



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 273

Repealing ASIC class orders on holding client assets

November 2016

About this paper

This consultation paper sets out ASIC's proposals to repeal class orders on holding client assets that are no longer required and do not form a necessary and useful part of the legislative framework. Under the *Legislation Act 2003*, these class orders will expire ('sunset') if not remade.

We are seeking feedback on our proposals to repeal:

- Class Order [CO 03/1110] *Prime brokerage: Relief from holding client property on trust*, which is due to expire on 1 October 2017;
- Class Order [CO 03/1111] *Prime brokerage: Relief from holding scheme property separately*, which is due to expire on 1 October 2017; and
- Class Order [CO 03/1112] *Relief from obligation to hold client money on trust*, which is due to expire on 1 October 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 23 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.

Contents

| | |
|---|-----------|
| The consultation process | 4 |
| A Background | 5 |
| Purpose of ‘sunsetting’ legislative instruments..... | 5 |
| Instruments to be repealed..... | 5 |
| B Repealing ASIC class orders | 7 |
| Your feedback..... | 7 |
| Class Order [CO 03/1110] <i>Prime brokerage: Relief from holding client property on trust</i> | 7 |
| Class Order [CO 03/1111] <i>Prime brokerage: Relief from holding scheme property separately</i> | 8 |
| Class Order [CO 03/1112] <i>Relief from obligation to hold client money on trust</i> | 9 |
| Key terms | 10 |

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 21 December 2016 to:

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 Australian Securities and Investments Commission
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 Melbourne VIC 3001
 facsimile: 03 9280 3444
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What will happen next?

| | | |
|----------------|-----------------------|--|
| Stage 1 | 23 November 2016 | ASIC consultation paper released |
| Stage 2 | 21 December 2016 | Comments due on the consultation paper |
| Stage 3 | January–February 2017 | Repeal of instruments |

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.

Instruments to be repealed

- 4 This consultation paper seeks feedback on our proposals to repeal the following class orders because, in our view, they no longer serve a regulatory purpose:
 - (a) Class Order [CO 03/1110] *Prime brokerage: Relief from holding client property on trust*;
 - (b) Class Order [CO 03/1111] *Prime brokerage: Relief from holding scheme property separately*; and
 - (c) Class Order [CO 03/1112] *Relief from obligation to hold client money on trust*.
- 5 In doing this, we hope to ensure that only instruments that serve a regulatory purpose are maintained.

- 6 We have a deregulatory focus. We are aware of the burden unnecessary red tape can impose, including on business and the potential impact of this on productivity. To address this, we continue to pursue initiatives to reduce red tape for individuals and businesses. We welcome feedback where repealing an instrument would impose a regulatory burden on business.

B Repealing ASIC class orders

Key points

We are proposing to repeal the following class orders, which sunset on 1 October 2017:

- Class Order [CO 03/1110] *Prime brokerage: Relief from holding client property on trust*;
- Class Order [CO 03/1111] *Prime brokerage: Relief from holding scheme property separately*; and
- Class Order [CO 03/1112] *Relief from obligation to hold client money on trust*.

We have formed the preliminary view that these class orders are no longer required and do not form a necessary and useful part of the legislative framework.

Your feedback

- 7 We invite you to comment on our proposals to repeal the class orders in this section, including whether the class orders are currently operating effectively and efficiently, and whether any entities are relying on them. If we do not receive submissions which reasonably establish the utility of these class orders, we will repeal them. These proposals are only an indication of the approach we may take and are not our final policy.

Class Order [CO 03/1110] *Prime brokerage: Relief from holding client property on trust*

Background

- 8 [CO 03/1110] exempts prime brokers who are authorised deposit-taking institutions (ADIs) from the requirement to hold property on trust for the benefit of a client.
- 9 The current conditions of [CO 03/1110] are:
- (a) the property consists of securities;
 - (b) the client is a wholesale client;
 - (c) the prime broker holds the property under the terms of a prime brokerage agreement; and

- (d) the prime broker and the client have agreed in writing that the prime broker does not hold the property on trust for the client.

Proposal

- B1 We propose to repeal [CO 03/1110], which would otherwise sunset on 1 October 2017. You can access the current instrument at www.legislation.gov.au by clicking on the following direct link: [\[CO 03/1110\]](#).

Rationale

- 10 We have reached the preliminary view that [CO 03/1110] should be repealed because we have not identified a class of persons that relies on it. [CO 03/1110] is an instrument that we consider no longer forms a useful part of the legislative framework. We consider that any residual need for relief provided by this class order is more appropriately given on a case-by-case basis by application.

Class Order [CO 03/1111] *Prime brokerage: Relief from holding scheme property separately*

Background

- 11 [CO 03/1111] exempts responsible entities of a registered scheme from the obligation to hold scheme property separately and declares that the relevant provision of the *Corporations Act 2001* (Corporations Act) be modified to allow responsible entities to appoint a prime broker who is an Australian ADI to hold scheme property on its behalf if certain conditions are met.
- 12 In particular, [CO 03/1111] allows a responsible entity to appoint an ADI as agent to hold scheme property on its behalf where the ADI deposits the money into an account with itself and uses this money in the ordinary course of its banking business.
- 13 The current conditions of [CO 03/1111] are:
- (a) the scheme property consists of money;
 - (b) the scheme property is held by a person (the ‘prime broker’) who is an Australian ADI under the terms of a prime brokerage agreement between the prime broker and the responsible entity; and
 - (c) the responsible entity takes reasonable steps to ensure the prime broker has in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in connection with its holding the scheme property on behalf of the responsible entity.

Proposal

B2 We propose to repeal [CO 03/1111], which would otherwise sunset on 1 October 2017. You can access the current instrument at www.legislation.gov.au by clicking on the following direct link: [\[CO 03/1111\]](#).

Rationale

- 14 We have reached the preliminary view that [CO 03/1111] should be repealed because we have not identified a class of persons that relies on it. [CO 03/1111] is an instrument that we consider no longer forms a useful part of the legislative framework. We consider that any residual need for relief provided by this class order is more appropriately given on a case-by-case basis by application.

Class Order [CO 03/1112] *Relief from obligation to hold client money on trust*

Background

- 15 [CO 03/1112] exempts an Australian financial services (AFS) licensee that is an Australian ADI from the obligation to hold a client's money on trust where the client is a wholesale client and the AFS licensee and the client agree in writing.
- 16 The current conditions of [CO 03/1112] are:
- (a) the money that is paid is in connection with:
 - (i) a financial service provided to the client as a wholesale client; or
 - (ii) a financial product acquired by a person as a wholesale client; and
 - (b) the AFS licensee and the client have agreed in writing that the AFS licensee does not hold the money on trust for the benefit of the client.

Proposal

B3 We propose to repeal [CO 03/1112], which would otherwise sunset on 1 October 2017. You can access the current instrument at www.legislation.gov.au by clicking on the following direct link: [\[CO 03/1112\]](#).

Rationale

- 17 We have reached the preliminary view that [CO 03/1112] should be repealed because we have not identified a class of persons that relies on it. [CO 03/1112] is an instrument that we consider no longer forms a useful part of the legislative framework. We consider that any residual need for 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 |
|--------------------------|--|
| ADI | Authorised deposit-taking institution—has the meaning given in s5 of the <i>Banking Act 1959</i> |
| 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. |
| ASIC | Australian Securities and Investments Commission |
| ASIC Act | <i>Australian Securities and Investments Commission Act 2001</i> |
| [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 |
| registered scheme | A registered managed investment scheme or a proposed registered managed investment scheme |
| responsible entity | The company named in ASIC's record of the scheme's registration as the responsible entity or temporary responsible entity of the scheme |
| scheme property | Means: <ul style="list-style-type: none"> (a) contributions of money or money's worth to the scheme; (b) money that forms part of the scheme property under provisions of the Corporations Act or the ASIC Act; (c) money borrowed or raised by the responsible entity for the purposes of the scheme; (d) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraphs (a), (b) or (c); and (e) income and property derived, directly or indirectly, from contributions, money or property referred to in paragraphs (a), (b), (c) or (d) Note: This is a definition contained in s9 of the Corporations Act. |

| Term | Meaning in this document |
|------------------|--|
| securities | <p>Means:</p> <ul style="list-style-type: none">• debentures, stocks or bonds issued or proposed to be issued by a government; or• shares in, or debentures of, a body; or• interests in a managed investment scheme; or• units of such shares <p>Note: This is a definition contained in s92(1) of the Corporations Act.</p> |
| sunsetting | The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect |
| wholesale client | As defined in s761G(4) of the Corporations Act |