advice	Financial product advice
AFS licence	<p>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</p> <p>Note: This is a definition contained in s761A.</p>
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
Ch 5C (for example)	A Chapter of the Corporations Act (in this example numbered 5C)
[CO 14/26] (for example)	<p>An ASIC class order (in this example numbered 14/26)</p> <p>Note: Legislative instruments made from 2015 are referred to as ASIC instruments.</p>
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
CP 85 (for example)	An ASIC consultation paper (in this example numbered 85)
dealing	<p>Subject to the exemptions in s766C, means the following conduct:</p> <ul style="list-style-type: none"> (a) applying for or acquiring a financial product; (b) issuing a financial product; (c) in relation to securities or managed investment interests—underwriting the securities or interests; (d) varying a financial product; and (e) disposing of a financial product. <p>Further, arranging for a person to engage in conduct referred to in paragraphs (a)–(e) is also dealing in a financial product, unless the actions concerned amount to providing financial product advice</p> <p>Note: This is a definition contained in s766C of the Corporations Act.</p>
Div 5A (for example)	A Division of the Corporations Act (in this example numbered 5A)

Term	Meaning in this document
financial product	<p>A facility through which, or through the acquisition of which, a person does one or more of the following:</p> <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) <p>Note: This is a definition contained in s763A of the Corporations Act: see also s763B–765A.</p>
financial product advice	<p>A recommendation or statement of opinion, or a report of either of these things, that:</p> <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	<p>Financial product advice that is not personal advice</p> <p>Note: This is a definition contained in s766B(4) of the Corporations Act.</p>
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>
Product Disclosure Statement (PDS)	<p>A document that must be given to a client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act</p> <p>Note: See s761A for the exact definition.</p>
Pt 7.9 (for example)	A Part of the Corporations Act (in this example number 7.9)
RG 161 (for example)	An ASIC regulatory guide (in this example numbered 161)
RIS	Regulation Impact Statement

Term	Meaning in this document
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