



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 269

Remaking ASIC class order on managed investment scheme buy-backs and updating related guidance

October 2016

About this paper

This consultation paper sets out ASIC's proposals to remake our class order on on-market buy-backs by ASX-listed schemes. Under the *Legislation Act 2003*, this class order will expire ('sunset') if not remade.

We are seeking feedback from responsible entities of registered managed investment schemes on our proposal to remake, without significant changes, Class Order [CO 07/422] *On-market buy-backs by ASX-listed schemes*, which is due to expire on 1 April 2018.

This paper also seeks feedback on our draft updated Regulatory Guide 101 *Managed investment scheme buy-backs* (draft updated RG 101), which provides guidance on our relief for managed investment scheme buy-backs.

Note: The draft ASIC instrument and draft updated RG 101 are available on our website at www.asic.gov.au/cp under CP 269.

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 12 October 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 Background6**
 - Purpose of ‘sunsetting’ legislative instruments6
 - Our approach to remaking legislative instruments6
- B Remaking ASIC class order8**
 - Your feedback8
 - Class Order [CO 07/422] *On-market buy-backs by ASX-listed schemes*.....8
- C Updated regulatory guidance12**
 - Guidance on relief for on-market and off-market scheme buy-backs....12
- D Regulatory and financial impact14**
- Key terms15**

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 buy-backs by ASX-listed schemes. 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 D, '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 23 November 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	12 October 2016	ASIC consultation paper released
Stage 2	23 November 2016	Comments due on the consultation paper
Stage 3	February–March 2017	Commencement of remade instrument and release of updated guidance

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 appropriate 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 consumer trust and confidence and ensuring fair and efficient markets.
- 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 with the benefit

of 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 07/422] *On-market buy-backs by ASX-listed schemes*, which sunsets on 1 April 2018.

We have formed the preliminary view that this class order is operating effectively and efficiently, and continues to form a 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 269.

Your feedback

- 6 In this section, we have invited specific feedback on proposed minor policy changes. However, 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 07/422] *On-market buy-backs by ASX-listed schemes*

Background

- 7 ASIC aims to regulate on-market buy-backs by responsible entities of ASX-listed registered managed investment schemes (schemes) in a way that ensures that the regulatory protections that Parliament intended for these schemes are not undermined but operate in a commercially sensible manner.
- 8 The *Corporations Act 2001* (Corporations Act) does not specifically prohibit an on-market buy-back by a responsible entity of a scheme. However, certain requirements in the Corporations Act have the effect of preventing or making it commercially difficult for such a responsible entity to engage in on-market buy-backs of interests.

Relief from the requirements for withdrawal rights in s601GA(4)

- 9 Section 601GA(4) of the Corporations Act requires that if members have a right to withdraw, the scheme's constitution must specify the right and set

out adequate procedures for withdrawal in a way that is fair to all members. However, the right to withdraw in an on-market scheme buy-back arises from the market contract rather than being specified in the constitution.

Note: See [Regulatory Guide 134](#) *Managed investments: Constitutions* (RG 134) at RG 134.146–RG 134.152.

- 10 We have given relief in [CO 07/422] from s601GA(4) because in our view compliance with this provision would be impracticable for an on-market scheme buy-back.

Note: See RG 134.134–RG 134.159 for our policy on withdrawal rights in s601GA(4).

Relief from withdrawal procedures in Pt 5C.6

- 11 Many schemes listed on ASX may be classified as non-liquid schemes for the purposes of Pt 5C.6 because of the nature of the assets held by the scheme.
- 12 In the absence of relief, s601KD of the Corporations Act may have the effect of preventing a non-liquid listed scheme from engaging in an on-market buy-back. On-market buy-backs by nature are continuous buy-backs rather than proportional. Trading system rules require trades to be settled within a certain number of days of the transaction. However, under s601KD, the responsible entity must not satisfy withdrawal requests until the close of the withdrawal offer period (which must be a minimum of 21 days) and the proportional satisfaction requirement could only be calculated at the end of the withdrawal offer period.
- 13 We consider the policy objectives of Pt 5C.6 of fair and equal access to liquidity to be less relevant for non-liquid listed schemes because all members are likely to have the ability to liquidate their investment by selling on-market at any time. [CO 07/422] provides an alternative means of ensuring fairness between members and for members to have a reasonable opportunity to accept offers of withdrawal under the buy-back.

Takeovers relief from s606

- 14 Section 606 of the Corporations Act prohibits certain acquisitions of relevant interests in voting interests. We consider this prohibition could make it difficult for schemes to engage in an on-market buy-back because it might mean that the proportionate share of those members who do not participate increases. The holding of those members could exceed the permitted threshold when there is not a takeover offer. [CO 07/422] gives relief from the prohibition in s606 on certain acquisitions of relevant interests in listed schemes.

Note: Such a problem would also exist for share buy-backs were it not for the exception in s611, item 19, which facilitates acquisitions that result from share buy-backs.

Proposal

B1 To preserve its effect beyond the sunset date of 1 April 2018, we propose to continue the relief currently given by [CO 07/422] in a new legislative instrument that reflects current drafting practice, with minor changes: see draft ASIC Corporations (ASX-listed Schemes On-market Buy-backs) 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: [\[CO 07/422\]](#).

The only changes proposed are to:

- (a) expand the relief to cover a listed scheme that has more than one class of interest by removing the requirement set out in notional s601KF(2);
- (b) simplify the requirements where a responsible entity or its nominee exercises certain discretions by removing the requirements set out in notional s601KI;
- (c) update the name of the legislative instrument; and
- (d) reflect current drafting practice and update the format of the current document.

Your feedback

B1Q1 Do you agree with proposal B1(a) to extend the relief to schemes with more than one class of interest? Please provide reasons for your response.

Rationale

15 We have reached the preliminary view that [CO 07/422] 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.

More than one class of interest

16 We have previously given individual relief similar to [CO 07/422] where a listed scheme has more than one class of interest. We are proposing to remove the limitation set out in notional s601KF(2) to extend the relief to a listed scheme with more than one class of interest. We consider that the risk of unfair treatment of members of a class is addressed by the responsible entity's duty to treat members of each class fairly.

Obligations in notional s601KI

17 We have also reached the preliminary view that the obligations imposed by notional s601KI are not required because:

- (a) the requirements substantially duplicate the requirements that will apply under s601FC(1A) as notionally applying under [Class Order \[13/657\]](#)

Discretions affecting the amount of consideration to acquire interests and withdrawal amounts;

- (b) the responsible entity has general duties under the Corporations Act (e.g. to exercise the degree of care and diligence a reasonable person would if they were in the responsible entity's position) that would require, where appropriate, meeting the requirements that have applied under notional s601KI;
- (c) buy-backs are subject to the ASX Listing Rules, including rules that impose specified parameters and procedures for a buy-back;
- (d) relief only applies where the buy-back occurs in the ordinary course of trading on the financial market of ASX;
- (e) removing this requirement more closely aligns with the controls for companies conducting buy-backs; and
- (f) the requirements may, to the extent they require documentation and record keeping that is not otherwise required, impose an unnecessary compliance burden on responsible entities.

C Updated regulatory guidance

Key points

We are proposing to rename [Regulatory Guide 101](#) *On-market buy-backs by ASX-listed schemes* (RG 101) to *Managed investment scheme buy-backs* and extend this guidance to cover:

- our relief for on-market buy-backs of ASX-listed schemes in draft ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/XX; and
- the factors we will consider when we assess an application for individual relief for managed investment scheme buy-backs.

Guidance on relief for on-market and off-market scheme buy-backs

- 18 RG 101 currently sets out our policy on relief provided for an on-market buy-back of an ASX-listed scheme.
- 19 In addition to the relief provided in ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/XX, we consider applications for individual relief from a range of requirements that may be granted to a responsible entity as appropriate in the circumstances of the particular scheme buy-back proposal.
- 20 For a scheme buy-back that is not an on-market buy-back of an ASX-listed scheme, we may grant relief similar to that provided for on-market buy-backs of ASX-listed schemes in ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/XX. We may also extend relief provided to on-market buy-backs of ASX-listed schemes to schemes listed on other financial markets.
- 21 We may also grant relief:
- (a) from the requirement to treat members equally under s601FC(1)(d);
 - (b) from the prohibition on a responsible entity from acquiring interests in the scheme for less consideration than another person under s601FG(1)(a);
 - (c) from the prohibition on unsolicited offers to purchase products off-market under Div 5A of Pt 7.9;
 - (d) from the requirement to give the offer to all members of the scheme or to all members of a particular class;
 - (e) to facilitate a shorter offer period; and
 - (f) for scheme buy-backs involving stapled and unstapled securities.

Proposal

c1 We propose to:

- (a) update our guidance in RG 101 to reflect the relief for on-market buy-backs in draft ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/XX; and
- (b) extend our guidance in RG 101 to include:
 - (i) the types of applications for individual relief for scheme buy-backs we will consider granting; and
 - (ii) the factors we will consider when we assess an application for individual relief for a scheme buy-back.

See draft updated RG 101 at Attachment 2 to this consultation paper.

Your feedback

- C1Q1 Overall, is the proposed guidance helpful? If not, why not?
- C1Q2 Are there any additional matters on which you would like our guidance?
- C1Q3 Are there any matters in our guidance that require clarification?
- C1Q4 Are there any matters you believe could be deleted from our guidance?

Rationale

- 22 To assist the responsible entity of a scheme to carry out a buy-back, our updated guidance in RG 101 will provide details of the types of applications for individual relief we will consider granting, as well as details of factors we will consider when assessing such applications and the conditions that apply.

D Regulatory and financial impact

- 23 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 responsible entities and registered managed investment schemes; and
 - (b) ensuring sufficient investor protection.
- 24 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).
- 25 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.
- 26 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
ASX	ASX Limited or the exchange market operated by ASX Limited
[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
listed	Has the meaning given in s9
on-market	Has the meaning given in s9
responsible entity	Has the meaning given in s9
RG 101 (for example)	An ASIC regulatory guide (in this example numbered 101)
RIS	Regulation Impact Statement
s25 (for example)	A section of the Corporations Act (in this example numbered 25), unless otherwise specified
scheme	A registered managed investment scheme as defined in s9
scheme buy-back	A scheme buy-back as described in draft updated RG 101.2
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect