



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 264

Remaking ASIC class order on nominee and custody services and proposed changes to platforms policy

July 2016

About this paper

This consultation paper sets out ASIC's proposal to remake, with changes, Class Order [CO 02/295] *Nominee and custody services*, which is due to expire on 1 April 2017. Under the *Legislation Act 2003*, this class order will expire ('sunset') if not remade.

We are also seeking feedback on our proposals:

- on access by retail clients to a financial product issuer's dispute resolution processes for investments through a nominee and custody service, or through an investor directed portfolio service (IDPS) or IDPS-like scheme (together, referred to as platforms); and
- to amend the definitions of 'IDPS' and 'IDPS-like schemes' in our class orders for platforms.

Feedback is sought from nominee and custody service operators, platform operators, dealer groups and other interested stakeholders.

Note: The draft ASIC instruments are available on our website at www.asic.gov.au/cp under CP 264.

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 21 July 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 nominee and custody services and platforms. 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 E, '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 1 September 2016 to:

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What will happen next?

Stage 1	21 July 2016	ASIC consultation paper released
Stage 2	1 September 2016	Comments due on the consultation paper
Stage 3	November– December 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 '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, and necessary.

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, with changes, Class Order [CO 02/295] *Nominee and custody services*, which sunsets on 1 April 2017.

We have formed the preliminary view that an amended version of the class order would continue 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 amendments proposed in this section, is available on our website at www.asic.gov.au/cp under CP 264.

Class Order [CO 02/295] *Nominee and custody services*

Background

- 6 A nominee and custody service is an arrangement that does not have the characteristics of a managed investment scheme for which regulation is intended. A nominee and custody service has the following features:
- (a) assets in which a client has an economic interest (or expects to derive a benefit) may be acquired or held by a custodian (which may or may not be the operator);
 - (b) the client has the sole discretion to decide what (but not necessarily when) assets are acquired or disposed of, except where:
 - (i) there are prior written directions that the client has agreed not to vary, acquire or dispose of a particular asset in particular circumstances (other than a circumstance that is affected by a discretion of an operator); and
 - (ii) the client has authorised an operator or another person to give directions on their behalf, for the purpose of the other person receiving or securing payment of money owing by the client to the person; and
 - (c) the service is not an investor directed portfolio service (IDPS) or provided under an IDPS-like scheme.

Note: Our policy on nominee and custody services is mutually exclusive of our policy on IDPSs and IDPS-like schemes (together, referred to as platforms). While the two services have a number of characteristics in common, ordinarily nominee and custody services do not have the characteristics of a managed investment scheme (unlike platforms) because they do not provide cost savings or access to investments that the client could not otherwise access directly.

- 7 Typically, a nominee and custody service is an arrangement for the holding of securities and associated maintenance, such as the banking of dividends and the receipt of communications. Usually, it provides some form of consolidated reporting and does not have a menu of investment opportunities associated with it.
- 8 [CO 02/295] provides relief for:
- (a) operators of a nominee and custody service; and
 - (b) issuers offering or issuing securities that are acquired through a nominee and custody service.
- 9 The relief applies to operators that are Australian financial services (AFS) licensees. An operator will generally require an AFS licence to arrange for the issue of financial products on behalf of nominee and custody service clients.
- 10 [CO 02/295] modifies the Corporations Act to require AFS licensees operating a nominee and custody service to meet certain obligations to ensure that regulatory protections that would apply to a direct acquisition by clients will apply if an acquisition is through a nominee and custody service.

Proposal

B1 To preserve its effect beyond the sunset date of 1 April 2017, we propose to partially continue the relief currently given by [CO 02/295] in a new legislative instrument that reflects current drafting practice: see draft ASIC Corporations (Nominee and Custody Services) Instrument 2016/XX at Attachment 1 to this consultation paper. You can access the current instrument at www.legislation.gov.au by clicking on the following direct link: [\[CO 02/295\]](#).

The changes proposed are to:

- (a) change the term 'NCS' to 'nominee and custody service' and amend the definition to:
 - (i) exclude platforms; and
 - (ii) remove the requirement that the service is to be provided in such a way that clients are not led to expect, and are not likely to receive, benefits;
- (b) remove the relief given from Ch 5C of the *Corporations Act 2001* (Corporations Act);
- (c) require the operator of the nominee and custody service to hold an AFS licence;
- (d) amend the relief to align it with the equivalent requirements for platforms—for example:
 - (i) exclude certain investments from being acquired through a nominee and custody service;

- (ii) require the AFS licensee to be reasonably satisfied that clients have been given certain disclosure documents; and
- (iii) require the AFS licensee to facilitate the resolution of disputes between clients and the underlying product issuers.

Note: For further details about proposal B1(d)(iii), see Section C of this paper, which also includes proposed amendments to the class orders relating to platforms.

- (e) update the name of the legislative instrument; and
- (f) reflect current drafting practice and update the format of the current document.

Your feedback

B1Q1 Are all of the heads of relief in [CO 02/295] regularly relied on or should we consider allowing the relief to lapse? Please provide reasons for your response, including any details about the ways, and frequency, relief is relied on by industry.

B1Q2 Do you see any regulatory impacts of:

- (a) removing the Ch 5C relief;
- (b) restricting relief to holders of an AFS licence; and
- (c) amending the relief to align it with the equivalent requirements for platforms?

Please provide reasons and detailed examples.

Rationale

- 11 We have reached the preliminary view that, other than the Ch 5C relief, the relief in [CO 02/295] 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.

Amending the definition

- 12 We are proposing to change the term ‘NCS’ to the more user-friendly term ‘nominee and custody service’. We are also proposing to add a new limb to the definition of nominee and custody service to make it clear that it does not include an ‘IDPS’ or an ‘IDPS-like scheme’, which are subject to relief under [Class Order \[CO 13/763\] Investor directed portfolio services](#) and [Class Order \[CO 13/762\] Investor directed portfolio services provided through a registered managed investment scheme](#). As discussed in paragraph 16, the requirement for the service to be provided in such a way that clients are not led to expect, and are not likely to receive, benefits will also be removed.

Removing the Ch 5C relief

- 13 The purpose of the Ch 5C relief in [CO 02/295] was to put in place a mechanism to put beyond doubt concerns around the argument that a nominee and custody service may be a managed investment scheme that requires registration, given the broad definition of the concept.
- 14 We consider that a nominee and custody service will ordinarily not be within the definition of a managed investment scheme because there will not be any financial benefits or interests in property produced by pooling of contributions or the use of contributions in a common enterprise.
- 15 Schemes that include the provision of custody of assets chosen by clients that do provide financial benefits or interests in property would generally enable cost reductions to be passed on to clients or facilitate access to assets, and so would normally be excluded from being a nominee and custody service because they would be within the definition of an IDPS.
- 16 As such, we consider the Ch 5C relief is not necessary, given our view that a nominee and custody service is generally not considered to be a registered managed investment scheme. We are also proposing to remove the related requirement in the definition of a 'nominee and custody service' for the service to be provided in such a way that clients are not led to expect, and are not likely to receive, benefits. This limb of the definition is also no longer necessary.

Restricting relief to holders of an AFS licence

- 17 Operators of a nominee and custody service will generally require an AFS licence to arrange for the issue of financial products on behalf of the nominee and custody service clients, and holders of assets held through a nominee and custody service will require an AFS licence authorising the provision of a custodial or depository service. We consider the relief should be confined to AFS licensees to give ASIC more confidence that the relevant obligations are being complied with.

Note: An AFS licensee has a general obligation to do all things necessary to ensure that they provide financial services efficiently, honestly and fairly, and specific obligations such as obligations that relate to the provision of financial services; the competence, knowledge and skills of responsible managers; managing conflicts of interest and risk management; the adequacy of financial, technological and human resources; and dispute resolution and compensation arrangements.

Aligning the relief with the equivalent requirements for platforms

- 18 We are proposing to align the relief for nominee and custody services with the equivalent requirements for platforms. This will provide consistency and simplify the requirements relating to nominee and custody services and platforms.

C Access to dispute resolution for nominee and custody service clients and platform clients

Key points

We are proposing to impose requirements on an AFS licensee operating a nominee and custody service or a platform to ensure retail clients have the same rights of complaint as they would have had if they had acquired the financial products directly.

The draft ASIC instruments, which reflect the amendments proposed in this section, are available on our website at www.asic.gov.au/cp under CP 264.

Previous platform proposals on access to dispute resolution

Background

- 19 In March 2012, we published a consultation paper setting out our proposals and supporting rationale for reviewing our regulatory approach to platforms: see [Consultation Paper 176](#) *Review of ASIC policy on platforms: Update to RG 148* (CP 176). A summary of key submissions made in response to CP 176 and our consideration of those responses can be found in [Report 351](#) *Response to submissions on CP 176 Review of ASIC policy on platforms: Update to RG 148* (REP 351).
- 20 In CP 176, we proposed that platform clients should have access to a product issuer's internal and external dispute resolution system when they have concerns about investments made through platforms: see proposal F5(a) in CP 176.
- 21 We did not proceed in 2013 with applying a restriction on acquisitions because we sought to confirm that existing ASIC-approved dispute resolution schemes would be able to address such complaints under their terms of reference. We have now confirmed this.
- 22 In June 2013, the Regulation Impact Statement (RIS) in relation to our updates of the guidance on platforms in [Regulatory Guide 148](#) *Platforms that are managed investment schemes* (RG 148) and accompanying class orders proposed that pending further consideration platform investors should be given access to a product issuer's internal dispute resolution processes as if they were a direct investor in the product where the product issuer consents to doing so and we did not require product issuers to provide access to external dispute resolution schemes.

Proposal

c1 We propose to:

- (a) for issues or sales after 30 June 2017—require that platform clients have access to a product issuer’s internal and external dispute resolution system when they have concerns about investments made through the platform as if they were a direct investor in the product (see notional s1013DAB(8)(b)(ii) and (8G) in draft amended [CO 13/762] and notional s912AD(26)(b)(ii) and (26G) in draft amended [CO 13/763] at Attachments 2 and 3 to this consultation paper); and
- (b) from 30 June 2017, delete notional s912ADA from [CO 13/763] and notional s912ADB from [CO 13/762], which require AFS licensees that issue accessible financial products through a platform to provide a notice to the responsible entity of the operator of the platform that states it will comply with certain dispute resolution requirements; and
- (c) for issues or sales after 30 June 2017—require that nominee and custody service clients have access to a product issuer’s internal and external dispute resolution system when they have concerns about investments made through the nominee and custody service as if they were a direct investor in the product (see draft notional s912AE(4)(b) and (8) in draft ASIC Corporations (Nominee and Custody Services) Instrument 2016/XX at Attachment 1 to this consultation paper.

Your feedback

- C1Q1 Do you agree with this proposal? If not, why not?
- C1Q2 What benefits and disadvantages do you think will result from the implementation of this proposal? Please explain.
- C1Q3 Are there any practical problems with the implementation of this proposal? Please give details.
- C1Q4 Should we consider alternative options and, if so, what are they and why? Please give details.
- C1Q5 Do you see any impacts to specific classes of product issuer that should be considered? For example, what are the detailed cost estimates that might apply to issuers or sellers of financial products that make issues after 30 June 2017 and that are not currently required to implement and maintain internal dispute resolution processes or to obtain membership of an external dispute resolution scheme?
- C1Q6 Should ASIC also require issuers of financial products through a nominee and custody service or a platform, that have an AFS licence, to have an AFS licence that authorises the issue of financial products to retail clients? Please give details.

Rationale

- 23 AFS licensees providing financial services to retail clients have an obligation to have a dispute resolution system in place consisting of:
- (a) internal dispute resolution procedures; and
 - (b) membership of one or more external dispute resolution schemes (s912A(1)(g) and 912A(2)).
- 24 As AFS licensees, this obligation extends to an operator of a nominee and custody service or a platform, product issuers and licensed dealer groups if they provide financial services to retail clients. It is appropriate that retail clients for whom financial products are held through a nominee and custody service or a platform have the same rights of complaint as they would have had if they had acquired the financial products directly.
- 25 Given the nature of the custodial holding of investments through a nominee and custody service or a platform, we think it is important that a nominee and custody service or a platform should facilitate clients raising complaints with issuers (e.g. by confirming to the issuer that the client is a person who is eligible to make a complaint because of their holding and by providing details of the circumstances in which the client directed the operator to acquire the investment).

D Definitions of ‘IDPS’ and ‘IDPS-like scheme’

Key points

We are seeking your feedback on our proposals to amend the definition of:

- an ‘IDPS’ in [CO 13/763] to clarify the types of arrangements covered by the definition; and
- an ‘IDPS-like scheme’ in [CO 13/762] to extend the definition to schemes that meet the substance of the existing criteria in the definition.

The draft ASIC instruments, which reflect the amendments proposed in this section, are available on our website at www.asic.gov.au/cp under CP 264.

Clarifying the definitions in [CO 13/763] and [CO 13/762]

Background

26 Following consultation with several stakeholders, we have been made aware of a lack of clarity on whether certain types of arrangements are intended to be covered by the definition of an ‘IDPS’ in [CO 13/763]. In conjunction with our consideration of the proposals set out in this paper, we consider that amendments to the definition of an ‘IDPS’ should be considered as part of this work. We are proposing that the definition should be amended to clarify the types of arrangements intended to be covered by the definition.

27 Similarly, we are aware of a lack of clarity on the schemes that are technically not covered by the definition of an ‘IDPS-like scheme’ in [CO 13/762], but which otherwise satisfy the criteria in the definition. We are proposing to amend the definition so that a scheme that substantially meets the definition criteria, but is not currently technically covered by the definition, is covered by the definition as intended.

Proposal

D1 We propose to amend the definition of:

- an ‘IDPS’ in [CO 13/763] to add a new limb that excludes an arrangement under which material terms of any rights that may be acquired on behalf of a client are negotiated, or substantially determined (see draft amended [CO 13/763] at Attachment 3 to this consultation paper); and
- an ‘IDPS-like scheme’ in [CO 13/762] to extend the definition to a scheme that meets the requirements of (a) and (b) of the definition, as well as to a scheme that has a constitution with provisions that effect these requirements (see draft amended [CO 13/762] at Attachment 2 to this consultation paper).

Your feedback

- D1Q1 Do you agree with this proposal? If not, why not?
- D1Q2 Are there any practical problems with the implementation of this proposal? Please give details.

Rationale

- 28 We are aware of a number of recent examples of arrangements that we did not consider were of a type that was intended to be covered by the definition of an 'IDPS' in [CO 13/763]. We consider that the proposed amendment to the IDPS definition will clarify the types of arrangements that are intended to be covered by this definition. For example, arrangements relating to 'marketplace lending' or 'peer-to-peer' lending are not generally intended to be covered by the IDPS definition because the loans are generally initiated through the platform.

Note: See RG 148.6–RG 148.8 for more information on the definition of an IDPS and [Information Sheet 213](#) *Marketplace lending (peer-to-peer lending) products* (INFO 213) for more information relating to marketplace lending.

- 29 The proposed change to the definition of an 'IDPS-like scheme' in [CO 13/762] is to clarify that the definition covers schemes that in substance have the features described in the constitutional provisions set out in the existing definition. We consider that the relevant test should consider how the scheme functions, rather than by reference to the presence of certain provisions in the scheme's constitution.

Note: See RG 148.9–RG 148.10 for more information on the definition of an IDPS-like scheme.

E Regulatory and financial impact

- 30 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) reducing the regulatory burden and promoting consistent regulation of AFS licensees for products issued to retail clients; and
 - (b) providing adequate regulatory safeguards to ensure consumers receive appropriate financial product disclosure and access to dispute resolution procedures.
- 31 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 a minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).
- 32 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC will not give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.
- 33 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
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.
Ch 5C (for example)	A chapter of the Corporations Act (in this example numbered 5C)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
CP 176 (for example)	An ASIC consultation paper (in this example numbered 176)
IDPS	An investor directed portfolio service as defined in [CO 13/763]
IDPS-like scheme	An investor directed portfolio service-like scheme as defined in [CO 13/762]
Legislation Act	<i>Legislation Act 2003</i>
nominee and custody service	A nominee and custody service as defined in draft ASIC Corporations (Nominee and Custody Services) Instrument 2016/XX at Attachment 1 to this consultation paper
platform	For the purposes of this consultation paper, IDPS and IDPS-like schemes, but does not extend to nominee and custody services, superannuation master trusts or other superannuation funds, self-managed superannuation funds or managed discretionary account services
retail client	A client as defined in s761G of the Corporations Act and Ch 7, Pt 7.1, Div 2 of the Corporations Regulations
RG 148 (for example)	An ASIC regulatory guide (in this example numbered 148)

Term	Meaning in this document
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