



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 258

Remaking ASIC class order on differential fees: [CO 03/217]

May 2016

About this paper

This consultation paper sets out ASIC's proposal to remake our class order on differential fees. Under the *Legislation Act 2003*, this class order will expire ('sunset') if not remade.

We are seeking feedback from financial product providers and the financial services sector on our proposal to remake, without significant changes, [Class Order \[CO 03/217\] Differential fees](#), 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 258.

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 30 May 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

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 differential fees. 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 July 2016 to:

David Freyne
Senior Lawyer, Investment Managers and Superannuation
Australian Securities and Investments Commission
Level 5, 100 Market Street
Sydney NSW 2000
facsimile: (02) 9911 2414
email: david.freyne@asic.gov.au

What will happen next?

Stage 1	30 May 2016	ASIC consultation paper released
Stage 2	12 July 2016	Comments due on the consultation paper
Stage 3	September– October 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 *Legislation Act 2003* (Legislation 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 Legislation (FRL). 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 03/217] *Differential fees*, which sunsets on 1 April 2017.

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 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 258.

Your feedback

- 6 In this section, we have invited specific feedback on our relief and our proposed minor policy changes. You are invited to comment on our proposal to remake the ASIC class order in this section, including whether the class order is currently operating effectively and efficiently. The proposed changes are only an indication of the approach we may take and are not our final policy.

Class Order [CO 03/217] *Differential fees*

Background

- 7 Section 601FC(1)(d) of the *Corporations Act 2001* (Corporations Act) requires the responsible entity of a registered managed investment scheme to treat members who hold interests of the same class equally and members who hold interests of different classes fairly. Equal treatment prohibits a responsible entity from charging fees to a member of one class that differ from those charged to another member of the same class based on either characteristics of the member or individual negotiation between the member and the responsible entity.
- 8 ASIC has a long-published view that the equal treatment provision (s601FC(1)(d)) does not permit differential fees. [CO 03/217] gives relief in recognition that:
- (a) differential fee arrangements are a means by which large investors are attracted to a scheme and may deliver cost savings to all investors through more efficient scheme structures;

- (b) fees that apply to members on a transparent basis, such as banding or tiered fees, enable investors to consider if the fee they will pay is reasonable given the fees others will pay; and
- (c) relief only applies to fee arrangements that are adequately disclosed (both to existing members and in disclosure documents) and where the fee arrangements do not adversely affect the fees that any other member will incur.

9 Subject to certain conditions, [CO 03/217] allows a responsible entity to discriminate between registered managed investment scheme members in relation to fees in certain situations—for example:

- (a) on the basis of the aggregate of holdings of a member and their family across a range of financial products offered/issued by the responsible entity, according to the value of the interests held, or the period of time during which the interests have been held;
- (b) where a member carries out transactions in relation to the scheme by electronic means;
- (c) where a member is an employee of the responsible entity (or related body corporate of the responsible entity), provided the employee's interest relating to other members does not exceed 5%; and
- (d) where there is a saving to the scheme resulting from the lower cost of servicing a member because of a particular characteristic of that member.

Proposal

B1 To preserve its effect beyond the sunset date of 1 April 2017, we propose to continue the relief currently given by [CO 03/217] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Registered Schemes: Differential Fees) Instrument 2016/XX attached to this consultation paper. You can access the current instrument at www.legislation.gov.au by clicking on the following direct link: [\[CO 03/217\]](#).

The only changes proposed are to:

- (a) expand the relief where a member acquires an investment under a switching facility that involved a withdrawal from another managed investment scheme operated by the responsible entity to also cover a switching facility that involves a withdrawal from another managed investment scheme operated by a related body corporate of the responsible entity;
- (b) remove relief where a member carries out transactions in relation to the scheme by electronic means;
- (c) update the name of the legislative instrument;
- (d) reflect current drafting practice and update the format of the current document;

- (e) simplify the drafting to give greater clarity;
- (f) update legislative references and definitions; and
- (g) correct any minor drafting errors.

Your feedback

- B1Q1 Are all of the heads of relief in [CO 03/217] regularly relied upon or should ASIC consider allowing the relief to lapse? Please provide reasons for your response, and any details about the ways, and frequency, relief is relied upon by industry.
- B1Q2 Do you agree with proposal B1(a) to extend the switching facility relief to a managed investment scheme operated by a related body corporate of the responsible entity? Please provide reasons for your response.
- B1Q3 Do you agree with proposal B1(b) to remove relief where a member carries out a transaction by electronic means? Please provide reasons for your response and details of any regulatory impact of a policy change in this area.
- B1Q4 Should we review our policy on the restrictions on individual fee negotiation in subsection 5(3) of draft ASIC Corporations (Registered Schemes: Differential Fees) Instrument 2016/XX, and, in particular:
- (a) Is this relief widely used and considered useful by industry? Please provide any relevant data available to support your response.
 - (b) Should all members (including retail clients) be permitted to individually negotiate fees with a responsible entity? Please provide reasons for your response and details of any regulatory impact of a policy change in this area.
 - (c) Would an ability for all members to negotiate fees with a responsible entity have a positive or negative impact on the fee structure and overall level of fees that might apply generally to members? Please provide reasons and any data supporting your response.

Rationale

- 10 We have reached the preliminary view that [CO 03/217] 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 this class order.

Expanding the scope of the switching facility relief

- 11 We have previously given case-by-case relief for managed investment schemes operated by a related body corporate of the responsible entity. We

are proposing to extend the switching facility relief to include a registered scheme operated by a related body corporate of the responsible entity.

Removing unnecessary relief

- 12 We are proposing to remove the relief for a member that carries out transactions in relation to the scheme by electronic means on the basis that the relief is not necessary. If the electronic means is made available to all members who hold interests of the same class, the responsible entity is treating all members of that class equally for the purposes of s601FC(1)(d).

Individual negotiation exemption

- 13 We are interested in your views on our policy on the equal treatment requirement exemption based on individual negotiation between a responsible entity and a member, and whether we should review our policy in this area.

C Regulatory and financial impact

- 14 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) the effective and efficient regulation of registered managed investment schemes; and
 - (b) ensuring sufficient investor protection.
- 15 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).
- 16 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.
- 17 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
[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.
Ch 6D (for example)	A chapter of the Corporations Act (in this example numbered 6D)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
Legislation Act	<i>Legislation Act 2003</i>
retail client	A client as defined in s761G of the Corporations Act and Ch 7, Pt 7.1, Div 2 of the Corporations Regulations
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