



**ASIC**

Australian Securities & Investments Commission

## CONSULTATION PAPER 270

# Remaking ASIC class orders on registered schemes

October 2016

### About this paper

This consultation paper sets out ASIC's proposals to remake four of our class orders relating to registered schemes. Under the *Legislation Act 2003*, these class orders will expire ('sunset') if not remade.

We are seeking feedback on our proposals to remake, without significant changes, the following class orders:

- Class Order [CO 98/50] *Incorporating parts of other compliance plans*, which is due to expire on 1 April 2018;
- Class Order [CO 98/60] *Protecting class rights in a managed investment scheme*, which is due to expire on 1 April 2018;
- Class Order [CO 98/1806] *Related bodies corporate and external members of compliance committee*, which is due to expire on 1 October 2017; and
- Class Order [CO 98/1808] *Allowing constitutions to use Appendix 15A of the ASX Listing Rules*, which is due to expire on 1 October 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 270.

### 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 14 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.

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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 25 November 2016 to:

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## What will happen next?

<b>Stage 1</b>	14 October 2016	ASIC consultation paper released
<b>Stage 2</b>	25 November 2016	Comments due on the consultation paper
<b>Stage 3</b>	February–March 2017	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 10<sup>th</sup> 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 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 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 98/50] *Incorporating parts of other compliance plans*, which sunsets on 1 April 2018;
- Class Order [CO 98/60] *Protecting class rights in a managed investment scheme*, which sunsets on 1 April 2018;
- Class Order [CO 98/1806] *Related bodies corporate and external members of compliance committee*, which sunsets on 1 October 2017; and
- Class Order [CO 98/1808] *Allowing constitutions to use Appendix 15A of the ASX Listing Rules*, which sunsets on 1 October 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. We are proposing to extend the relief currently available under [CO 98/1808] so that it also applies in relation to the Sydney Stock Exchange Listing Rules and may in the future apply in relation to the listing rules of other financial markets, where relevant.

Each class order has been redrafted into a single new instrument 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 consultation paper, is available on our website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 270.

### Your feedback

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

### Class orders on registered schemes: [CO 98/50], [CO 98/60], [CO 98/1806] and [CO 98/1808]

#### Background to [CO 98/50]

- 7 Under s601HB of the *Corporations Act 2001* (Corporations Act), it is only possible for a compliance plan to incorporate provisions of another compliance plan as they existed at a specified date.

8 [CO 98/50] provides relief to allow a compliance plan to incorporate parts of a previously lodged compliance plan as amended from time to time. This means that the incorporated parts of a compliance plan are in effect also amended when the previously lodged compliance plan is amended.

9 Relief under [CO 98/50] only applies where the compliance plan contains a statement to the effect that the responsible entity will review the appropriateness of the compliance plan when any amendment is made to a part of a compliance plan that is incorporated by reference in it.

### **Background to [CO 98/60]**

10 [CO 98/60] provides that if the constitution of a registered scheme sets out a procedure for varying or cancelling rights of a class of members of the scheme, or rights attached to a class of interests under the scheme, those rights may be varied or cancelled by special resolution of the members of the scheme only if that procedure is complied with.

11 The provisions in Pt 2F.2 of the Corporations Act that protect class rights of members of companies do not extend to registered schemes. Our relief in [CO 98/60] modifies Ch 5C of the Corporations Act so that the constitution of a registered scheme may protect the rights of members of a class by requiring that modifications of the constitution that impact on class rights are subject to compliance with any relevant procedures in the constitution.

### **Background to [CO 98/1806]**

12 [CO 98/1806] provides relief so that a person is not taken to have been substantially involved in business dealings, or in a professional capacity, with a responsible entity because they are an external director of a related body corporate or a member of a compliance committee of a registered scheme operated by a related body corporate.

13 A person can be an external member of a compliance committee even though they are an external director of the responsible entity or a member of another compliance committee of a registered scheme operated by the responsible entity: s601JB(4) of the Corporations Act. We have provided relief because holding an external directorship of, or membership of the compliance committee of a registered scheme operated by, a related body corporate is not likely to lead to any greater risk of loss of independence, and in our view these circumstances should not cause the loss of external director or member status.

### **Background to [CO 98/1808]**

14 Where a registered scheme is listed or seeking admission, under the ASX Listing Rules, its constitution must be consistent with the listing rules. This

does not apply if the constitution includes the provisions in Appendix 15A of the ASX Listing Rules which provide an alternative mechanism for consistency.

- 15 [CO 98/1808] allows the inclusion of a provision to the effect of Appendix 15A of the ASX Listing Rules (at 1 July 1998) in the constitution, and provides that if there is such a provision the constitution is taken to have any provisions that are required under that provision and that any change in the constitution as a result is not treated as a modification of the constitution.
- 16 Without the relief under [CO 98/1808], a constitution that contained such provisions may be inconsistent with requirements in s601GA of the Corporations Act that the constitution make adequate provision for, or specify, certain matters.

## Proposal

**B1** To preserve the effect of [CO 98/50] and [CO 98/60] beyond the sunset date of 1 April 2018, and [CO 98/1806] and [CO 98/1808] beyond the sunset date of 1 October 2017, we propose to continue the relief currently given by these instruments in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Chapter 5C—Miscellaneous Provisions) Instrument 2016/XX attached to this consultation paper. You can access the current instruments at [www.legislation.gov.au](http://www.legislation.gov.au) by clicking on the following direct links: [\[CO 98/50\]](#), [\[CO 98/60\]](#), [\[CO 98/1806\]](#) and [\[CO 98/1808\]](#).

The only changes proposed are to:

- (a) combine [CO 98/50], [CO 98/60], [CO 98/1806] and [CO 98/1808] into a single instrument;
- (b) extend the relief currently given by [CO 98/1808] so that it also applies in relation to the Sydney Stock Exchange Listing Rules and may in the future apply in relation to the listing rules of other financial markets, where relevant; and
- (c) make other minor changes to:
  - (i) reflect current drafting practice;
  - (ii) update legislative references and definitions; and
  - (iii) correct any minor drafting errors.

### *Your feedback*

**B1Q1** Do you agree with our proposal to combine the relief under [CO 98/50], [CO 98/60], [CO 98/1806] and [CO 98/1808] into a single instrument? If not, please give reasons.

**B1Q2** Do you agree with our proposal with respect to the relief under [CO 98/1808]? If not, please give reasons.

## Rationale

- 17 We have reached the preliminary view that [CO 98/50], [CO 98/60], [CO 98/1806] and [CO 98/1808] 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.

## Consolidation of the four class orders

- 18 [CO 98/50], [CO 98/60], [CO 98/1806] and [CO 98/1808] make miscellaneous amendments to Ch 5C of the Corporations Act as it applies to responsible entities of registered schemes. Although the subject matters of the class orders vary and a responsible entity of a registered scheme may not necessarily rely on each class order, we consider that these class orders should be consolidated into a single instrument to reduce the number of individual instruments across which the relevant relief is provided and can be found.
- 19 We are seeking feedback on whether relief under these four class orders should be consolidated into a single instrument and, if not, reasons why this should not occur: see question B1Q1.
- 20 We consider that regulatory documents such as explanatory statements and regulatory guides should adequately set out the relevant legislative history and where the remade relief can be found.

## Relief under [CO 98/1808]

- 21 We are proposing to extend the relief under [CO 98/1808] so that it also applies in relation to the Sydney Stock Exchange Listing Rules and may in the future apply in relation to the listing rules of other financial markets that require or allow for the constitution of a registered scheme to contain provisions similar in effect to those in Appendix 15A of the ASX Listing Rules.
- 22 In the course of re-drafting the relief under [CO 98/1808], we took into account the restriction under the *Legislation Act 2003* on incorporation of material by reference as in force or existing 'from time to time'. We also have not reproduced the relief provided under [CO 98/1808] in relation to s601GC of the Corporations Act on the basis that we consider the relief is not legally necessary.
- 23 We are seeking feedback on our proposal with respect to the relief under [CO 98/1808]: see question B1Q2.

## Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
ASX Listing Rules	The listing rules of the financial 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.
Ch 5C (for example)	A chapter of the Corporations Act (in this example numbered 5C), unless otherwise specified
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
Pt 2F.2 (for example)	A part of the Corporations Act (in this example numbered 2F.2), unless otherwise specified
registered scheme	A managed investment scheme that is registered under s601EB of the Corporations Act
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
Sydney Stock Exchange Listing Rules	The listing rules of the financial market operated by Sydney Stock Exchange Limited