



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 261

Remaking and repealing ASIC class orders on rights issue notifications and money market deposits

June 2016

About this paper

This consultation paper sets out ASIC's proposals to remake a class order on rights issue notifications and repeal a class order on money market deposits. Under the *Legislation Act 2003*, these class orders will expire ('sunset') if not remade or repealed.

We are seeking feedback from stakeholders on our proposals to:

- remake, without significant changes, Class Order [CO 02/225] *Rights issue notifications—securities*; and
- repeal Class Order [CO 00/231] *Money market deposits*.

Both these class orders are 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 261.

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 15 June 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 process4**
- A Background5**
 - Purpose of ‘sunsetting’ legislative instruments5
 - Our approach to remaking legislative instruments5
- B Remaking ASIC class order7**
 - Your feedback7
 - Class Order [CO 02/225] *Rights issue notifications—securities*7
- C Repealing ASIC class order12**
 - Your feedback12
 - Class Order [CO 00/231] *Money market deposits*12
- Key terms15**

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 15 July 2016 to:

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Lawyer, Corporations
Australian Securities and Investments Commission
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Sydney NSW 2000
email: policy.submissions@asic.gov.au

What will happen next?

Stage 1	15 June 2016	ASIC consultation paper released
Stage 2	15 July 2016	Comments due on the consultation paper
Stage 3	July–August 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*, 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. 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.
- 3 Where an instrument is deemed to no longer serve a regulatory purpose we will consult on repealing it. We will repeal instruments rather than allow them to sunset so that industry is certain of our intentions and confident that, where instruments are removed, this was our intention.

Our approach to remaking legislative instruments

- 4 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.
- 5 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.

6 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 02/225] *Rights issue notifications—securities*, which is due to expire 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 261.

Your feedback

- 7 You are invited to comment on our proposal to remake Class Order [CO 02/225] *Rights issue notifications—securities*, including whether the class order is currently operating effectively and efficiently. Our proposal is only an indication of the approach we may take and is not our final policy.

Class Order [CO 02/225] *Rights issue notifications—securities*

Background

- 8 [CO 02/225] provides relief in connection with 'rights issue notifications' (i.e. the notification form that members receive in a rights offer informing them of their individual entitlement to acquire a specified number of shares or interests under the offer). The standard form used by listed companies, referred to as an 'entitlement and acceptance form', combines the 'rights issue notification' with an acceptance form and is provided to members with the offer document or disclosure document, as applicable, for the rights offer.
- 9 In a renounceable rights offer, one of the options available to the offeree includes transferring all or part of their entitlement to another person. The transfer of such an entitlement is governed by Div 3 of Pt 7.11 of the *Corporations Act 2001* (Corporations Act) and reg 7.11.11(2) of the *Corporations Regulations 2001* (Corporations Regulations). The latter provides that a sufficient transfer of a 'Division 3 right' can be effected by a document duly completed in accordance with specified forms set out in Sch 2A to the Corporations Regulations.

- 10 In practice, this is effected by the offeree (i.e. the transferor) sending a completed ‘renunciation and transfer form’ to the relevant share registry and, if the transferee wishes to take up all or part of the entitlement transferred to them, they must then send their application money together with the entitlement and acceptance form to the registry.

Chapter 6D disclosure relief

- 11 [CO 02/225] provides relief from s721(1), 723(1) and 727(2) of the Corporations Act to persons involved in the renunciation and transfer of rights issued under a renounceable rights offer, but only to the extent that those provisions might otherwise require a ‘rights renunciation form’ to be included in or accompanied by a disclosure document.
- 12 A rights renunciation form is defined in [CO 02/225] as all or any of:
- (a) Forms 5, 6, 7 or 8 in Sch 2A to the Corporations Regulations (forms to effect the renunciation and transfer of rights); or
 - (b) a pre-printed notification form informing the holders of Div 3 assets of their individual entitlement to acquire a specified number of Div 3 assets under a renounceable rights offer that satisfies the conditions of the class order.
- 13 The relief is only available where the person is issuing a rights renunciation form in the course of settling a sale of rights issued under offers by a listed body of securities of the body for issue, where:
- (a) the offers are made *pari passu* to members of the body (except to those members in a jurisdiction where it is not lawful or practicable to make the offer);
 - (b) the offers are renounceable; and
 - (c) the body has lodged a disclosure document for the offers that complies with Ch 6D of the Corporations Act.

Chapter 7.9 disclosure relief

- 14 [CO 02/225] also provides relief from s1012B, 1016A and 1021C of the Corporations Act to a body that makes offers to issue and issues interests in a managed investment scheme under a rights offer, but only to the extent that those provisions might require:
- (a) a rights renunciation form to be included in or be accompanied by a Product Disclosure Statement (PDS) for the renunciation or transfer of Div 3 rights; or
 - (b) the issuer to give a PDS to a person to whom the rights are transferred (a transferee) or to a transferee who exercises such rights.

- 15 The relief is only available where the body is offering to issue and issuing interests in a listed registered managed investment scheme where:
- (a) the offers are made *pari passu* to members of the scheme (except to those members in a jurisdiction where it is not lawful or practicable to make the offer);
 - (b) the offers are renounceable; and
 - (c) where the body has lodged a PDS for the interests, the PDS complies with Pt 7.9 of the Corporations Act.

Conditions

- 16 Both the Ch 6D and Pt 7.9 relief is subject to the following conditions:
- (a) a disclosure document or PDS for the offers is made available for inspection at the body's registered office;
 - (b) the body gives a disclosure document or PDS for the offers free of charge to a person who requests it during the period in which the offers remain open; and
 - (c) the body announces to each prescribed financial market in the official list of which it is included that a disclosure document or PDS for the offers may be reviewed at its registered office or obtained free of charge on request.

Proposal

B1 To preserve its effect beyond the sunset date of 1 April 2017, we propose to continue the relief currently given by [CO 02/225] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Renounceable Rights Issue Notifications) Instrument 2016/XX attached to this consultation paper. You can access the current instrument on www.legislation.gov.au by clicking on the following direct link: [\[CO 02/225\]](#).

The only changes proposed are to:

- (a) update the conditions of the class order to facilitate electronic access to documents;
- (b) remove references to elements of the instrument that are no longer relevant or necessary;
- (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.

Rationale

- 17 Our preliminary view is that [CO 02/225] is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of any significant issues with the current operation of the class order.
- 18 In reaching our preliminary view, we considered the following:
- (a) [CO 02/225] was made before the introduction of the cleansing notice regime in s708AA and 1012DAA of the Corporations Act in 2007. Before that regime, entities wishing to make rights offers had to make those offers under a prospectus or PDS lodged with ASIC. Currently, entities that are able to satisfy the criteria in s708AA or 1012DAA when making such offers are not required to lodge a prospectus or PDS. These entities do not need to rely on our relief. However, while the relief applies to a more limited range of offers, there are still instances where a prospectus or PDS needs to be prepared (e.g. where the entity is not able to satisfy the conditions of s708AA or 1012DAA).
 - (b) The policy objective underlying [CO 02/225] to facilitate the transfer of rights offered under a renounceable rights offer made under a disclosure document or PDS is still applicable. The relief allows a rights renunciation form in relation to a transfer of the rights to be circulated without a disclosure document or PDS, as long as the conditions of our relief are satisfied.
 - (c) If the relief in [CO 02/225] were allowed to sunset, there may be higher compliance costs involved in the transfer of rights offered under a renounceable rights offer made under a disclosure document or PDS.
 - (d) If we remake [CO 02/225], the conditions in the instrument will ensure that the relevant disclosure document or PDS for the securities or interests underlying the rights, as applicable, are available and accessible to transferees.

Facilitating electronic access to documents

- 19 One of the conditions of the relief in [CO 02/225] is that a disclosure document or PDS must be made available for inspection at the entity's registered office. In order to facilitate electronic access to these documents, we are proposing to amend this condition so that the relevant entity has the option of either making the relevant disclosure document or PDS available for inspection at its registered office or publishing it on its website. We consider that the conditions set out in the draft instrument reflect the way investors commonly access these types of documents and provides entities with the ability to better align their disclosure with investor preferences.

Removing unnecessary references

- 20 Section 1021C relates to the offence of failing to give another person a PDS by the time they are required to do so under Pt 7.9. We consider that relief from s1021C is not necessary given that persons who satisfy the conditions of the proposed instrument will have the benefit of relief from s1012B and 1016A, and therefore will not be subject to any requirement to give another person a PDS in the circumstances contemplated by the instrument in any event.
- 21 We have also removed some transitional elements of the class order that are no longer relevant or necessary.

C Repealing ASIC class order

Key points

We are proposing to repeal Class Order [CO 00/231] *Money market deposits*, which is due to expire on 1 April 2017.

We have formed the preliminary view that this class order is no longer required and does not form a necessary and useful part of the regulatory framework.

Your feedback

- 22 You are invited to comment on our proposal to repeal Class Order [CO 00/231] *Money market deposits*, including whether the class order is operating effectively and efficiently, and whether any entities are relying on it. If we do not receive any submissions requesting the class order be remade, we will repeal it. This proposal is only an indication of the approach we may take and is not our final policy.

Class Order [CO 00/231] *Money market deposits*

Background

- 23 [CO 00/231] provides relief from the prospectus, securities hawking and debenture provisions of the Corporations Act to corporations that deal in the short-term money market in the ordinary course of their business. The relief is only available when offering a highly rated short-term money market facility to depositors who regularly deal in the short-term money market or invest in securities in the ordinary course of their business.
- 24 The class order exempts corporations offering to accept such deposits from the following parts and provisions of the Corporations Act:
- (a) Pts 2L.1–2L.5, which relate to the requirements for debentures, including the requirement for a trust deed and trustee;
 - (b) s718, which requires a disclosure document to be used for an offer of securities to be lodged with ASIC;
 - (c) s727(2), which prohibits a person from making an offer of securities (or distributing an application form for an offer of securities) that needs disclosure to investors under Pt 6D.2 unless a disclosure document for the offer has been lodged with ASIC; and

- (d) s736, which prohibits a person from offering securities for issue or sale in the course of, or because of, an unsolicited meeting with another person or telephone call to another person.
- 25 The relief is available only where the corporation makes offers to accept deposits of money in amounts of not less than \$100,000 made to persons whose ordinary business is or includes:
- (a) the investment of funds on the short-term money market; or
 - (b) investment in securities or the purchase and/or sale of securities.
- 26 The class order was originally made under s260MA(1) and 741(1) of the Corporations Law and has continued in force under s1399 of the Corporations Act. The class order refers to provisions of the Corporations Law, which under s1407 of the Corporations Act are taken to include a reference to the corresponding provision of the Corporations Act.
- 27 In providing this relief, we took the view that the prospectus, securities hawking and debenture provisions were inappropriate for offers of highly rated short-term money market deposit facilities to persons who are substantial and regular depositors.

Proposal

- c1 We propose to repeal [CO 00/231], which would otherwise expire on 1 April 2017. You can access the current instrument at www.legislation.gov.au by clicking on the following direct link: [\[CO 00/231\]](#).

Rationale

- 28 We have formed the preliminary view that [CO 00/231] has limited use. This is because the principal circumstances contemplated by the class order are not likely to trigger the operation of Chs 6D or 2L. These circumstances mainly relate to the activities of professional or sophisticated investors dealing in the short-term money market, which is a wholesale market.
- 29 The provisions of the Corporations Act from which [CO 00/231] provides relief will only be triggered if the relevant offers to accept deposits constitute offers of debentures. This is because:
- (a) Ch 6D only applies to offers of securities (see s700). If the relevant offers to accept deposits are not debentures, those offers will fall outside of the definition of securities (see s92); and
 - (b) Ch 2L only applies to offers of debentures (see s283AA).
- 30 However, the definition of debentures in s9 specifically excludes an undertaking by an Australian authorised deposit-taking institution (ADI) to repay money deposited with it, or lent to it, in the ordinary course of its

banking business. We consider that the persons most likely to be offering highly rated short-term money market facilities to depositors are also likely to be Australian ADIs operating in the ordinary course of their banking business. Accordingly, because offers to accept deposits by these persons are excluded from the definition of debentures and therefore are not subject to Chs 6D or 2L, these persons would not need to rely on the relief in [CO 00/231].

- 31 Further, the relief only applies to offers to accept deposits of more than \$100,000 from persons whose ordinary business is or includes the investment of funds on the short-term money market or investment in securities. Offers to such persons are likely to fall under existing exceptions to the disclosure, securities hawking and debenture provisions in Chs 6D and 2L, such as:
- (a) s708(8), which provides an exception to the disclosure requirements in Ch 6D for certain offers of securities to sophisticated investors;
 - (b) s708(11), which provides an exception to the disclosure requirements in Ch 6D for certain offers of securities to professional investors;
 - (c) s708(19), which provides an exception to the disclosure requirements in Ch 6D for offers of debentures by Australian ADIs and bodies registered under s21 of the *Life Insurance Act 1995*;
 - (d) s736(2), which provides an exception to the securities hawking prohibition in Ch 6D for, among other things, certain offers to sophisticated or professional investors; and
 - (e) s283AA(1)(a), which excludes the operation of Ch 2L for offers of debentures that do not require disclosure under Ch 6D (except where disclosure is not required because of s708A or 708(14)).
- 32 Where the relevant offer falls under one of these exceptions, the relief in [CO 00/231] would not be necessary. We consider that it would be very rare that an offer of the type contemplated by [CO 00/231] would not fall within one of the above exceptions.
- 33 [CO 00/231] is an instrument we consider no longer forms a necessary and useful part of the legislative framework. We consider that any residual need for the relief provided by this class order is more appropriately given on a case-by-case basis by application.

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
Australian ADI	An Australian authorised deposit-taking institution, as defined in s9 of the Corporations Act
Ch 6D (for example)	A chapter of the Corporations Act (in this example numbered 6D)
[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
debenture	Has the meaning given in s9 of the Corporations Act
Div 3 (for example)	A division of the Corporations Act (in this example numbered 3)
interest	An interest in a managed investment scheme
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.
Pt 5.1 (for example)	A part of the Corporations Act (in this example numbered 5.1)
reg 7.11.11(2) (for example)	A regulation of the Corporations Regulations (in this example numbered 7.11.11(2))
RIS	Regulation Impact Statement
s25 (for example)	A section of the Corporations Act (in this example numbered 25)
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect