



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 271

Remaking and repealing ASIC class orders on internet offers, hawking and PDS obligations

November 2016

About this paper

This consultation paper sets out ASIC's proposals to remake our class orders on offers for securities on the internet and on hawking. 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, Class Orders [CO 02/246] *Offers of securities on the internet* and [CO 02/641] *Hawking: Securities and managed investments*, which are due to expire on 1 April 2017.

Note: The draft ASIC instruments are available on our website at www.asic.gov.au/cp under CP 271.

We are also seeking feedback on our proposal to repeal Class Order [CO 02/286] *Obligation to provide a PDS: s1012B(4)*, which sunsets on 1 April 2017.

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 10 November 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 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 7 December 2016 to:

Annabel Gibson
 Strategic Policy Adviser, Strategy Group
 Australian Securities and Investments Commission
 Level 7, 120 Collins St
 Melbourne Victoria 3000
 Australia
 Facsimile: + 61 3 9280 3306
 Email: Annabel.Gibson@asic.gov.au

What will happen next?

Stage 1	10 November 2016	ASIC consultation paper released
Stage 2	7 December 2016	Comments due on the consultation paper
Stage 3	By 1 April 2017	Commencement of remade instruments and repeal of relevant class order

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 (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.
- 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 consumer trust and confidence and ensuring fair and efficient markets.
- 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 orders

Key points

We are proposing to remake:

- Class Order [CO 02/246] *Offers of securities on the internet*, which is due to sunset on 1 April 2017; and
- Class Order [CO 02/641] *Hawking: Securities and managed investments*, which is due to sunset on 1 April 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.

These class orders have been redrafted using ASIC's current style and format, while substantively preserving the current effect of the instruments. The draft ASIC instruments, which reflect the minor amendments proposed in this paper, are available on our website at www.asic.gov.au/cp under CP 271.

Your feedback

- 7 You are invited to comment on any of our proposals to remake the ASIC class orders in this section, including whether the class orders are 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 02/246] *Offers of securities on the internet*

Background

- 8 Under the *Corporations Act 2001* (Corporations Act), persons who make an offer of financial products ('offerors') to persons in Australia must comply with certain obligations designed to protect financial consumers, including:
- obligations in Div 2 of Pt 7.9 to provide offerees with a Product Disclosure Statement (PDS) in connection with the offer of a financial product ('PDS obligations');
 - obligations in Div 4 of Pt 7.9 relating to the advertising of a financial product ('advertising obligations'); and
 - the prohibition on offers to sell or issue a financial product in the course of unsolicited contact with another person under s992A(3) ('hawking prohibition').

These obligations apply in circumstances where offers are made available to, or received by, persons in Australia over the internet.

9 [CO 02/246] conditionally exempts offerors from complying with the PDS obligations, the advertising obligations and the hawking prohibition when making offers of financial products. This relief recognises that offers of financial products over the internet may give rise to uncertainty about the application of the laws of jurisdictions in which such offers can be accessed.

10 The purpose of the relief under [CO 02/246] is to ensure that:

- (a) offers to which the exemption applies are only issued in Australia incidentally to their issue in foreign jurisdictions where those offers can be lawfully made; and
- (b) such offers are not intended to result in applications for investments being made by persons in Australia.

This relief is intended for the benefit of foreign offerors that make offers of financial products to persons outside of Australia.

Proposal

B1 To preserve its effect beyond the sunset date of 1 April 2017, we propose to continue the relief currently given by [CO 02/246] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Offers Over the Internet) 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: [\[CO 02/246\]](#).

The only changes proposed are to:

- (a) remove the exemption from the hawking prohibition on the basis that this exemption is contained in Class Order [CO 02/641] *Hawking: Securities and managed investments*;
 Note: In this paper, we are also proposing to remake [CO 02/641]: see proposal B2.
- (b) amend the current condition (a) in [CO 02/246] by replacing the requirement to take a variety of precautions reasonably designed to exclude offers being accepted by persons in Australia with a requirement to take reasonable steps to ensure that people in Australia are excluded from accepting the offer ('reasonable steps' requirement);
- (c) introduce a new condition to clarify that the relief is only available where the receipt of the offer in Australia is merely incidental to the making of the offer outside of Australia ('incidental issue' requirement);
- (d) remove condition (e), which requires offers to contain a statement to the effect that the offer or invitation to which it relates is not available to persons in Australia because the policy behind this condition is met by the broader 'reasonable steps' and 'incidental issue' requirements;

- (e) simplify the drafting to give greater clarity—for example, by incorporating conditions (b) and (c) into the new ‘reasonable steps’ requirement;
- (f) update the name of the legislative instrument;
- (g) reflect current drafting practice and update the format of the current document;
- (h) update legislative references and definitions; and
- (i) correct any minor drafting errors.

Rationale

- 11 We have reached the preliminary view that [CO 02/246] 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.

Introducing a new ‘reasonable steps’ requirement

- 12 We are proposing to introduce a new condition to require the offeror to take reasonable steps to ensure that people in Australia are excluded from accepting the offer. This will replace the current condition (a) under [CO 02/246], which requires offerors to take ‘a variety of precautions’ designed to exclude offers being accepted by persons in Australia. In our view, a reasonable steps requirement best balances:

- (a) the need to avoid breaches, inadvertent or otherwise, of Australian laws that are designed to protect investors and consumers in Australia; and
- (b) the need to avoid imposing an unnecessary burden on foreign offerors that make offers to foreign persons over the internet.

- 13 To further simplify the drafting we are also proposing to incorporate the previous conditions (b) and (c) into the reasonable steps requirement. These currently require offerors to ensure that offers:

- (a) are not made in a manner or in locations that are calculated to draw them to the attention of persons in Australia (see condition (b) of [CO 02/246]); and
- (b) do not contain material that was specifically relevant to persons in Australia (see condition (c) of [CO 02/246]).

In our view, an offeror that fails to ensure that conditions (b) and (c) are met would likely fail to meet the proposed new requirements—namely, the reasonable steps and incidental issue requirements.

Introducing a new ‘incidental issue’ requirement

- 14 We are proposing to introduce a new condition to clarify that the relief is only available where the receipt of an offer in Australia is merely incidental to the making of the offer outside of Australia. This has been introduced to better reflect our policy in [Regulatory Guide 141](#) *Offers of securities on the internet* (RG 141).

Removing condition (e)

- 15 We are proposing to remove condition (e) under [CO 02/246], which currently requires offers to contain a statement to the effect that the offer or invitation to which it relates is not available to persons in Australia. We are proposing to remove this condition because:
- (a) consistent with our policy in [Regulatory Guide 107](#) *Fundraising: Facilitating electronic offers of securities* (RG 107) at RG 107.130, we consider it unreasonable to expect that foreign offerors making offers to foreign persons over the internet should include statements to the effect that the offer is not available to persons in Australia; and
 - (b) the objective of this condition—namely, the protection of consumers in Australia—is already achieved by the proposed new reasonable steps and incidental issue requirements.

Class Order [CO 02/641] *Hawking: Securities and managed investments*

Background

- 16 Under the Corporations Act, a person (the ‘offeror’) must not offer financial products for issue or sale in the course of, or because of, an unsolicited meeting or telephone call. An offer includes inviting an application for issue or sale. An offeror includes issuers and sellers of financial products, as well as their agents and representatives. Offering financial products for issue or sale in the course of, or because of, an unsolicited meeting or telephone call is commonly known as ‘hawking’.
- 17 The Corporations Act prohibits hawking. The hawking prohibitions are set out in the following sections:
- (a) s736—for securities (e.g. shares and debentures);
 - (b) s992AA—for managed investments (e.g. units in trusts); and
 - (c) s992A—for other financial products (e.g. superannuation, life and general insurance, derivatives and deposit products).

- 18 The hawking prohibition aims to prevent pressure selling of financial products to retail clients, such as ‘badgering’ and ‘boiler room’ practices.
- 19 The relief provided by [CO 02/641] is technical in nature. It provides that:
- (a) securities and interests in managed investment schemes are exempt from s992A(3); and
 - (b) interests in managed investment schemes that are not managed investment products are exempt from s992A(1).
- 20 The relief is required because, in its absence, securities and interests in managed investment schemes would be subject to two differing hawking prohibitions. The relief provides certainty of obligations.
- 21 Section 992A(3) provides that a person must not make an offer to issue or sell a financial product in the course of, or because of, a series of unsolicited circumstances. Securities and interests in managed investment schemes (both financial products) are provided with relief from this provision by [CO 02/641] because both have hawking prohibition provisions that specifically relate to them (s736 in the case of securities and s992AA in the case of managed investment products).
- 22 Section 992A(1) provides that a person must not offer financial products for issue or sale in the course of, or because of, an unsolicited meeting with another person. Section 992A(2) provides that s992A(1) does not apply to securities and managed investment products because they have separate anti-hawking provisions, detailed above. This does not apply to interests in unregistered managed investment schemes because ‘managed investment product’ only relates to registered schemes: s764A(1)(b).
- 23 Section 992AA prohibits hawking ‘interests in managed investment schemes’ rather than ‘managed investment products’. ‘Interests in managed investment schemes’ includes both registered and unregistered scheme interests. Without the relief, unregistered managed investment schemes would be required to comply with both s992AA and 992A.

Proposal

B2 To preserve its effect beyond the sunset date of 1 April 2017, we propose to continue the relief currently given by [CO 02/641] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Securities and Managed Investment Scheme Hawking Relief) Instrument 2016/XX at Attachment 2 to this consultation paper. You can access the current instrument at www.legislation.gov.au by clicking on the following direct link: [\[CO 02/641\]](#).

The only changes proposed are to:

- (a) update the name of the legislative instrument;

- (b) reflect current drafting practice and update the format of the current document;
- (c) simplify the drafting to give greater clarity;
- (d) update legislative references and definitions; and
- (e) correct any minor drafting errors.

Rationale

- 24 We have reached the preliminary view that [CO 02/641] 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.

C Repealing ASIC class order

Key points

We are proposing to repeal Class Order [CO 02/286] *Obligation to provide a PDS: s1012B(4)*, which sunsets 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

- 25 You are invited to comment on our proposal to repeal the ASIC class order in this section, including whether the class order is currently 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. The proposal is only an indication of the approach we may take and is not our final policy.

Class Order [CO 02/286] *Obligation to provide a PDS: s1012B(4)*

Background

- 26 [CO 02/286] provides relief to a person in circumstances where they have been exempted from the obligation to provide a PDS under s1012B(3) but not from the requirement to provide a PDS under s1012B(4). [CO 02/286] was issued to correct possible oversights in instruments issued before March 2002 which, while providing relief from s1012B(3), did not express relief in a way that would provide relief from s1012B(4).

Proposal

- c1 We propose to repeal [CO 02/286], which would otherwise sunset on 1 April 2017. You can access the current instrument at www.legislation.gov.au by clicking on the following direct link: [\[CO 02/286\]](#).

Rationale

- 27 We are unaware of any continuing instruments that rely on the relief provided by [CO 02/286]. Accordingly, we are of the view that the instrument should be repealed.

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.
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
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.
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