



**ASIC**

Australian Securities & Investments Commission

## CONSULTATION PAPER 253

# Remaking and repealing ASIC class orders on dollar disclosure

February 2016

### About this paper

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

We are seeking feedback from Australian financial services (AFS) licensees on our proposals to remake, without significant changes, the following class orders:

- Class Order [CO 04/1431] *Dollar disclosure: Cost of derivatives, foreign exchange contracts, general insurance products and life risk insurance products*, which is due to expire on 1 October 2016; and
- Class Orders [CO 04/1433] *Dollar disclosure: Non-monetary benefits and interests* and [CO 04/1435] *Dollar disclosure: Amounts denominated in a foreign currency*, which are 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 253

We are also seeking feedback from AFS licensees on our proposals to repeal Class Orders [CO 04/1430] *Dollar disclosure: Unknown facts or circumstances* and [CO 04/1432] *Dollar disclosure: Interest payable on deposit products*, which are due to expire on 1 April 2017.

### 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 29 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](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 30 March 2016 to:

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## What will happen next?

<b>Stage 1</b>	29 February 2016	ASIC consultation paper released
<b>Stage 2</b>	30 March 2016	Comments due on the consultation paper
<b>Stage 3</b>	August 2016	Commencement of remade instrument(s)

## 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 ‘sunsetting’ 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 04/1431] *Dollar disclosure: Cost of derivatives, foreign exchange contracts, general insurance products and life risk insurance products*, which sunsets on 1 October 2016;
- Class Order [CO 04/1433] *Dollar disclosure: Non-monetary benefits and interests*, which sunsets on 1 April 2017; and
- Class Order [CO 04/1435] *Dollar disclosure: Amounts denominated in a foreign currency*, which sunsets on 1 April 2017.

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.

The class orders have been redrafted using ASIC's current style and format, while preserving the current effect of the instruments. The draft ASIC instrument, which reflects the minor amendments proposed in this paper, is available on our website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 253.

### Your feedback

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

### General background for all dollar disclosure class orders

- 7 The dollar disclosure provisions (as defined in the 'key terms' in this consultation paper) in the *Corporations Act 2001* (Corporations Act) require various costs, fees, charges, expenses, benefits and interests to be stated as amounts in dollars in Statements of Advice (SOAs), Product Disclosure Statements (PDSs) and periodic statements (including exit statements), except where ASIC has provided relief.

Note: Fee disclosure statements issued in accordance with s962H of the Corporations Act also require ongoing fees paid under an ongoing fee arrangement to be expressed in Australian dollars, unless an alternative is provided in the Corporations Regulations 2001 (Corporations Regulations). There are currently no alternatives provided in the Corporations Regulations. Therefore, for the purpose of this consultation paper, this provision is not referred to as a 'dollar disclosure provision'.

- 8 The dollar disclosure provisions are designed to help consumers better understand information about costs, fees, charges, expenses, benefits and interests by expressly requiring certain information to be presented in dollar terms.
- 9 We have provided conditional class order relief in relation to the obligation to disclose amounts in dollars for a variety of situations where we were satisfied that, for compelling reasons, compliance would be impossible, unreasonably burdensome or not in the interests of clients in certain circumstances. See Table 1 for the relief we have provided.

**Table 1: Class order relief we have given**

<b>Class order relief</b>	<b>Documents affected</b>	<b>Relevant powers</b>
[CO 04/1430] <i>Dollar disclosure: Unknown facts or circumstances</i>	SOAs and PDSs	regs 7.7.11, 7.7.12, 7.7.13A, 7.9.15B and 7.9.15C
[CO 04/1431] <i>Dollar disclosure: Cost of derivatives, foreign exchange contracts, general insurance products and life risk insurance products</i>	PDSs	s1020F
[CO 04/1432] <i>Dollar disclosure: Interest payable on deposit products</i>	PDSs	reg 7.9.15B
[CO 04/1433] <i>Dollar disclosure: Non-monetary benefits and interests</i>	SOAs and PDSs	s951B and 1020F
[CO 04/1435] <i>Dollar disclosure: Amounts denominated in a foreign currency</i>	SOAs and PDSs and periodic statements	s951B and 1020F

## Disclosure in dollars: [CO 04/1431], [CO 04/1433] and [CO 04/1435]

### Background to [CO 04/1431]

- 10 [CO 04/1431] grants relief under s1020F from the dollar disclosure provisions that apply to PDSs for costs associated with acquiring derivatives, foreign exchange contracts, general insurance products and life risk insurance products.
- 11 This relief is granted under our determination powers in regs 7.7.11, 7.7.12, 7.7.13A and 7.9.15B.



- 12 We have granted relief under [CO 04/1431] because we are satisfied that, for compelling reasons, it would be unreasonably burdensome and not in the interests of clients to require PDSs for derivatives, foreign exchange contracts, general insurance products and life risk insurance products to comply with the dollar disclosure provisions. The cost of these products is typically dependent on numerous variables that change over time or relate to the particular characteristics of individual clients.
- 13 If you are relying on [CO 04/1431] you must include in the PDS:
- (a) a description of any significant factors that will affect the cost of acquiring the financial product; and
  - (b) an explanation of the impact of each of those factors on the cost of acquiring the financial product.

### **Background to [CO 04/1433]**

- 14 [CO 04/1433] grants relief under s951B (for SOAs) and 1020F (for PDSs) from the dollar disclosure provisions for information about:
- (a) non-monetary benefits and non-monetary interests required to be disclosed in an SOA; and
  - (b) non-monetary benefits required to be disclosed in a PDS.
- 15 Non-monetary benefits are benefits that have been or may be received by a client or providing entity in a form other than money.
- 16 We have granted this relief because we are satisfied that, for compelling reasons, it would be impossible to comply with the dollar disclosure provisions for non-monetary benefits and non-monetary interests.
- 17 If you are relying on [CO 04/1433] you must disclose in the PDS or SOA:
- (a) the nature and extent of the non-monetary benefit or non-monetary interest;
  - (b) for non-monetary benefits or non-monetary interests that may be provided or that may arise in the future, the circumstances in which the non-monetary benefit or non-monetary interest may be provided or may arise;
  - (c) the estimated value of the non-monetary benefit or non-monetary interest (expressed as an amount in dollars or a range of amounts in dollars) where a retail client would reasonably require such an estimated value for the purposes of deciding whether to acquire the financial product (in the case of a PDS) or to act on the advice provided (in the case of an SOA).

## Background to [CO 04/1435]

- 18 [CO 04/1435] grants relief under s951B and 1020F from the obligation to disclose an amount in dollars (i.e. in Australian currency) where that amount is denominated in a foreign currency. For the relief to apply the amount must be disclosed in that foreign currency. This relief applies to SOAs, PDSs and periodic statements.
- 19 We have granted this relief to facilitate effective disclosure of amounts that are denominated in a foreign currency.

## Proposal

**B1** To preserve the effect of [CO 04/1431] beyond the sunset date of 1 October 2016, and [CO 04/1433] and [CO 04/1435] beyond the sunset date of 1 April 2017, we propose to continue the relief currently given by these instruments in a single new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Disclosure in Dollars) 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: [\[CO 04/1431\]](#), [\[CO 04/1433\]](#) and [\[CO 04/1435\]](#).

The only changes proposed are to:

- (a) combine [CO 04/1431], [CO 04/1433] and [CO 04/1435] into one instrument;
- (b) rename the legislative instrument to reflect the combining of the three class orders;
- (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.

## Rationale

- 20 We have formed the preliminary view that [CO 04/1431], [CO 04/1433] and [CO 04/1435] 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.
- 21 We propose to combine all the class orders into one instrument for ease of reference, because all three class orders relate to dollar disclosure.

## C Repealing ASIC class orders

### Key points

We are proposing to repeal the following class orders:

- Class Order [CO 04/1430] *Dollar disclosure: Unknown facts or circumstances*, which sunsets on 1 April 2017; and
- Class Order [CO 04/1432] *Dollar disclosure: Interest payable on deposit products*, which sunsets on 1 April 2017.

We have formed the preliminary view that these class orders are no longer required and do not form a necessary and useful part of the regulatory framework.

### Your feedback

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

### [CO 04/1430] *Dollar disclosure: Unknown facts or circumstances*

- 23 [CO 04/1430] provides relief from the dollar disclosure provisions where either the providing entity, in the case of an SOA, or the responsible person, in the case of a PDS, is required to disclose information as an amount in dollars. The relief is provided where that amount depends, in whole or in part, on a fact or circumstance that, at the time the preparation of the SOA or PDS is completed:
- (a) is not known to the providing entity or responsible person; and
  - (b) could not have been found out by the providing entity or responsible person.

### Proposal

- c1 We propose to repeal [CO 04/1430] which would otherwise sunset on 1 April 2017. You can access the current instrument on [www.comlaw.gov.au](http://www.comlaw.gov.au) by clicking on the following direct link: [\[CO 04/1430\]](#).

## Rationale

- 24 We have formed the preliminary view that [CO 04/1430] has limited use. This is because it would not be reasonable for a person to require information in dollar terms if the facts and circumstances underlying the information are not known to the regulated person and could not have been found out by the regulated person. Therefore, the law does not actually require disclosure of this information in dollar terms. This view is supported by the notes to the determinations in [CO 04/1430] which highlight that the application of the determinations might be limited.
- 25 We are not aware that [CO 04/1430] is being relied on and do not consider that the relief is necessary.

## **[CO 04/1432] *Dollar disclosure: Interest payable on deposit products***

- 26 [CO 04/1432] grants relief from the obligation to disclose in a PDS an amount in dollars. It applies to a benefit that is an amount of interest payable to a holder of a deposit product, where that amount is to be worked out by applying a percentage to the amount standing to the credit of the facility that is the deposit product from time to time.

## Proposal

- c2 We propose to repeal [CO 04/1432] which would otherwise sunset on 1 April 2017. You can access the current instrument on [www.comlaw.gov.au](http://www.comlaw.gov.au) by clicking on the following direct link: [\[CO 04/1432\]](#).

## Rationale

- 27 We have formed the preliminary view that [CO 04/1432] has limited use. This is because in many circumstances it would not be reasonable for a person to require information in dollar terms about an amount of interest payable to a holder of a deposit product where the amount is not actually known by the regulated person. Therefore, the law does not actually require disclosure of this information in dollar terms. However, as stated in the note to the determination in [CO 04/1432], in such cases s1013D(1)(b) of the Corporations Act is likely to have the effect that a description of how interest is to be calculated must be included in the PDS.
- 28 We are not aware that the class order is being relied on and do not consider that the relief is necessary.

## 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.
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
dollar disclosure provisions	The provisions of the Corporations Act and Corporations Regulations that require various costs, fees, charges, expenses, benefits and interests to be stated as amounts in dollars unless ASIC grants relief: see s947B(2)(h), 947C(2)(i), 947D(2)(d), 1013D(1)(m) and 1017D(5A) and regs 7.7.10A–7.7.11, 7.7.11B–7.7.13B, 7.9.15A–7.9.15C, 7.9.19A–7.9.19B, 7.9.20A–7.9.20B, 7.9.74A–7.9.75 and 7.9.75C–7.9.75D
Legislative Instruments Act	<i>Legislative Instruments Act 2003</i>
Product Disclosure Statement (PDS)	A document that must be given to a retail 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  Note: See s761A for the exact definition.
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)	A document that must be given to a retail client for the provision of personal advice under Subdivs C and D of Div 3 of Pt 7.7 of the Corporations Act  Note: See s761A for the exact definition.

Term	Meaning in this document
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect